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*The cases marked with a star are now authority. See *Hessong v. Burgan*, 9 L. D., 353.

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* The cases marked with a star are now authority. See *Hessong v. Burgan*, 9 L. D., 353.

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

PRIVATE LAND CLAIMS—TREATY RESERVATION.

JOSEPH FARR.

By the terms of the treaties between the United States and the Republic of Mexico, all lands embraced within the boundaries of Mexican or Spanish grants, at the date said treaties were ratified, were placed in a state of reservation for the ascertainment of rights claimed under said grants, and by the act of March 3, 1891, said reservation is continued in force, and will so remain until final action is taken on the respective claims or grants affected thereby.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (W. M. W.)

The case of Joseph Farr has been considered on his appeal from your office decision of August 21, 1895, rejecting his application to enter under the homestead law the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and lots 1 and 2 of Sec. 30, T. 9 N., R. 3 E., Santa Fe, New Mexico, land district.

On September 12, 1894, Farr made an application to enter the land in question under the homestead law.

On September 14, 1894, the register and receiver rejected said application, for the reason—

that the land applied for was withdrawn from entry on June 2, 1886, by the Hon. Commissioner, it being within the limits of the Diego Padilla, or El Tago grant.

Farr appealed. In his appeal he alleged

that the said tract of land is not now within the limits of the said Diego Padilla, or El Tago grant, because the said grant claim was rejected by the United States court of private land claims, on the 8th of September, 1894, prior to the filing of said homestead application.

It appears from a certified statement of the deputy clerk of the court of private land claims that on the 8th day of September, 1894, said private land claim was rejected by that court, and that an appeal from the judgment of said court was taken to the supreme court of the United States, where the case was pending when your office decision was rendered affirming the judgment of the local officers.

Farr appeals.

The appellant alleges that the land applied for is not *now* within the limits of the Diego Padilla or El Tago grant, for the reason that said grant was rejected by the court of private land claims on September 8, 1894.

Your office found that:

The land within the claimed limits of the El Tago grant is in a state of statutory reservation, to satisfy the claim, under the provisions of section 8 of the act of July 22, 1854. (10 Stat., 308.)

Said section 8 provided that:

Until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the provisions of this act.

This was clearly a statutory reservation, covering *all* lands situated in the territory acquired from Mexico, claimed under Mexican or Spanish grants; it was to remain in force "until the final action of Congress on such claims."

By act of March 3, 1891 (26 Stat., 854), Congress established the court of private land claims, with jurisdiction to hear and determine all cases or claims presented by any person or persons or corporation or their legal representatives,

claiming lands within the limits of the Territory derived by the United States from the Republic of Mexico and now embraced within the Territories of New Mexico, Arizona, or Utah, or within the States of Nevada, Colorado, or Wyoming, by virtue of any such Spanish or Mexican grant, concession, warrant, or survey, as the United States are bound to recognize and confirm, by virtue of treaties of cession of said country by Mexico to the United States, which at the date of the passage of this act have not been confirmed by act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect.

The purpose of Congress in passing this act evidently was to provide a special tribunal to pass upon, settle, determine and adjudicate every claim that existed, or could properly be made, under any and all grants made by Spain or Mexico to lands within the territory specified in said act, prior to its acquisition by the United States from Mexico.

By the 7th section of the act it is provided, *inter alia*, that:

The said court shall have full power and authority to hear and determine all questions arising in cases before it relative to the title to the land the subject of such case, the extent, location, and boundaries thereof, and other matters connected therewith fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations, the stipulations of the treaty concluded between the United States and the Republic of Mexico at the city of Guadalupe-Hidalgo, on the second day of February, in the year of our Lord, eighteen hundred and forty-eight, or the treaty concluded between the same powers at the city of Mexico, on the thirtieth day of December, in the year of our Lord, eighteen hundred and fifty-three, and the laws and ordinances of the government from which it is alleged to have been derived, and all other questions properly arising between the claimants or other parties in the case and the United States.

Section 9 of the act provides that the party against whom the court shall decide in any case:

Shall have the right of appeal to the supreme court of the United States, such appeal to be taken within six months from date of such decision, and in all respects to be taken in the same manner and upon the same conditions, except in respect of the amount in controversy as is now provided by law for the taking of appeals from decisions of the circuit courts of the United States. On any such appeal the supreme court shall re-try the cause, as well the issues of fact as of law, and may cause testimony, to be taken in addition to that given in the court below, and may amend the record of the proceedings below as truth and justice may require; and on such re-trial and hearing, every question shall be open, and the decision of the supreme court thereon shall be final and conclusive. Should no appeal be taken as aforesaid, the decree of the court below shall be final and conclusive.

The act contains nineteen sections, in which full and specific provisions are made for determining all the rights of all claimants under Mexican or Spanish grants, in the States and Territories named. The 15th section expressly repeals section 8 of the act of July 22, 1854, referred to in your office decision as reserving the land involved. The repeal of said section is without any qualification and goes to the entire section, "and all acts amendatory or in extension thereof, or supplementary thereto." It follows that your office erred in holding that the land in question is in a state of statutory reservation under the act of 1854, *supra*.

However, it does not necessarily follow that your office decision must be reversed; for, if the conclusion reached was the correct one under the law and record presented, then it should be affirmed.

The question to be determined is, whether the land in question was properly subject to entry under the homestead law at the time Farr made his application.

As long as the 8th section of the act of 1854, *supra*, was in force, there can be no question but what this land was reserved. It should be borne in mind that in enacting said section Congress undertook to provide a manner whereby it was intended to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico. The surveyor-general for New Mexico, under instructions of the Secretary of the Interior, was required to make a full report of all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe-Hidalgo.

By the terms of said treaty the United States bound itself to protect all claimants having such claims in their rights, and it may be that the express reservation made by section 8 of said act was placed therein more in the nature of a precaution than as a necessity. Whatever may have been the purpose of Congress in making said reservation, it is clear that all lands embraced within the claimed limits of grants made by Mexico or Spain prior to said treaty were in a state of reservation under the terms of the treaty itself, independent of any reservation that might be made after such treaty was duly ratified. It follows that

the repeal of the section of the statute containing the reservation would not have the effect of releasing lands reserved under treaty obligations from such reservation.

As has been shown, the act of March 3, 1891, provided for a special tribunal to determine the rights of claimants to lands included within grants claimed to have been obtained from Mexico or Spain prior to the treaty of Guadalupe-Hidalgo. Congress invested said tribunal with full authority to determine every question, subject to the right of appeal to the supreme court of the United States, respecting the validity, extent and scope of all unadjusted claims to lands included in Spanish or Mexican grants. The title, validity and boundaries of such grants or claims were to be adjudicated "according to the law of nations, the stipulations of the treaty concluded between the United States and the Republic of Mexico at the city of Guadalupe-Hidalgo," on February 2, 1848, and the treaty between the same powers on December 30, 1853.

It is, therefore, held that under the above named treaties all lands embraced within the boundaries of Mexican or Spanish grants or claims at the date said treaties were duly ratified were by said treaties placed in a state of reservation; that said reservation has been continued in force by the act of March 3, 1891, *supra*; that such reservation will continue in force until after the judgment of said court becomes final and in all respects complete.

Farr's application to enter the land in question, having been made at a time when said land was in a state of reservation and not subject to entry, was rightfully rejected.

The conclusion of your office in the decision appealed from was correct. The judgment appealed from is accordingly affirmed.

RAILROAD GRANT—LAND EXCEPTED—DONATION CLAIM.

OREGON AND CALIFORNIA R. R. CO. *v.* CROCKER.

A donation claim of a married man embracing more than three hundred and twenty acres is not void, but voidable only, and land included therein, at the time when a railroad grant becomes effective, is excepted from the operation of the grant.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (W. A. E.)

The SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the fractional SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ (or lot 1) of Sec. 7, T. 1 S., R. 2 W., Oregon City, Oregon, land district, are within the primary limits of the grant made by act of July 25, 1866 (14 Stat., 239), to aid in the construction of the Oregon and California Railroad, and lie opposite the portion of said road that was definitely located January 29, 1870.

March 30, 1880, said tracts were listed by the railroad company, per list 13.

March 23, 1885, William L. Crocker made homestead entry for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 7, and this entry was commuted to cash on December 4, 1886.

By your office letter of March 19, 1895, the railroad company's list was held for cancellation in so far as it covered the tracts above described, for the reason that said tracts were included, at the date of the definite location of the road, in the uncanceled donation claim of one Jacob Minter.

From this action the company has appealed.

The records show that on November 30, 1855, Jacob Minter filed notification under section 5 of the Oregon donation act of September 27, 1850 (9 Stat., 486), as amended by the act of February 14, 1853 (10 Stat., 158), for these tracts in section 7, together with adjoining lands in section 18, the whole being estimated at "about 320 acres," the amount of land that a married man and his wife could take under section 5 of said act as amended; that as a matter of fact said donation claim covered more than the legal three hundred and twenty acres, but that it remained intact up to December 17, 1876, when, at the request of the heir of said Minter, the tracts in section 7 were excluded, and patent issued for the remainder.

The railroad company contends:

1. That a donation notification does not except the land covered thereby from the operation of the grant to said company.
2. That section 5 of the donation act confined a married claimant to three hundred and twenty acres, one hundred and sixty for himself and one hundred and sixty for his wife, and as Minter's claim covered more than three hundred and twenty acres, it was invalid as to the excess and the company's grant took effect upon the excess.

It has recently been held by the Department that land embraced within a notification of a donation claim, at the time when a railroad grant becomes effective, is excepted from the operation of said grant, though claims of such character are not specifically named in the excepting clause of the grant. *Oregon and California R. R. Co. v. Kuebel*, 22 L. D., 308; *Oregon and California R. R. Co. v. Bagley*, 23 L. D., 392.

This ruling disposes of the first contention of the railroad company, and renders further comment thereon unnecessary.

In the case of *John J. Elliott*, 1 L. D., 303, it was held that the filing of the original notification was an *ipso facto* segregation of the tract there described from the lands contiguous thereto. A donation notification had the effect, therefore, of an entry in the matter of segregating the land covered thereby.

The Department has held that a homestead entry exceeding one hundred and sixty acres is voidable only, and while of record is an appropriation of the land. *Charles Hoffman*, 4 L. D., 92; *Legan v. Thomas et al.*, *id.*, 441.

It follows that Minter's donation notification, during the time it embraced more than the legal three hundred and twenty acres, was voidable only, and was an appropriation of the entire amount of land covered thereby.

On January 29, 1870, when the grant took effect, these tracts in section 7 were covered by Minter's notification, and consequently were excepted from the operation of the grant.

Your office decision is affirmed.

OSAGE CEDED LANDS—FORFEITURE OF ENTRY.

MARS TAYLOR.

The Department has authority to cancel entries of Osage ceded lands where default exists as to the payment of the purchase price.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (W. C. P.)

I am in receipt of your letter of October 10, 1896, asking for instructions as to the proper procedure in the matter of the purchase by Mars Taylor of the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 33, T. 31 S., R. 18 E., Kansas, being a part of the body known as the "Osage ceded lands."

By the treaty of September 29, 1865 (14 Stat., 687), the Osage Indians granted and sold to the United States certain lands in Kansas for which the United States agreed to pay the sum of \$300,000 to be placed to the credit of said Indians in the Treasury and interest to be paid thereon at five per centum per annum. Said treaty further provided:

Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands but no pre-emption claim or homestead settlement shall be recognized; and after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the "civilization fund" to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States.

By the second article of said treaty certain other lands were ceded to the United States to be held in trust for said Osage Indians and surveyed and sold for their benefit.

By joint resolution of April 10, 1869 (16 Stat., 55), it was provided that any *bona fide* settler residing upon any portion of the lands by virtue of the first and second articles of said treaty being a citizen of the United States or having declared his intention to become a citizen should be entitled to purchase the same in quantity not exceeding one hundred and sixty acres, at one dollar and twenty-five cents per acre, within two years from the date of said resolution under such rules and regulations as may be prescribed by the Secretary of the Interior.

The next legislation affecting these lands is found in the act of August 11, 1876 (19 Stat. 27). It was there provided by section one that any *bona fide* settler residing at the time of completing his or her entry, as hereinafter provided, upon any portion of the land sold to the United States, by virtue of the first article" (of said treaty of 1865, who is a citizen of the United States, &c.) "shall be and hereby is, entitled to purchase the same in quantity not to exceed one hundred and sixty acres at the price of one dollar and twenty-five cents per acre within one year from the passage of this act, under such rules and regulations as may be prescribed by the Secretary of the Interior and on the terms hereinafter provided.

The second section of said act makes provision for the protection of persons who had purchased any portion of said lands from railroad companies claiming the same.

Section three prescribes the terms of purchase, and reads as follows:

That the parties desiring to make entries under the provisions of this act who will, within twelve months after the passage of the same make payment at the rate of one dollar and twenty-five cents per acre, for the land claimed by said purchaser, under such rules and regulations as the Commissioner of the General Land Office may prescribe, as follows, that is to say: said purchaser shall pay for the land he or she is entitled to purchase one-fourth the price of the land at the time the entry is made, and the remainder in three annual payments, drawing interest at the rate of five per centum per annum, which payment shall be secured by notes of said purchaser, payable to the United States; and the Secretary of the Interior shall withhold title until the last payment is made; and the Secretary of the Interior shall cause patents to issue to all parties who shall complete their purchases under the provisions of this act, and if any claimant fails to complete his or her entry at the proper land office within twelve months from the passage of this act, he or she shall forfeit all right to the land by him or her so claimed, except in cases where the land is in contest: *Provided further*, That nothing in this act shall be construed to prevent any purchaser of said land from making payment at any time of the whole or any portion of the purchase money.

Section four provides for entries on said lands for townsites. Section five provides for the re-establishment of entries theretofore canceled by the Secretary of the Interior. Section six reads as follows:

That all declaratory statements made by persons desiring to purchase any portion of said land under the provisions of this act, shall be filed with the register of the proper land office within sixty days after the passage of the same: *Provided, however*, That those who may settle on said land after the passage of this act shall file their declaratory statement within twenty days after the settlement, and complete their purchase under the provisions of this act within one year thereafter.

Section seven reads as follows:

That nothing in this act shall be so construed as to prevent said land from being taxed under the laws of the State of Kansas as other lands are or may be taxed in said State from and after the time the first payment is made on said land, according to the provisions of this act.

Section eight, the last of said act, provides for the purchase by certain railroad companies of certain tracts.

On October 26, 1876, instructions were given to the local officers calling attention to the various provisions of said law and telling them of their duties thereunder.

The right given to settlers to purchase these lands is in the nature of a pre-emption right, and by parity of reasoning the authority of this Department to declare and enforce a forfeiture for failure of the purchaser under this law to comply with the provisions thereof would be the same as in pre-emption cases. While the law under consideration contains no express declaration of forfeiture for default in making the deferred payments, it does contain the provision that—"the Secretary of the Interior shall withhold title until the last payment is made." The contract was one of sale, by which the United States agreed to convey the title upon certain conditions, one of which was the payment by the purchaser of the specified price within three years from the date of his entry. The failure of a purchaser to comply with the obligations he had assumed would relieve the United States of all obligations under such contract and would render the claim of the defaulting purchaser liable to a declaration of forfeiture. Furthermore, the authority to declare a forfeiture of such claims, and to enforce it by cancellation of the entries, is necessary to a proper administration of the law directing the sale of these lands.

The provisions of this law are very like those of the law providing for the sale of the Otoe and Missouri lands, of which my predecessor, Secretary Smith, after discussing the question, said (23 L. D., 143):

I am fully persuaded, therefore, of the power of the Secretary of the Interior to cancel the entries of these purchasers of Otoe and Missouri lands who are in default in the deferred payments.

So in the case of Osage ceded lands this Department has authority to cancel entries where default exists as to the payment of the purchase price.

It is, and should be, the policy to allow the purchaser of public lands opportunity to cure his default before final action is taken upon his claim, and in these cases notice should be given the purchaser, by service upon him personally if he can be reached in that way, and, if not, then by publication in such manner as will most likely reach him, that his entry will be canceled unless he shall, within some reasonable time, to be specified, complete his purchase.

Your attention is also called to the fact that said law specifically provides that nothing therein "shall be so construed as to prevent said land from being taxed under the laws of the State of Kansas." In view of this provision, you should ascertain whether the land has been sold for taxes, and at the same time, whether any transfer of any kind has been made. The present claimant of the land should be served with notice of the contemplated cancellation of the entry.

REPAYMENT—COMMON GRANTED LIMITS.

THOMAS HAWLEY.

An even numbered section lying within the common granted limits of two railroad grants remains at double minimum though one of such grants may have been forfeited, and an application for repayment on the ground of double minimum excess must be accordingly denied.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (E. M. R.)

This is an application by Thomas Hawley for the repayment of the double minimum excess paid in the Ashland, Wisconsin, land district, on cash entry No. 5037, for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 14, T. 49 N., R. 7 W., and is before the Department on appeal from your office decision of October 31, 1895, denying said application.

This land is within the common ten mile limits of the Omaha railroad and the Wisconsin Central railroad. The appeal is based upon the authority of the case of James McVicar (21 L. D., 128).

On June 3, 1856 (11 Stat., 20), Congress passed an act to aid in the construction of the Chicago, St. Paul, Minneapolis and Omaha railroad. On May 5, 1864 (13 Stat., 56), Congress passed an act by which the grant to the said Omaha railroad company was enlarged from six to ten sections per mile. By the same act a grant was made to aid in the construction of the railroad now known as the Wisconsin Central railroad.

The tract of land upon which re-payment is now asked, as has been stated, is within the common ten mile limits of these two roads.

This Department has held that the grant made by the act of 1864 was of a moiety to each road of the lands so lying within the common limits of both, but held that in view of the fact of the withdrawal for indemnity purposes in behalf of the Omaha railroad in 1856, the grant to the Central company was defeated as to land so situated. (Wisconsin Central R. R. Co., 10 L. D., 63; and Chicago, St. Paul, Minneapolis and Omaha R. R. Co., Id., 147.)

In the decision of the Department in the case of James McVicar (*supra*) it was said—

In the adjustment of the Omaha grant said company was required to make selection of lands within the common limit equal to its moiety, to which it was given full title, the remaining lands being held to apply to the moiety for the Central company's grant, which being defeated by the reservation under the act of 1856, as before stated, were opened to entry. The land in question is a portion of that restored, and in completing entry therefor, McVicar was required to pay at the rate of \$2.50 per acre or the double minimum price.

Section 4 of the act of Congress of May 5, 1864 (13 Stat., 66—page 67 thereof), provides:

And be it further enacted, That the sections and parts of sections of lands which shall remain to the United States within ten miles on each side of said roads shall not be sold for less than double the minimum price of the public lands when sold;

nor shall any of the said reserved lands become subject to private entry until the same have been first offered at public sale at the increased price.

In the case of the Wisconsin Central R. R. Co. *v.* Forsythe (159 U. S., 46), it was held that the withdrawal made for indemnity purposes under the act of 1856 did not serve to defeat the attachment of rights under the grant made by the act of 1864, and consequently that the Wisconsin Central railroad company was entitled to its proportionate share of the land so lying within the ten mile limits of each road. This was a reversal of the holdings of this Department, inasmuch as it was held by the supreme court that the withdrawal did not operate to defeat the grant to the Wisconsin Central railroad company.

Under the act of Congress of September 29, 1890 (26 Stat., 496), being "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and for other purposes," which forfeited unearned lands granted to railroads in various states and provided for the restoration of such lands to the public domain, it was provided that lands so forfeited and restored to the public domain should be entered at the rate of \$1.25 per acre.

It will be noticed that the land in controversy is a part of an even numbered section, to-wit, section 14. By referring to the original act making this grant in behalf of the Wisconsin Central Railroad Company, and in which at the same time is enlarged the grant in behalf of the Omaha Company, it will be seen that the lands increased in price were those which were not granted to these railroad companies. The lands granted to the railroad companies were the odd numbered sections within said limits. They, therefore, were not increased in price. And under the act of September 29, 1890, the lands granted to the railroad were forfeited and were directed to be sold at \$1.25 per acre.

It thus follows that there is no statutory authority for ordering re-payment in this case, and this land being within the ten mile limits of the Omaha railroad, despite the fact that the grant to aid in the construction of the Wisconsin Central railroad has failed and determined, the even sections within said ten mile limits of the Omaha railroad remain at double minimum prices.

While it is unfortunate that Congress should have directed the sale of the odd numbered sections at single minimum rates in this particular instance, and left the even numbered sections at double minimum rates, still this is no hardship to the claimants under the public land laws on the even numbered sections, inasmuch as the reason of increased valuation by proximity to a railroad existed here as in all other instances of increased prices. The law simply relieves claimants upon odd numbered sections similarly situated in reference to a railroad from paying the double minimum price.

The decision of your office is affirmed and the application for re-payment is denied.

COAL LAND ENTRY—PRICE OF LAND.

ALLEN L. BURGESS.

The price of coal land is dependent upon its distance from a completed railroad at the date of entry, and not at the date of the application.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (S. V. P.)

Allen L. Burgess made coal land entry September 14, 1895, of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 14, T. 55 N., R. 85 W., Buffalo land district, Wyoming, and upon examination of the final proof your office held it unsatisfactory with respect to the proof furnished as to the distance of the land from a completed railroad at the time said entry was made, and required further proof on that point, in order that the proper price of the land might be determined. From this action Burgess has appealed.

In the final affidavit made by Burgess, he states:

I made application to purchase said land on or about November 14, 1892, at which time said land was not within fifteen miles from the line of any completed railroad; and that the delay in making payment for said land has been caused through a contest pending on said land between Hermann Timm and myself, which contest has been recently decided.

The price of coal land is fixed by section 2347 of the Revised Statutes, which provides that:

Every person above the age of twenty-one years . . . shall, upon application to the register of the proper land office, have the right to enter by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person . . . upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Under the construction of this statute, adopted and followed by the Department, it is the distance of the land from a completed railroad at the date of entry that determines its price. See paragraph 13, Regulations of July 31, 1882 (1 L. D., 689).

In the case of Edward B. Largent *et al.* (13 L. D., 397), a protest against the allowance of the application to enter was filed, as in the case at bar, and the Department in disposing of the question said:

The filing of the protest against the entry of Strong was a risk that must be assumed by all who apply to enter the public land. The fact that in this particular case it had the effect to postpone the entry until after a railroad was completed within fifteen miles of the tract, which under the law doubled the price of the land, is only incidental, and the government can not be properly held chargeable for the delay, occasioned by Mr. Bagnell's protest.

and it was therefore held that the price of the land was dependent upon its distance from a completed railroad at date of entry, and not at the date of the application.

The decision of your office is affirmed.

SCHOOL LANDS—SETTLEMENT BEFORE SURVEY.

STATE OF WASHINGTON *v.* KUHN.

The act of February 28, 1891, amending sections 2275 and 2276, R. S., protects settlement on school land prior to survey, and said statute in that respect supersedes the provisions of sections 10, and 11, of the act of February 22, 1889.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (C. J. G.)

This case is in relation to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 36, T. 21 N., R. 8 E., Seattle land district, Washington.

On April 18, 1893, Edward A. Kuhn made homestead entry for this tract, alleging settlement thereon September 29, 1890.

On August 13, 1895, the State of Washington, by its Commissioner of Public Lands, entered protest against the allowance of said entry, and requested that a hearing be ordered to determine the rights of the respective parties.

The grounds urged in said protest were, that title to this land, being located in section thirty-six, had passed and become vested in the State of Washington by virtue of sections ten and eleven of the act of February 22, 1889 (25 Stat., 676), admitting the said State into the Union; that the title of the State of Washington in and to said land is not affected or invalidated by reason of the provision of the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes of the United States.

The State of Washington was admitted into the Union on November 11, 1889.

On October 7, 1895, Kuhn submitted his final proof; and on October 10, 1895, the local office dismissed the protest filed by the State of Washington, holding that the claim of said State was in contravention of the act of February 28, 1891 (*supra*). Kuhn's final proof being satisfactory final certificate was duly issued thereon.

The State of Washington filed an appeal from the above decision, and under date of November 29, 1895, your office affirmed the action of the local office. A further appeal on behalf of the State brings the case before this Department, the errors assigned being in line with the specifications contained in the protest against Kuhn's entry.

That portion of sections 2275 and 2276, incorporating the act of February 26, 1859 (11 Stat., 385), which has reference to the point under consideration, is as follows:

Where settlements, with a view to pre-emption, have been made before survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors, etc.

The act of February 22, 1889 (*supra*), has a provision in section 11 thereof as follows:

All lands herein granted for educational purposes . . . shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

The act of February 28, 1891 (*supra*), amended sections 2275 and 2276 of the Revised Statutes to read as follows:

Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers

That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands . . . within the State or Territory where such losses or deficiencies of school sections occur, etc.

It has been decided by the Department that the provisions of sections 10 and 11 of the act of February 22, 1889, and those of sections 2275 and 2276 of the Revised Statutes, being in apparent conflict, the same are superseded by the act of February 28, 1891, and that the grants to these States are to be found in and governed by this later act. The Department, in the instructions to your office dated April 22, 1891 (12 L. D., 400), held,

that the provisions of the prior act of February 22, 1889, in so far as they are in conflict with those of said sections 2275 and 2276 of the Revised Statutes as amended by the later act of February 28, 1891, are superseded by the provisions of said sections as amended, and that the grants of school lands to those States mentioned in said act of February 22, 1889, are to be administered and adjusted under the provisions of this later general law.

It is thus apparent from the foregoing that until survey no rights of the State can attach to sections 16 and 36 under the grant; and that settlements made on said sections before survey shall be subject to the claims of such settlers.

The records of your office show that the plat of survey for the land in question was filed in the Seattle land office, and the said land opened to entry, on February 7, 1893.

As previously set out herein Kuhn alleges settlement on September 29, 1890.

Your office decision is hereby affirmed.

PRACTICE—NOTICE—SCHOOL LANDS—SELECTION.

RICE *v.* STATE OF CALIFORNIA.

Service of notice of contest by registered letter is not personal service within the meaning of Rule 9 of Practice.

The title of the State to school lands vests at the date of the completion of the survey, and if the land is not then known to be mineral in character, the subsequent discovery of mineral thereon will not divest the title that has already passed.

The State by a school indemnity selection in lieu of land alleged to be mineral in character waives its claim to the basis, which may be thereupon disposed of as part of the public domain.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (P. J. C.)

The land involved in this appeal is the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 36, T. 11 N., R. 8 W., M. D. M., San Francisco, California, land district, the plat of which was approved and filed in the local office August 9, 1875.

On March 20, 1895, John C. Rice filed an affidavit of contest, alleging that he has known the land since 1890, that it is mineral in character, and ever since deponent first knew the land it has been known to be mineral, being more valuable for mineral than for agricultural purposes.

A hearing was ordered and a copy of the notice sent by registered mail to the surveyor general of California. There was no appearance for the State at the hearing, or subsequently. The contestant submitted his testimony, and the local officers held the land to be mineral in character, known to be such at the date of the survey. No appeal was taken. Your office, by letter of November 5, 1895, reversed the action of the register and receiver on two grounds; first: that service of notice of a hearing by mail was without "authority of law or warrant in the rules of practice;" and second: that the land being in section 36 was granted to the State as school land, "unless said land was known to be mineral in character at the date when said land was surveyed."

The appeal of Rice brings the case before the Department, and the rulings stated above are alleged to be error.

It is stated by counsel in his brief that your office decision is erroneous on the first proposition because.

the record contains the surveyor general's written acknowledgment of the receipt of notice, which is sufficient to perfect service under the doctrine of *Crowston v. Seal*, 5 L. D., 213; *Canal Co. v. Louisiana*, 5 L. D., 479.

The only "written acknowledgment of the receipt of notice" to be found in the record is the return receipt for a registered letter.

The case of *Crowston v. Seal* is overruled in *Elting v. Terhune* (18 L. D., 586), where it is distinctly held that service of notice of contest by registered letter is not personal service within the meaning of Rule 9 of Practice. The other case cited by counsel does not treat of service of notice of contest, but of service of notice of a decision of your office upon one of the parties to a contest, and is therefore not an authority upon the proposition stated by counsel.

On the second proposition it has been repeatedly held that the State's title to school lands under the act of March 3, 1853 (10 Stat., 244), vests at the date of the completion of the survey,

and if the land, although in reality mineral, was not then *known* to be mineral, the subsequent discovery of its mineral character would not divest the title which had already passed. (Abraham L. Miner, 9 L. D., 408; *Pereira v. Jacks*, 15 L. D., 273.)

There is nothing in the affidavit of contest or the evidence submitted to show anything to defeat the operation of the grant. All that is claimed is that cinnabar exists on the surface of the ground and its presence was sufficient to characterize the land as mineral.

While there was no error in your office judgment as the case was then presented, yet there have been some subsequent developments that render it necessary to further consider the matter.

My attention is called to the fact that the State has, subsequent to the initiation of this proceeding by Rice, made indemnity selections in lieu of the land in controversy, two of which—Stockton lists Nos. 220 and 221—have been approved by your office to the extent of sixty acres, and two others—Stockton list No. 222, and San Francisco list No. 5273, 10 acres each—are now pending. It is stated by counsel that all these selections have been approved, but informal inquiry in your office shows the fact to be as above stated. The reason assigned by the State for making these indemnity selections is that the land in controversy is mineral in character.

By act of Congress of February 28, 1891 (26 Stat., 796), Sec. 2275 R. S., was amended, and among other provisions therein is found this—

And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen and thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections.

Under the terms of this statute it is clear that the State may make indemnity selections whenever any of its granted school lands are found to be mineral in character. In reference to the land in controversy the State has, presumably, satisfied itself that it does not fall within the terms of its grant and has selected other lands in lieu thereof. The Department, in commenting on the proviso above quoted, has said:

Conceding that the school grant attached to the specific sections after they were designated by the survey, the State having selected equivalent land in lieu thereof, the government may hold the State to its waiver of the school sections and dispose of it as part of the public domain. (*Gregg et al. v. Colorado*, 15 L. D., 151.)

It seems to me that this rule may be applied in the case at bar, and that the State by reason of its selection is estopped from making any further claim to the land in controversy.

Notwithstanding the decision of your office was correct on the record

as it then stood, yet by reason of the action of the State since the rendition of your office judgment, it is clear that the land in controversy is now a part of the public domain and may be disposed of as such, and that part of your office judgment that held that the land inured to the State under its grant must be vacated.

It is so ordered.

SECOND HOMESTEAD ENTRY—CORROBORATORY AFFIDAVIT.

BOHUN *v.* BREST.

The right to make a second homestead entry may be recognized where the first through mistake was not made for the land intended, and was accordingly relinquished.

An official certificate of the register as to the truthfulness of the applicant may be accepted in lieu of the corroboratory affidavit required in the case of an application to make second homestead entry, where the failure to furnish such affidavit is satisfactorily explained.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (C. J. W.)

On May 25, 1891, Nicholas Brest made homestead entry No. 255 for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 24, T. 24 N., R. 21 E., and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 22, T. 24 N., R. 22 E., Waterville land district, Washington. S. L. Bohun contested the entry, after due notice served by publication, December 8, 1894. On January 15, 1895, the case came on for hearing, and Brest made default. The evidence disclosed the fact that Brest had never lived on or improved the land. The local officers recommended the cancellation of the entry, and there being no appeal, on April 26, 1895, your office canceled said entry.

On filing his contest Bohun made application to enter the land embraced in Brest's entry, and which he alleged Brest had abandoned, and he also filed an application for the restoration of his homestead rights. It appears from the record that on April 26, 1889, Bohun made homestead entry No. 219 for the NW. $\frac{1}{4}$, Sec. 26, T. 15 N., R. 3 W., Guthrie land district, Oklahoma. The same was canceled by relinquishment on November 21, 1889, when Peter Anderson entered the said tract. On January 14, 1895, the local officers forwarded to your office the application of Bohun to make entry of the land covered by his contest and application for restoration of his homestead rights, with the recommendation that the same be granted. On April 26, 1895, your office rejected said application for the reason, and upon the ground, that Bohun's affidavit, in which he set forth the facts upon which he based his right to second entry, was uncorroborated. From this decision Bohun appealed. The principal ground of his appeal is that he is a qualified homesteader, and under the law is entitled to a homestead of one hundred and sixty acres, and that he has never perfected an entry or exhausted his rights. Bohun, in his affidavit, states

that after making homestead entry No. 219 (at Guthrie) he returned to his home in Nebraska, with the intention of going upon the land entered within six months, but was informed by parties at Guthrie that the surveyor, who was employed to run out the lines, had made a mistake, and that the entry had been made on the wrong tract of land in another township, and that before he could return, other parties had filed and made improvements on the land that he intended to file on, and that at the time he was unable to stand the cost of a contest, and that the land embraced in the entry was not desirable and not fit for farming. That he does not remember the names of the parties who would corroborate this affidavit, and could not get their affidavits without going to Guthrie for that purpose. He further states that after finding the error that had been committed, he relinquished the land back to the government on the 21st day of November, 1889, and that he has never had the benefit of the homestead laws, and that he did not sell his right to the land and did not receive the amount of his filing fees.

It is evident that it is the purpose of the law that every citizen possessing the requisite qualifications should be entitled to a homestead of one hundred and sixty acres of public land subject to entry, and that a second entry may be made in instances where, for some cause unforeseen, the first entry has failed without fault or fraud upon the part of the entryman. If the facts set out in the affidavit of Bohun are true, he has not exhausted his homestead rights, and should be permitted to make a second entry. It was evidently not because of the insufficiency of the facts, that your office rejected his application, but because it was held that they were not sufficiently proven—the objection being that the usual corroborating affidavit was wanting. The party is competent to testify in his own behalf, but lest a door for fraud should be opened by depending entirely upon the testimony of the applicant in this class of cases, it has been the rule of the Department to require some sort of corroboration of the truth of the applicant's statements. Your office doubtless sought to follow this rule in rendering the decision complained of. It is not believed that under the peculiar facts of this case, the rule as properly construed would be violated by granting the applicant's petition. The chief office of corroborative evidence of whatever nature it may be is to give assurance of the good faith and truthfulness of the affiant to be corroborated. The reason for the failure in this case to furnish additional affidavits setting up the same facts stated in the applicant's affidavit is given, and that reason is at least forcible. It is followed by evidence of the general truthfulness of the affiant. The register of the land office at Waterville, in forwarding the application of Bohun for restoration of his homestead right, mentions the fact that his showing is not corroborated, and then adds the following—

The tract of land that he makes application for is now held by Nicholas Brest homestead entry No. 255, and Bohun has filed a contest against said tract which I

presume from what I can learn from other parties will be an *ex parte* contest. The register has known Mr. Bohun for sometime, and believes him to be a truthful man, and we would recommend that his right be restored and that he be allowed to make this entry.

The facts stated in Bohun's affidavit are presumptively true, and this presumption is strengthened by the official report of the register to the effect that he knows and believes him to be a truthful man. This report made by an officer of the government, acting under oath, is equivalent to an affidavit, and may be regarded as a substantial compliance with the rule requiring initiatory affidavits to be corroborated. The land he seeks to enter was restored to the public domain through the instrumentality of a contest initiated by him and proof produced by him. It is believed that the showing made is sufficient under the circumstances to authorize the restoration of his homestead right.

Your office decision is accordingly reversed, and Bohun will be allowed to make second entry for the land applied for.

MINING CLAIM—JUDICIAL PROCEEDINGS—SECTION 2332, R. S.

CAIN ET AL. *v.* ADDENDA MINING CO.

Judicial proceedings are not effective as against an application for mineral patent if not based upon an adverse claim as provided by statute.

Continuous possession of a mining claim, with due compliance of law, for a period equal to the time prescribed by the statute of limitations for mining claims, in the State wherein such claim is situated, entitles the claimant under the provisions of section 2332, R. S., to a patent, in the absence of any adverse claim.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897.
(I. H. L.) (E. B., Jr.)

The record in this case shows that The Addenda Gold and Silver Mining Company, a corporation organized under the laws of California, made application November 11, 1879, for patent to the Addenda lode claim, situated in Bodie, California, land district; that the claim was located May 19, 1877; that the period of publication ended January 17, 1880; that during the period of publication the said application was adversely by the owner of the Concordia lode claim, suit duly commenced thereon, and judgment given April 13, 1882, awarding the ground in conflict to the adverse claimant; that on December 10, 1894, the said company made mineral entry No. 240 for what remained after excluding the conflict with the Concordia lode and the Insurance lode; that on April 27, 1895, James S. Cain, Alexander J. McCone, and John W. Kelly filed a protest against said entry, alleging, in effect,—

1. That the Addenda claim had been abandoned by said company subsequent to application for patent and before entry;

2. That in 1894, and subsequent to the alleged abandonment, the Addenda claim had been re-located, and that protestants were owners of the ground under the re-location; and

3. That in November, 1894, they commenced suit against said company to quiet title, which suit was then pending.

In the course of proceedings fully set out in your office decisions of September 3, 1895, and (on review) January 9, 1896, and not necessary to be recited here in detail, your office by its former decision held that protestants' said suit, not having been instituted under any provision of the mining laws, did not authorize any stay of proceedings under the company's application for patent; that it was shown that the company had in good faith endeavored to comply with the mining laws; that the alleged re-location by one P. Curtis, under which protestants claimed, having been made by him while agent of said company, was in fraud of the company's rights, gave protestant no right against the company, was insufficient to defeat its entry; and therefore dismissed the protest. Upon motion for review by protestants, your office, in its latter decision, basing its action largely upon a judgment in favor of protestants in their said suit, made and entered in the superior court of Mono county, California, August 30, 1895, overruled its former decision and held the company's entry for cancellation. The company thereupon appealed, assigning error as follows:

The Commissioner erred in holding that the said Addenda Gold and Silver Mining Company had not complied in good faith with the laws governing and holding mining claims.

The Commissioner erred in holding that the only remedy in the above entitled matter was by an action in equity to hold the re-locators and their grantees trustees for the Addenda Gold and Silver Mining Company.

The Commissioner erred in holding that the Addenda Gold and Silver Mining Company abandoned its claim by failing to file a notice of its intention to hold the said location in good faith under the act of November 3rd, 1893.

The Commissioner erred in holding that there is a final decree in favor of the plaintiffs in the case of *Cain et al. v. Addenda Gold and Silver Mining Company*.

The Commissioner erred in holding that the application for a patent should be canceled instead of suspended during the pendency of the action of *Cain et al. v. Addenda Gold and Silver Mining Company*.

The Commissioner erred in holding that the patent should be held for cancellation on the ground that the Department of the Interior did not have sufficient equity powers to waive a technical violation of the law, where the applicant was not to blame for such violation.

The Commissioner erred in holding the application for a patent for cancellation under the facts recited in his decision of January 9th, 1896.

It is in evidence and not denied that prior to 1886 said company had expended \$100,000 on said claim; that said Curtis was the superintendent of the company during 1885, in their mining operations thereon; that from 1886 to 1892, inclusive, he was the company's agent to see that the annual assessment work was done thereon, the company having no other agent in the neighborhood; that the company sent him \$100 each year during that period to pay for such work, and that he regularly filed each year during that period his affidavit with the district mining recorder, that he had expended that amount in assessment work upon the claim in behalf of said company.

On November 23, 1893, Congress passed an act (28 Stat., 6), excusing assessment work on a mining claim for that year upon the filing for record in the office where the location certificate was on file a notice that the claimant in good faith intended to hold and work the claim. Such notice was sent by the company to Curtis in November, 1893, to be duly filed. He admits the receipt of this notice, but not that he agreed to file it. John Dixon, a director and former president of the company, swears positively that Curtis did agree to file the notice in a letter to him dated December 5, 1893. He did not file it, but on January 1, 1894, re-located the claim, under the name of the Black Rock Consolidated lode claim, and on May 2, 1894, made a conveyance of the same to said Kelly. Kelly made a location covering the Addenda ground and some additional ground, on June 18th following, which he called the Contention Mine, and subsequently made conveyances of one third interests, each, thereunder, to Cain and McCone.

I am convinced from the evidence that Kelly knew of the relations between Curtis and the Addenda Company, and that Curtis had taken advantage of these in an attempt to surreptitiously gain possession of the company's claim; and am also convinced that the company attempted in good faith to comply with the act last above mentioned, and supposed, until long afterward, that it had duly complied. There was no intention on the part of the company to abandon the claim. It must be conceded, however, that the company did not in fact comply with the said act. But the law, generally speaking, does not look with favor upon a forfeiture of property, and the Department is not, therefore, disposed to extend any aid toward these protestants in their insistence upon a forfeiture, under all the circumstances, but, on the contrary, to construe the law in the case strictly against them.

They are not here as adverse claimants in any sense under the mining laws, but merely as *amici curiæ*—friends of the court. They have a right to protest under section 2325 of the mining laws (Revised Statutes), but no right to contest. They may not assert any claim as against the applicant for patent, but only challenge the applicant's claims under the law (*Wight v. Dubois et al.*, 21 Fed. Rep., 693). The judgment on the suit to quiet title which protestants set up and which appears to have become final on failure of the company to appeal therefrom within a year from the entry thereof (Sec. 939 Cal. Code of Civil Procedure—Deering), is not a judgment on an adverse claim, and not, therefore, effective against the company in their proceedings for patent.

Although Curtis testifies that the assessment work done on the Addenda under his supervision from 1886 to 1892, inclusive, was done perfunctorily, contributed little if at all to the development of the claim, and that only \$95 of the \$100 sent him was applied toward actual labor thereon, the other five dollars going to pay for recording the affidavit of labor, the company is shown to have been in unquestioned possession during all that time, and I think it may be safely held that the work was a sufficient compliance with the mining laws

in the absence of any attempted re-location during that time, or any adverse claim. Under a state of facts analogous to the present case the Department held, in *Stewart et al. v. Rees et al.* (21 L. D., 446), under authority of section 2332 of the Revised Statutes, and the cases cited, that—

If the claimant has been in possession and worked the Jaw Bone [mining claim] for the period prescribed by the statute of limitations for mining claims in Montana, prior to the re-location by the protestants, he is entitled to have the same passed to patent, at least as against these protestants (*Glacier v. Willis*, 127 U. S., 471; 420 Mining Co. v. Bullion Co., 1 Mont. M. R., 114).

The Jaw Bone mining claim was located in Montana, but section 2332 of the Revised Statutes is applicable to mining claims in any "State or Territory." It reads—

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

The "time prescribed by the statute of limitations for mining claims" in California is five years. A mining claim in California is real estate (*John Melton et al. v. Orville D. Lambard*, 51 Cal., 258), and the period of limitation as to actions for the recovery of real estate is five years from seizin or possession of "the plaintiff, his ancestor, predecessor or grantor." (Sec. 318 Cal. Code of Civil Procedure—Deering; and *Morris v. De Celis*, 51 Cal., 55.) The Addenda company having held and worked its claim continuously for more than five years immediately prior to the alleged re-location, it is, under section 2332 of the Revised Statutes, and *Stewart et al. v. Rees et al.* (*supra*), entitled to have the same passed to patent, as against these protestants.

Your office decision of January 9, 1896, herein, is accordingly reversed, and said protest dismissed, and you will pass the Addenda claim to patent, subject, however, to any objections appearing in the record and not herein considered.

RAILROAD GRANT—LANDS EXCEPTED—PRE-EMPTION FILING.

NORTHERN PACIFIC R. R. Co. v. ROGERS.

Land embraced within a pre-emption filing of record at the time when a railroad grant becomes effective is excepted from the operation of the grant, and the company in such case is not entitled to question the legality of the filing or the qualifications of the pre-emptor.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (P. J. C.)

The land involved in this appeal is the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 1 and 2, Sec. 5, Tp. 1 N., R. 4 W., Helena, Montana, land district, and

is within the primary limits of the grant to the Northern Pacific Railroad Company, as shown by its map of definite location filed July 6, 1882. It is also within the limits of the withdrawal on general route, which became effective February 21, 1872, and was listed by the company (list No. 12), July 28, 1886.

It appears that one John Paul filed pre-emption declaratory statement for the tracts, April 24, 1871, alleging settlement March 1, previous. He subsequently offered final proof, which was rejected by the local officers, because he was not qualified to file for or enter the land, for the reason that he had prior thereto completed a pre-emption for land in Colorado, upon which patent had issued. After the rejection of his final proof he entered into a contract to purchase the land of the railroad company. It also appears that one Bennett Degenhart, on December 27, 1883, presented his application to make homestead entry of said tract, alleging settlement in July, 1882, and on the protest of the railroad company against the acceptance of the same a hearing was had, and on final appeal to the Department Degenhart's application was rejected. (*Degenhart v. Northern Pacific*, 15 L. D., 159.) A motion for review of this decision was denied, December 21, 1892, and the case against Degenhart was formally closed on the records of your office.

The present controversy arises on the application of Thomas B. Rogers, filed in the local office August 21, 1895, to make homestead entry of the tract, on the ground that under the decision of Supreme Court in *Whitney v. Taylor* (158 U. S., 85,) the pre-emption filing of John Paul, existing of record on February 21, 1872, the date of the withdrawal of lands within the limits of the grant, excepted the land from the operation thereof.

On consideration of this application your office, by letter of September 23, 1895, decided that, under the doctrine of the *Whitney-Taylor* case, the land was excepted from the grant. The connection of the other parties with the case was stated, substantially, as above, then the following order was made:

Should this decision holding the company's list for cancellation as to the land involved become final, and should it appear upon an investigation that Paul and Degenhart have abandoned their respective interests in said land, Mr. Rogers will be permitted to make homestead entry therefor, in accordance with his original application, but not otherwise. If Mr. Paul is, as he claims, a *bona fide* purchaser of the land from the railroad company, it would appear that he is entitled to relief under act of March 3, 1887, and in any case should the railroad claim be eliminated and other parties set up a claim to the land, a hearing will be necessary in order to determine the respective rights of all adverse claimants.

From this judgment the railroad company has appealed, assigning as error, (1) in holding the expired pre-emption filing of John Paul was sufficient to except this land from the operation of the grant, and (2) for any reason to have rejected the claim of the company.

It is contended by counsel that, inasmuch as the question as to the

right of the company to select this land was decided in its favor in the case of *Degenhart v. Northern Pacific* that this case is *stare decisis*; that the decision in that case

should be conclusive, and inasmuch as it was then affirmatively found that Paul was not a qualified pre-emptor, it necessarily follows that his filing was an absolute nullity, and could have no possible effect upon the operation of the railroad grant.

I do not conceive this position of counsel to be sound. It is shown that Paul's filing was of record and uncanceled at the date of withdrawal on general route, and also of definite location. Under the doctrine of the *Whitney-Taylor* case, as construed by the Department in *Fish v. Northern Pacific* (23 L. D., 15), this filing excepted the land from the grant, and the company can not be heard to question the legality of the filing or the qualifications of the pre-emptor. The test should be: was there a filing on record at the time. If there was, it was then simply a question between the government and entryman, in which the railroad company would not be permitted to be heard.

Your office judgment is therefore affirmed.

ADDITIONAL HOMESTEAD ENTRY—SECTION 6, ACT OF MARCH 2, 1889.

WALLACE H. HERRICK.

The right to make additional homestead entry under section 6, act of March 2, 1889, is limited to cases where the original entry was made prior to the passage of said act.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (S. V. P.)

I have examined the record brought up by the appeal of Wallace H. Herrick from the decision of your office rendered October 10, 1895, rejecting his application to make homestead entry of lot 3, NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ Sec. 26, T. 27 N., R. 21 W., Missoula land district, Montana.

It appears that Herrick made said application August 7, 1895, stating in his preliminary affidavit

I have heretofore made homestead entry of the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 26, T. 30 N., R. 21, for which I hold receiver's duplicate receipt No. 745, issued May 2d, 1895, at U. S. local land office, Missoula, Montana.

The local office rejected said application for the reason that "Wallace H. Herrick has exhausted his homestead right as shown by affidavit accompanying the application, and by records of this office. See 15 L. D., 285." This action you affirmed on appeal. The record of the entry referred to in Herrick's preliminary affidavit accompanies the papers sent up with his appeal, and it appears therefrom that said entry was made January 19, 1893, and commuted May 2, 1895.

It is urged on behalf of appellant that he is entitled to make the entry in question under section six, act of March 2, 1889 (25 Stat., 854), which provides—

That every person entitled under the provisions of the homestead laws to enter a

homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land, as added to the quantity previously so entered by him shall not exceed one hundred and sixty acres.

In the departmental circular issued March 8, 1889 (8 L. D., 314), this provision was held applicable only in cases where the original entry was made prior to the passage of said act, and this construction has since been followed; John W. Cooper *et al.* (15 L. D., 285).

The decision of your office is therefore affirmed.

HOMESTEAD—SETTLEMENT—TRADE AND BUSINESS.

NORTHERN PACIFIC R. R. CO. ET AL. v. WALDON.

The homestead law does not contemplate that the right of entry shall be exercised by one who makes settlement primarily and chiefly for trade and business, and not for agricultural purposes.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (C. J. W.)

On April 6, 1886, John S. Waldon made application to make homestead entry for W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 5, T. 130 N., R. 79 W., Bismarck, North Dakota, land district. The local officers rejected his application, and on appeal by him to your office, their decision was reversed, and on June 30, 1886, Waldon made homestead entry, No. 4317, for S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 5, T. 130 N., R. 79 W. Waldon gave notice of his intention to make final proof August 19, 1889. The taking of such proof was adjourned to August 26, 1889, at which time John A. Rea, as attorney for James G. Pitts and James McLaughlin, and F. M. Dudley and William H. Francis, attorneys for the Northern Pacific Railroad Company filed protests against the allowance of Waldon's proof. The land is within the indemnity limits of said railroad company, and was embraced in list 26 of its selection, filed January 8, 1885.

By letter "F" of March 20, 1895, the case was closed adversely to the right of the company to the land. The protestants do not undertake to set up any prior right in themselves but allege that Waldon never settled upon the land in good faith, intending to claim the same under the settlement laws; that at the date of the alleged settlement the land was not legally subject to either homestead or pre-emption settlement; that the entry and alleged settlement were illegal, made in fraud and bad faith and for the purpose of speculation and trade, and that Waldon has failed to meet the requirements of the homestead law, as to residence upon and cultivation of the land claimed by him. A hearing was had August 27, 1889, with all parties present.

December 21, 1889, the local officers rejected Waldon's final proof. Waldon appealed to your office, and on May 18, 1895, your office affirmed the decision of the local officers and held his entry for cancellation. From this decision Waldon appeals, alleging the following errors:

1st. In finding that Waldon went on the land in question for the purpose of engaging in the hotel business.

2d. In finding that at the time he made settlement on the land in controversy the same was used for the purpose of trade and business in the meaning of Sec. 2258 R. S.

3d. In holding that said land was not subject to entry because used for trade and business.

The protestants having alleged no right in themselves to the land in question, the case will be considered only as between the government and Waldon. If it be true that his settlement was made for speculative purposes, and that he went upon the land for the purpose of engaging in the hotel business, his entry nominally for homestead purposes was a fraud and unauthorized. The evidence of other witnesses, together with Waldon's admissions, leave no room for doubt as to the purpose of his settlement made in July, 1884, on a surveyed town lot, the boundaries of which were recognized and conformed to, in the erection of his building, a plat of the town having been filed with the register of deeds for Emmons county on June 3, 1884. In November, 1884, three months after the commencement of his settlement, he had published in the newspaper the following advertisement:

Merchants Hotel, Winona, D. T.

John Waldon, Proprietor.

This house is conducted in a first class manner, and every attention is paid to the comfort and convenience of travelers, the building is twenty-four by fifty, two stories high. The hotel is well furnished and the culinary department is well supplied with everything the market affords. If you have occasion to visit the beautiful and growing city of Winona do not forget to visit the Merchants.

The short interval between Waldon's settlement and the appearance of the advertisement quoted, had been presumably occupied in the building of the twenty-five hundred dollar house described. Any effort to find evidence of a settlement for agricultural and homestead purposes, in the acts performed by Waldon, or the language used by him in proclaiming his business and location, would prove useless. Waldon evidently appears to much better advantage as a stirring enterprising man of business with speculative projects in mind, than as a pioneer agricultural homeseeker, under the homestead laws. This is not said to his discredit, since it is not the policy of the law to discourage enterprise and industry, in any legitimate pursuit. The law, however, does not permit benefits which it confers upon homesteaders, to be appropriated by those who do not contemplate the use of the land for agricultural purposes, but for business and speculative purposes. It is not unlawful to make settlements for business purposes, but where such settlements are made, the rights thereby initiated must be perfected

under the townsite and not under the homestead laws. So far as the record indicates its status, the town of Winona is unincorporated, and no entry of lands has been made for the benefit of its inhabitants. Affidavits which are a part of the record indicate that improvements located on a forty of the SW. $\frac{1}{4}$, including Waldon's hotel, are worth five thousand dollars. As Waldon's improvements are worth \$2,500, if he was permitted to perfect title to the land through his entry, he would thus become possessed of improvements to the value of \$2,500 made by others. While these improvements in the form of business houses continue to be used and occupied for purposes of trade and business, the land is not subject to entry as a homestead, but may be applied for under the townsite laws. It is not decided that if Waldon had made his settlement in advance of any others, and for homestead purposes, that the entertainment of the public at his home for profit, would forfeit his right to perfect his title under his homestead entry, but the evidence shows that not only was the building of a town on this land in contemplation, but that at least three buildings were constructed, or in process of construction on this quarter, before Waldon made his settlement and commenced the erection of his hotel, and under such circumstances he must be held to have made his settlement primarily and chiefly for trade and business, and not for agricultural purposes.

Your office decision is therefore affirmed.

SWAMP LAND—HOMESTEAD—ACT OF JUNE 17, 1892.

HOLCOMB *v.* STATE OF CALIFORNIA.

The preferred right of homestead entry accorded to actual settlers, by the act of June 17, 1892, opening the Klamath River Indian reservation, does not extend to lands returned as swamp and overflowed, and so represented on the approved township surveys and plats.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (C. J. G.)

Phineas D. Holcomb has filed an appeal from your office decision of June 7, 1895, holding for cancellation his homestead entry, made May 22, 1894, for lot 5, Sec. 3, and lots 8 and 9, Sec. 4, T. 13 N., R. 1 E., Humboldt land district, California, to the extent that his said entry conflicts with the claim of the State under the swamp land grant.

The above described land is within what was the Klamath River Indian reservation in the State of California, set apart and reserved under authority of law by an executive order dated November 16, 1855.

The land is also claimed by the State of California under the swamp land grant of September 28, 1850 (9 Stat., 519).

The act of July 23, 1866 (14 Stat., 218), as incorporated in section 2488 of the Revised Statutes, provides as follows:

It shall be the duty of the Commissioner of the General Land Office, to certify over to the State of California as swamp and overflowed lands, all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23d day of July, 1866, under the authority of the United States.

Surveys and plats of the township in which the land in question is situated were made in the years 1878, 1881 and 1886. The lands within these surveys were returned as swamp. The map of survey, conformable to the field notes on file in the Humboldt land office, was approved July 30, 1889, and the tract in question was therein segregated and designated as swamp land.

It was upon the above showing that your office held Holcomb's homestead entry for cancellation, as being in conflict with the claim of the State of California.

Under the act of June 17, 1892 (27 Stat., 52), the lands embraced in what was Klamath River Indian reservation were opened to settlement under the laws of the United States granting homestead rights, and it was stated in the second proviso of the act as follows:

And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon.

It is under the above act that the appellant herein prefers his claim. In his appeal to this Department he alleges that the land in question is not swamp and overflowed land. In face of the return made by the U. S. surveyor-general for the State of California as to the character of this land, and numerous decisions governing such matters, it would seem that the appellant's allegation is impotent to change the ruling made by your office. In the case of State of California (23 L. D., 230, on review), vacating departmental decision of March 17, 1892 (14 L. D., 253), it was held:

Under the first paragraph of section 2488 R. S., the return of the land as swamp and overflowed, by the U. S. surveyor-general for the State of California, is conclusive evidence as to the character of the land so returned and represented as such on the approved township surveys and plats; and lands thus returned must be certified to the State as inuring thereto under the swamp grant.

In *State of California v. United States* (3 L. D., 521) referring to the first clause of section 4, act of July 23, 1866 (*supra*), it was said—

Under this clause, it is clear that the State has no valid claim to the land in question, unless it is represented upon the approved township survey and plat, as swamp and overflowed land, and, if the tract is so represented, then it matters not what the real character of the land is, whether swamp and overflowed or dry, the State is entitled to the tract. *Central Pacific R. R. Co. v. California* (4 C. L. O., 151).

In *Heath v. Wallace* (138 U. S., 573), referring to the same section, the court said—

As held in *Tubbs v. Wilhoit*, *supra*, this section of the statute established rules or methods for the identification of swamp and overflowed lands in California, which superseded all previous rules or methods for that purpose. The several rules or methods provided for were intended to meet any emergency that might arise, and thus give to the State all the swamp and overflowed lands within her limits. The method provided in the first clause was but one of several specified in the section. But one thing was required to be shown under this clause—only one kind of evidence as to the character of the lands was necessary—in order to give the State the right to demand the certification of them over to her as swamp and overflowed lands; and that evidence the United States furnished in the plat of the survey of the township in which the lands were situated. An inspection of the township plat would show whether or not any lands in the township were returned as swamp and overflowed. If they were, that designation was sufficient and conclusive evidence, under the first clause of section 4 of the act, to establish the title of the State to them.

The swamp land grant to the State of California was a grant *in praesenti* taking effect at the date of the passage of the act (*Wright v. Roseberry*, 121 U. S., 488). In his appeal to this Department Holcomb alleges that he settled on the land in question in the year 1883. He also contends that the terms “all of the lands” and “any lands” employed in the act of June 17, 1892, *supra*, cover his claim. Prior to the passage of said act the land involved herein was embraced in the Klamath River Indian reservation. It is true that the act of June 17, 1892, recognizes the rights of settlers on this reservation, but at the same time it can not be successfully contended that the said act recognized such rights to be superior to those of the State under the swamp land grant. If his said alleged settlement had been made upon any lands within the reservation allotted under the first proviso of the act and reserved for the permanent use and occupation of any village or settlement of Indians, it would readily be conceded that such settlement by the appellant could not avail. The act of June 17, 1892, while not in terms excepting the lands included in the swamp grant to the State, could not at the same time include them without express mention. It is a reasonable presumption that Congress intended by the said act to open to settlement only those lands owned by the United States, and that it had no intention of disposing of lands which had long since passed from government control. When, therefore, the phrase “all of the lands” was employed by Congress it is reasonable to suppose that all of the land not otherwise disposed of within the Klamath River Indian reservation, was meant. No other construction can be put upon the language of the act, unless it be held that Congress intended to repeal the swamp land act. This proposition is entirely too improbable to require serious consideration.

As heretofore set out a survey of the township in which this land is situated was made as early as 1878. All the township lines were completed in 1886. As was stated in the case of *Heath v. Wallace*, *supra*, an inspection of the township plat would have shown whether

or not any lands in the township were returned as swamp and overflowed. The appellant was thus charged with notice.

The appellant claims that he has been discriminated against, in this, that lands in this reservation returned as swamp have in certain cases been allotted to Indians. Provision is made in the act of June 17, 1892, for the allotment of lands within the reservation to the Indians under certain conditions. Without considering why allotments were made of lands returned as swamp in the particular instances cited by appellant, it is sufficient to say that such action could not inure to his benefit, nor justify the Department in allowing his entry on that account. Even though the said allotments were made through inadvertence or mistake, that fact could not avail as a reason why the Department should allow the appellant's claim in face of the prior approval of this land to the State under the swamp land grant.

The appellant likewise requests that action in this case be deferred pending the disposition by the superior court of the State of a suit initiated for the purpose of determining the character of the land in question. It would seem that nothing could be gained by awaiting the decision of said court as suggested. The Department would probably not interfere with the action heretofore taken in face of the decisions cited herein. That action is in harmony with the policy of the Department. Whatever the decision of said court may be, it could not interfere with the suggestion contained in your office decision regarding the procurement of a relinquishment from the State by the entryman.

Your said office decision is hereby affirmed.

RAILROAD GRANT—BENEFICIARY—LANDS EXCEPTED.

PHILLIPS *v.* SIOUX CITY AND PACIFIC R. R. CO. (ON REVIEW).

The effect of section 17, act of July 2, 1864, was not to make a new grant but to provide a new beneficiary under the original grant of July 1, 1862, as to the Sioux City branch, and said beneficiary could only take such lands as were capable of passing under the original grant; and would therefore not acquire title to lands that were a part of the bed of the Missouri river at the date of the original grant.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (J. L.)

This case involves lots 10 and 11 of section 1, and lot 1 of section 2, containing in the aggregate 59.60 acres, in O'Neill land district, Nebraska, in a township and range designated sometimes as T. 88 N., R. 48 W., of "5th" principal meridian, Dakota Territory, and sometimes as T. 29 N., R. 8 E., of "6th" principal meridian, Nebraska.

The facts are stated in the departmental decision of March 24, 1896, published in 22 L. D., 341. The decision was, that by the acts of July 1, 1862 (12 Statutes, 489), and July 2, 1864 (13 Statutes, 356), Congress

did not intend to grant *in presenti*, as public land for railroad purposes, a part of the bed of the Missouri river, which was then and from time immemorial had been covered by the waters of its main channel; and that therefore the lots of land in controversy did not pass under the grant.

The case is now before the Department for reconsideration upon a motion for review of said decision, filed by the "Missouri Valley Land Company, as successors in interest of the Sioux City and Pacific Railroad Company, and present owner of the land grant for the benefit of the latter company;" which motion has been entertained.

The specifications of error filed with the motion and the brief of counsel filed in support thereof allege matters both of law and of fact, and claim, substantially, that under the 17th section of the act of July 2, 1864, amending the 14th section of the act of July 1, 1862, the grant under which the Sioux City and Pacific Railroad Company claimed was not a grant *in presenti*, but was a conditional grant, intended to take effect *in futuro*, upon and after the

happening of certain contingencies, namely, that a company should be found willing to accept the grant and to carry out the purposes of the law; second, that the President should designate such company to that end; third, that a road should be built across Iowa or Minnesota to Sioux City; and fourth, in the absence of the construction of a road to Sioux City as aforesaid, then such road (or company) as should accept the promised grant by the act of 1864, might after the lapse of eighteen months from the enactment thereof proceed to the construction of the road contemplated by said grant.

In specification 5, it is claimed, that

the grant by the said 17th section not being *in presenti*, but rather the promise of the future conveyance of lands, did not become operative, and the title did not vest until the definite location of the road on January 4, 1868.

The facts alleged by counsel, and the facts developed by reference to the records of your office, so far as material, are:

1. That on December 24, 1864, the President by its request designated the Sioux City and Pacific Railroad Company to construct the railroad from Sioux City westwardly under the 17th section of the act of 1864. Said company filed its map of general route on June 27, 1865, and its map of definite location on January 4, 1868.

2. That in the spring of the year 1867; the Missouri river by an extraordinary avulsion cut for itself a new channel, and left its old bed, which includes the lots in controversy. The surveyor general's report, dated May 20, 1868, shows that *at that date*, the greater part of the 59.60 acres in contest was covered with the waters of an oblong lake following in its length the courses of the old bed of the river, and found to be impassable by the surveyor who had been sent out on April 30, 1868, to examine, survey and report upon the changes made by said avulsion. The waters of said lake were evidently waters left by the Missouri river, which had not evaporated or been absorbed enough to uncover the land. It is a fair inference as matter of fact, that on

January 4, 1868, the date of definite location, nearly if not quite all of the land in contest was covered by said lake.

From the standpoint of the railroad company, the foregoing facts suggest for consideration by the Department three questions: Whether under the grant title passed to the company, on December 24, 1864, the date of the President's designation by request; or on June 27, 1865, the date of the filing of the map of general route, which was certainly an acceptance by the company of the Presidential designation; or on January 4, 1868, the date of the definite location?

This Department is of opinion that the acts of July 1, 1862, and July 2, 1864, were laws of the land, as well as grants of public property, and that the grants of certain odd-numbered sections of public land described in the act of 1862 were grants *in presenti*. The Union Pacific Railroad Company, a corporation provided for by said act, and the grantee named therein, was not then in existence, and did not come into existence for several months after the passage of the act, upon compliance with the terms and conditions prescribed by Congress. Whatever may have been the common law rule in respect to the necessity for a grantee *in esse* at the date of a grant, it was so far modified by the act of Congress, that the non-existence of the grantee at the date of the grant did not in this case prevent the grant from taking effect immediately.

In the case of the Missouri, etc., R. R. Co. v. Kansas Pacific R. R. Co. (97 U. S., 497), the court said:

It is always to be borne in mind in construing a congressional grant, that the act by which it is made, is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only as to transfers between private parties.

By the 17th section of the act of 1864, Congress released the Union Pacific Railroad Company from its obligation to build the branch from Sioux City westward, and provided for the substitution of another grantee of the lands previously granted to aid in the construction of said branch, to be thereafter designated and approved by the President. The effect of this legislation was not to make a new grant but to provide a new beneficiary under the original grant of July, 1862, as to said branch. Such new beneficiary was to be entitled, in aid of the construction of said branch, to the lands granted by the said original act. In other words, it was to take and could take such lands only as were in existence at the date of said original act, and of the character described therein, and capable of passing thereunder.

It is therefore held that upon the designation and approval by the President, on the request of the company, as provided, the lands granted by the original act in aid of the Sioux City branch, passed to the designated company; and that the lots of land here in question being, at the date of the original grant of July, 1862, part of the bed of the Missouri river, did not pass to said new beneficiary company.

It is unnecessary to consider and decide any other question presented in connection with the application for review and reconsideration. For the reasons above stated the departmental decision of March 24, 1896, is adhered to.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

BRADFORD ET AL. v. DOTY.

Where there is doubt as to the actual boundary of lands about to be opened to settlement, and a government official, for the purpose of securing equal opportunities to all, designates a line from which the run shall be made, it is incumbent upon one who disregards such designation to show that by such action he gained no advantage over others.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (C. J. W.)

On September 22, 1891, Charles J. Doty made homestead entry No. 7761, for lots 1 and 2 and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 18, T. 17 N., R. 1 E., Guthrie, Oklahoma.

On October 1, 1891, Harry Pulliam filed his affidavit of contest; alleging that Doty entered on and occupied said land before noon of September 22, 1891, and that he (Pulliam) settled on said land immediately after twelve o'clock, noon, of September 22, 1891, before Doty or any one else had made a legal settlement thereon.

On October 5, 1891, Nettie J. Bradford filed her affidavit of contest, alleging that she made settlement on said land immediately after noon of September 22, 1891, and that she has improved the land, and resides on it, and that she made her settlement before either Doty or Pulliam and before Doty made entry.

A hearing was had at the local office at Guthrie on March 29, 1892, at which all the parties appeared and submitted testimony.

On December 17, 1892, the local officers found as follows:

The land embraced in this proceeding lies immediately east of the meridian line in the Iowa country and north of Langston, Oklahoma.

All of the parties, Doty, Pulliam, and Bradford, testify that they were along the meridian line at noon, September 22, 1891, and immediately after twelve o'clock of said day they stepped across the line, claimed and staked said tract of land as a homestead. As shown by the evidence in this case, exactly where the meridian line was, as understood by those congregated along the line at Pulliam's farm, was uncertain and unknown. Some of the people assembled there thought the fence of Pulliam (father of Harry) was on the line, and others were under the impression that the Iowa line was east of the fence. With this uncertainty touching the Iowa or meridian line the hour of twelve o'clock, September 22, 1891, arrived, and at the signal given by the marshal "to go," the respective parties according to their testimony "rushed" on the claim in dispute and set their stakes and claimed the same as a homestead a few seconds after twelve o'clock noon, September 22, 1891. The substance of the testimony of Lillian Hewitt is, that she was "standing right west of the gap cut by Harry Pulliam in his father's wire fence, and that Harry

Pulliam was also standing west of the gap, and when the word was given "to go," Harry Pulliam ran and stuck his stake on the claim in controversy; that Doty stood to the south of the post where the wire was cut, and on the east side of the fence; that Mr. Riggs told Doty that he had better step back inside of the fence or he would be a "sooner;" that Doty paid no attention to the suggestion of Mr. Riggs; that Harry Pulliam stuck his stake before Doty did his on "that corner;" that Pulliam's stake was six or eight feet from the line or wire fence. The testimony of Samuel Dennison discloses that Pulliam has almost 160 acres fenced "lacking a little;" that Doty has about three acres broken; that no corner stone was found, and that witness did not know where the correct corner stones were located.

Nathaniel H. Potter testified that he was on the line of the Iowa country September 22, 1891, and saw Miss Nettie J. Bradford standing near the corner of the land in contest with a board or stake in her hand, and that she has continuously resided on said claim.

The testimony of James Miller discloses that Miss Bradford has been living on the claim in dispute from the 8th of November to April, 1892.

As shown by the testimony of Charles Gandell, Miss Bradford on the opening day was at the corner post of Mr. Pulliam's fence and jumped over and stuck her stake there like the rest of them did.

Miss Nettie J. Bradford testified that she made settlement on the land in controversy directly after twelve o'clock September 22, 1891, and when the signal was given she stepped four or five steps and set her stake. It will be noticed that Miss Bradford was standing near the northwest corner of the land in contest and about half a mile north of Doty and Pulliam, at noon of September 22, 1891. By implication Nettie J. Bradford and Harry Pulliam in their contest affidavits charge Charles J. Doty with having entered upon and occupied said tract of land in violation of law and the President's proclamation. If we are correct in our conclusions to this implied charge on the part of Miss Bradford and Harry Pulliam against said Doty, it necessarily follows, in our judgment, that they admit that Doty made prior settlement upon the land in dispute September 22, 1891. In our opinion Doty located on said tract of land on the opening day as quickly as either of the other parties in this proceeding. Doty, however, testified that he was standing on the east side of the fence with one leg under the wire; that no one spoke to him or said anything about being a "sooner;" that there was no one spoke to him or laid their hands on him outside of Mr. Ballard (the marshal); that the first intimation he received in regard to being a "sooner" was after he had stuck his stakes. As between Doty and Pulliam, Doty testified that he did not know which of them stuck his stake first on the claim in controversy (page 389). The testimony of Harry Pulliam touching the time when he "jumped across the line and stuck a stake the first thing" in substance is, that Doty was standing southeast of Pulliam on the east line of the wire fence and immediately after the run Doty was noticed by Pulliam a little south and a little west distant about eight or ten feet (page 323). According to Pulliam's testimony, Doty being a little south and a little west of Pulliam is evidence that he had not traveled as far as Pulliam from the line, and therefore everything being equal (and there is no evidence to the contrary) stuck his stake first, possibly.

The testimony, however, of Doty on this point controls our judgment, inasmuch as he testified that he did not know whether Pulliam stuck his stake first or not, therefore we accept his testimony and the testimony of Pulliam and Miss Bradford, and find that we do not know from the evidence in this case which one of the parties in this proceeding, Doty, Pulliam, or Miss Bradford, first made settlement on the claim in dispute in the afternoon of September 22, 1891. So far as the meridian line being where the east wire fence was located on Pulliam's claim is concerned, the substance of E. C. Dodd's testimony on this question is, that by using a transit as testified to by F. S. Pulliam, accuracy could not be obtained; and that in order to

secure accuracy, the proper deflection of the needle, the difference of time from the original survey, the proper variations and the solar system would be necessary to secure accuracy.

F. S. Pulliam in his testimony disagrees with Surveyors McCoombs and Dodd, as to the correct method of ascertaining the meridian, standard correction and township lines. Mr. Pulliam testifies that at the time he built his fence the Iowa reservation had not been allotted, and that he put his fence on the east side of his claim in order to take in all of his ground on the east side of the same; that he knew that thirty-three feet on each side of the section line should be left for road purposes; that there was a trail along the east line of his fence, and that a considerable number of the people living north used this trail or road. On page 299 of record, Mr. Pulliam testified that he moved his first fence put along the east side of his claim, west about twenty feet, and that he intended to leave twenty feet "for the road;" that he knew that the law required thirty-three feet on each side of the section line should be left for a road, but did not believe the law applied to the boundary line of the Territory. By an act of Congress it is provided that a space of sixty-six feet shall be left between the sections in Oklahoma for the use of the public as a highway; we know of no law that provides for a different rule along the boundary line of the Territory which constitutes, as claimed by F. S. Pulliam, forty feet instead of sixty-six feet as a public highway along the boundary line of Oklahoma. If our position is correct in the premises, it follows, we think, that Pulliam's fence on the east side of his claim, according to his testimony, was thirteen feet west of the Iowa or meridian line on the opening day, and hence according to the evidence in this case, neither Pulliam nor Doty made their first settlement on the claim in dispute, but settled and staked upon Oklahoma lands homesteaded by F. S. Pulliam, father of contestant Harry Pulliam. However, the uncertainty about where the legal location of the meridian line was at the time and place when the respective parties made settlement on said claim in the afternoon of September 22, 1891, and the unusual circumstances attending their settlement upon said tract of land, creates so many doubts in our judgment, that we cannot arrive at any conclusion in this case different from the findings of the Hon. Commissioner of the General Land Office in the case of Miranda O. Jackson, now Cox, *et al. v. Samuel G. Garrett* (letter "H" June 30, 1894). In the case referred to, the land immediately south of that in controversy was taken on the opening day by the parties mentioned in said decision under similar circumstances as the one in dispute was taken by Doty, Pulliam and Miss Bradford, all of the parties on the opening day stepping across the line and claiming the respective tracts of land as a homestead. We are of the opinion that the rule applied by the Hon. Commissioner of the General Land Office in the case of Miranda O. Jackson *et al. v. Garrett*, so far as division, etc., applies in the case now before us.

Therefore we recommend that Charles J. Doty, the entryman, Harry Pulliam, first contestant, and Nettie J. Bradford be allowed to make a division of the land in contest, having regard for the legal subdivisions, and that if they are unable to come to an agreement that the claim be sold to the highest bidder of the three.

From this decision Doty and Pulliam appealed to your office.

On May 11, 1895, your office found as follows:

So far as the evidence shows the facts, I am of the opinion that Doty violated the law by voluntarily and purposely entering on the land before noon of September 22, 1891, and that he is, therefore, disqualified. Homestead entry No. 7761 is therefore held for cancellation.

As both Miss Bradford and Pulliam have made a reasonable compliance with the law by their improvements and residence on the land, and as Miss Bradford's improvements are on the north half and Pulliam's principal improvements on the south half, it would be but equitable to divide the land between them, and it is so ordered.

From this decision Doty has appealed. The chief grounds of exception to your office decision are, that it was error to hold:

1. That he was a "sooner" and disqualified.

2. That it was error to hold that the east line of Pulliam's fence was exactly on the meridian line.

3. That it was error to hold that

the belief that the Pulliam fence was on the meridian line was acted on by the deputy United States marshal on duty at that place, and who advised the parties there, September 22, 1891, for the purpose of making settlement, to remain on the west of said line until the signal was given, which advice seems to have been followed with very few exceptions.

This last assignment of error presents the vital question in the case. The record sustains your office as to fact that the deputy U. S. marshal acted on the belief that the Pulliam fence was on the meridian line, which was acquiesced in by the bulk of the people present. For the purpose of securing equal chances to all, the officer in charge had the right to locate and point out the line from which all should start. Doty did not acquiesce in this decision and belief, but stayed outside, and made his start from the outside of the fence. Presumably, in so doing he acquired advantage over those who stood inside the fence, and he at least assumed the burden of being able to show that he gained no advantage over Pulliam and Miss Bradford by so remaining outside. This he has failed to do, and it follows that his entry must be canceled.

This disposes of Doty's entry, and leaves the controversy between Pulliam and Miss Bradford. They seem to have made little effort to show any precedence of the one over the other as to the time each staked the claim. They are upon terms of equality in the matter of improvements. Neither the local officers nor your office has undertaken to settle the question of priority in settlement as between them. Miss Bradford has not appeared as an appellant at all. Pulliam has not appealed from your office decision, wherein you award half of the tract by subdivisions, on which her settlement and improvements are located, to Miss Bradford. Their consent to this adjustment is inferred, from their mutual acquiescence, and there being no longer an entry in question, your office decision is affirmed.

SOLDIERS ADDITIONAL HOMESTEAD—CERTIFICATE OF RIGHT.

JOHN H. HOWELL.

Soldiers additional homestead certificates of right, regularly issued, and located by bona fide purchasers thereof, but thereafter canceled for illegality, and so remaining unsatisfied at the passage of the act of August 18, 1894, are by said act validated, and may be reissued for the benefit of a bona fide purchaser thereof.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897.

(I. H. L.)

(F. W. C.)

With your office letter of December 12, 1896, were forwarded the papers in the matter of the appeal of John H. Howell from the action

of your office taken in the decision of October 12, 1896, denying his application for re-certification of the certificates of additional right under section 2306 of the Revised Statutes in the names of Mary Rollins, Richard W. Hunt, and Lorenzo J. Rowland.

This matter has been made special upon the recommendation of your office, it being stated that a decision thereon will form a precedent to be followed in other cases.

The history of the certificates of additional right herein involved, as gathered from your office decision, is as follows:

The certificate in the name of Rollins was located at Fargo, North Dakota, May 5, 1879. By your office letter "C" of June 10, 1884, the entry was adjudged illegal for the reason that the signatures of the witnesses and the entryman are written by one and the same person. Further, that the name of James F. Rollins, on whose account the certificate was issued, is not found upon the rolls of Company "A" Second Arkansas Infantry, as claimed. The party in interest was therefore allowed sixty days within which to show cause why the entry made upon the location of said certificate should not be canceled, or apply to purchase the tract under the provisions of the act of June 15, 1880 (21 Stat., 237).

On September 10, 1884, Stephen E. Randall, who claimed to be the then owner of the land under transfer from the entryman, purchased the tract under the provisions of the act of June 15, 1880, and upon said cash purchase patent issued.

The certificate issued in the name of Hunt was also located at Fargo, North Dakota, May 28, 1879, and by your office letter "C" of April 20, 1882, Hans Larson, who claimed to be the party in interest under said entry, was informed that the papers upon which the entry was based were of doubtful execution and he was therefore allowed sixty days within which to establish the legality of the papers or file proper application to purchase the tract under the provisions of the act of June 15, 1880 (*supra*). He availed himself of the latter privilege, and upon his purchase patent issued.

The certificate issued in the name of Rowland was also located at Fargo, North Dakota, May 5, 1879. After said location Rowland filed an affidavit in which he charged that he never executed the papers upon which the certificate and entry were based, and upon the testimony taken at a hearing ordered on said allegation the certificate was held to have been fraudulently obtained and was canceled together with the entry made thereon.

It appears that all three of the certificates before referred to were held by Charles D. Gilmore under powers of attorney which practically amounted to a sale of the right, in which the power to locate and to sell the land and to appropriate the proceeds thereof was given to Gilmore, the power being made irrevocable in consideration of the sum of one hundred dollars.

Gilmore it appears transferred these rights to William Milliken, whose name was substituted in the powers of attorney before referred to, and by said Milliken, as attorney in fact, the location of the certificates was made.

These certificates it would appear were illegally obtained, but there is nothing in the papers to connect Milliken with the frauds, and your office decision in no wise questions the *bona fides* of his purchase. The certificates issued have never been satisfied: it appearing that two of the parties invoked the provisions of the act of June 15, 1880, to enable them to purchase their lands, because of the "attempted" but ineffectual transfer; and the other party losing the land entirely by cancellation of the entry. From an affidavit executed by Howell, accompanied by a bill of sale executed by Sarah M., and Ida C. Milliken, it would appear that he (Howell) purchased the rights under said certificates from Sarah M. and Ida C. Milliken, the widow and surviving child of William Milliken, deceased, on August 1, 1896.

Howell's application for re certification of the right was made under the act of August 18, 1894 (28 Stat., 397), as construed in the Pillsbury case (22 L. D., 699). Your office denies the application for the reason that two of the tracts covered by the location of the certificates of right, in the names of Rollins and Hunt, were perfected under the act of June 15, 1880,

and it is not shown that the parties who purchased the tracts from the government were reimbursed by Milliken or his heirs for their outlay for a worthless title. (Further) it appears of record that Howell drew the several entries above mentioned from the files for examination at least as early as June 15, 1896; hence, prior to his purchase of these certificates he was aware of their invalidity. It is therefore held that he is not an innocent purchaser in the meaning of the act of August 18, 1894.

These objections I do not deem sufficient ground upon which to deny the right applied for.

As to the reimbursement to the persons who, in order to secure title to the lands covered by the locations of these certificates issued in the name of Rollins and Hunt, were obliged to purchase the lands at the government price, this is purely a matter between the parties in the settlement of which this Department can have no interest, inasmuch as the right to reimbursement, if any exists, cannot be regarded as a lien upon the certificates.

The question remaining for consideration is, therefore, whether these certificates were confirmed by the act of August 18, 1894 (*supra*), for if they were, Howell did not on August 1, 1896, purchase invalid certificates but validated certificates.

In the case of John W. Rankin (on review 21 L. D., 404), it was held:

But in the light of the history of this legislation, I am constrained to believe that the words, "all soldiers' additional homestead certificates heretofore issued," etc., should not be limited to validating the transfer of certificates heretofore issued, and in the hands of *bona fide* holders. This view is strengthened by the fact that the matter of transfers is dealt with by the second section of the act, and the language

"notwithstanding any attempted sale or transfer thereof," at the end of the first section, should not be construed to limit the operation of the act short of the obvious intent of Congress.

There is nothing in the record to question the *bona fides* of Milliken's purchase of these certificates of additional right, and as the same were regularly issued by your office and were never satisfied, under the decision just quoted from, it must be held that said certificates were validated by the act of August 18, 1894 (*supra*).

By his purchase Howell succeeds to the rights of Milliken's heirs, and the action of your office denying his application for recertification of the right under said certificates is reversed.

SOLDIER'S HOMESTEAD—TIME ALLOWED FOR ENTRY.

CARNEY *v.* BYERS.

A soldier who has filed a homestead declaratory statement is entitled to six calendar months after such filing within which to make entry, and commence settlement and improvement; and in the computation of such time the day of filing the declaratory statement should be excluded, and the last day of the specified period included.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (W. M. W.)

The case of David W. Carney *v.* John M. Byers has been considered upon the appeal of the former from your office decision of August 1, 1895, affirming the judgment of the local officers denying said Carney the right to make homestead entry under his soldier's declaratory statement, and dismissing his contest against the entry of Byers for the SW. $\frac{1}{4}$ of Sec. 9, T. 20 N., R. 10 W., Alva, Oklahoma, land district.

The record shows that on April 23, 1894, Carney filed soldier's declaratory statement for the land in question.

On October 23, 1894, Byers made homestead entry for the tract.

On October 24, 1894, Carney made application to make homestead entry of the tract under his soldier's declaratory statement, which was rejected for conflict with Byers's entry.

On the same day Carney filed an affidavit, in which he stated, among other things, after referring to Byers's entry:

That said homestead entry is fraudulent in this: That the said John M. Byers made said entry subject to the right of said David W. Carney, who had filed a soldier's declaratory statement for said tract of land April 23, 1894, and had made a valid settlement upon the same the last of July, 1894, by going upon said land and building him a frame house and digging him a good well for water, and making other valuable improvements upon said land, and remaining upon said land till about the middle of September, 1894, and at which time he went down into the Chickasaw country in the territory to look after a crop he had planted there the season prior to this time. And on the 17th day of September, 1894, he started to the U. S. Land Office at Alva, O. T., to perfect his entry, or place his homestead entry upon said tract of land, distance of about two hundred miles, and was driving over land when one of his horses became sick, and he did not reach the land office till on the morning of the

24th day of October, 1894, and he found out that one John M. Byers, the defendant, had filed said homestead entry on said tract of land the day before. And affiant now claims his right to enter said land on the grounds of prior settlement and improvement, and that he is the only person who ever made any settlement and improvement on said land.

On May 6, 1895, the register and receiver sustained Byers's motion to dismiss Carney's contest.

Carney appealed.

On August 1, 1895, your office, after reciting the facts, found that:

It follows that Carney can claim no rights under his soldier's declaratory statement for more than six months from the date of his filing had elapsed when he attempted to make homestead entry of the land, and the filing of a soldier's declaratory statement exhausts the homestead right.

Thereupon the judgment of the local officers was affirmed.

Carney appeals.

It is claimed in argument on behalf of Carney, that Byers's entry was made before the time had elapsed in which Carney had to appear at the local land office and file his "regular homestead affidavit."

The material question for determination is, whether Carney made his application to enter within the time allowed therefor under the law. If his application to enter was made within the time allowed by law in cases of soldiers' declaratory statements, then it was erroneous for the register and receiver to reject his application, and your office decision affirming their judgment was erroneous. If his application was not filed within the time allowed by law to make entry in such cases, there was no error in the judgments below.

Section 2304 of the Revised Statutes allows every private soldier and officer who has served in the army of the United States during the recent rebellion for ninety days, and who was honorably discharged, and has remained loyal to the government, to enter one hundred and sixty acres, or one quarter section, of certain public lands, of the character therein described, or of

other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead and filing his declaratory statement, within which to make his entry and commence his settlement and improvement.

Section 2309 provides:

That every soldier, sailor, marine, officer, or other person coming within the provisions of section two thousand three hundred and four, may, as well by an agent as in person, enter upon such homestead by filing a declaratory statement, as in pre-emption cases; but such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law.

As a matter of law, it is clear that a soldier who has filed a declaratory statement is entitled to six months time *after filing* such declaratory statement to *make his entry* and commence his settlement and improvement. The term six months, as used in the statute, means calendar months.

When the computation of time is to be made from an act done, the rule is to exclude the day on which the act is done, and include the last day in the specified period.

In *Sheets v. Selden's Lessee* (2 Wallace, 177-190), the supreme court of the United States very clearly and concisely states the rule respecting the computation of time as follows:

The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, is to exclude the day thus designated, and to include the last day of the specified period. "When the period allowed for doing an act," says Mr. Chief Justice Bronson, "is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time; and so be excluded from the computation."

Applying this doctrine to the case at bar, Carney was entitled to full six calendar months' time after the 23d day of April, 1894—the date of filing his soldier's declaratory statement—in which to make his entry thereunder. Excluding the day on which Carney's soldier's declaratory statement was filed, the six calendar months allowed him thereafter in which to make his entry would expire with and including the 24th day of October, 1894. His application to enter being offered on said date was in time, and should have been allowed.

Byers's entry was made before Carney's six months to make entry under his declaratory statement had expired, and for that reason Byers's entry was made subject to Carney's right, under the law and regulations, to make his entry. Instead of rejecting Carney's application to enter under his soldier's declaratory statement for conflict with Byers's entry, Carney's application being made within the time allowed should, as a matter of right, have been allowed, and such allowance would have operated to exclude Byers's claim, and his entry should have been canceled. See General Circular, p. 23.

Your office decision appealed from is therefore reversed, Byers's entry will be canceled, and Carney will be permitted to make entry of the tract under his application of October 24, 1894.

RAILROAD GRANT—INDEMNITY SELECTION.

NORTHERN PACIFIC R. R. Co. v. AYERS.

An indemnity selection of unsurveyed land should be canceled, not suspended to await survey.

Prior to selection the lands within the indemnity limits of the Northern Pacific grant are open to settlement and entry.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (J. L. McC.)

I have considered the case of the Northern Pacific Railroad Company v. Clara M. Ayers, involving her desert land entry for the E. $\frac{1}{2}$ of Sec. 3, T. 8 N., R. 1. E., Bozeman land district, Montana.

The land described is within the indemnity limits of said railroad, and was included in the withdrawal of February 21, 1872, upon general route. Upon the definite location of the line of said road, on July 6, 1882, it was found to be within the indemnity limits, and was ordered withdrawn by your office letter of June 9, 1883. Said indemnity withdrawal, however, has been held to be without validity or effect, and consequently no bar to settlement and entry under the public land laws.

On March 20, 1885, the company selected lots 1, 2, 3, and 4, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, of said Sec. 3; and on June 23, 1885, it selected the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section.

Inasmuch as Clara M. Ayers' desert-land entry was made (August 5, 1893), subsequently to the date of said selections by the company, the latter acquired the prior and paramount claim to such of the tracts as had been surveyed, to-wit, lots 1 and 2, and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 3; and your office, by decision of August 20, 1895, properly held the desert land entry for cancellation in so far as it embraced said tracts.

The SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 3 was, at the date of your said office decision, unsurveyed; your office therefore held that it was not subject to selection by the railroad company, and held its list for cancellation in so far as it embraced said tract.

The railroad company has appealed, alleging that your office was in error, (1) in holding that the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ was not subject to selection by the railroad company, because unsurveyed. It contends that—

Instead of cancelling the company's selection for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of this section, the Commissioner should have suspended the same to await acceptance of the survey.

In the case of the Northern Pacific Railroad Company (15 L. D., 8), the company selected lands of which it is said that "after an examination of the plats," it was "found practicable to protract the lines of survey of the adjoining sections of which survey had theretofore been made so as to include the two southwest quarters, selected by the company." Your office rejected the selection. The company appealed, contending that—

the establishment of the three corners and the survey of the exterior lines completed the field survey; and making and filing of the plat of the same by the surveyor general sufficiently identified the land to admit of their selection.

But the Department affirmed said decision, saying:

No plat of survey of the tracts in question was approved or on file in the district office or anywhere else at the date of the railroad selections; it follows that said selections were properly rejected.

The selections were not suspended "to await the acceptance of the survey." I do not think that it would be proper practice to pursue

such a course, and allowing lands to be "tied up" for an indefinite period by selections made prior to survey. If such "suspended" selections were to be considered a bar to settlement or entry, they might better be allowed. If they were to be considered no bar thereto, they might better be canceled.

(2). The company contends further that, inasmuch as the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ was unsurveyed, "it was error not to have canceled the desert-land entry of Clara M. Ayers for the same."

It having been decided that the railroad company has no valid claim to said SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the question as to what course the government may pursue with regard to Mrs. Ayers' desert-land entry for the same is one solely between the government and her, with which the railroad company has no concern.

(3). The question as to whether land within the indemnity limits of said company is subject to settlement and entry prior to selection has been decided in the affirmative by the Department in the case of said company against Jennie L. Davis (19 L. D., 87), and many others.

I concur in the conclusions reached by your office in the decision appealed from, and therefore affirm the same.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

LINCOLN v. SOWERS.

The right of purchase under section 5, act of March 3, 1887, is not defeated by a prior adverse application to enter under which no settlement right is asserted. Land subject to indemnity selection, and sold to a purchaser in good faith, as a part of the grant, may be purchased under said section, though no selection of the land was made by the company.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 8, T. 84 N., R. 23 W., Des Moines land district, Iowa.

The record shows that your office, on July 8, 1875, ordered a hearing in the case of Edward W. Templeman v. Cedar Rapids and Missouri River Railroad Company, the former having applied to make soldier's additional homestead entry for the tract in controversy, together with other land. Subsequently, on February 13, 1879, your office notified the local officers that it was not necessary to have the hearing ordered, in view of the decision of the Department holding that a homestead entry of record, uncanceled, segregated the land and was sufficient to defeat the grant in behalf of the Cedar Rapids and Missouri River Railroad Company, made on June 2, 1864 (13 Stat., 95), and the records of your office showing that one Bechtels had made homestead entry for the tract on February 6, 1863, which remained of record until canceled on April 29, 1872. Your office therefore held that this tract of land was

excepted from the operation of the grant in behalf of said railroad company. Of this action the attorneys for the railroad company were notified by letter of October 14, 1893, and the local officers were instructed to notify Templeman. On March 8, 1894, the local officers reported that after repeated attempts they had failed to serve him.

On June 26, 1894, the local officers transmitted the application of George B. Lincoln to make homestead entry of the land in controversy, and the alternative applications of James W. Sowers, either to enter or purchase under section 5 of the act of March 3, 1887.

From the application of George B. Lincoln it appears that it was filed on June 14, 1894, and was rejected by the local officers because of the pending application of Templeman; from which action Lincoln appealed, asserting that Templeman had no interest in and to this tract, as was shown by a letter from said Templeman to the attorney of Lincoln, dated Adel, Iowa, January 9, 1894, in which he said, "I have taken up all of my government lands that are due me." It appears further that the attorney of Lincoln had sought for Templeman with the intention of purchasing his preference right, and that this was his reply to such attempt.

In reference to the application of James W. Sowers, it appears that this was filed on June 18, 1894,—four days later than that of Lincoln,—and being rejected, Sowers took appeal. Sowers made application to enter as an adjoining farm homestead, he being the owner of the remainder of the said SE. $\frac{1}{4}$. It further appears in his affidavit, that he sets forth that he and his grantors "have been in open, actual and peaceable possession" of said land "from May 15, 1868, until the present time, claiming to be the owners thereof, and that my claim of title is derived as follows." And it further appears that the Cedar Rapids and Missouri River Railroad Company, claiming this land under the said act of June 2, 1864, sold, on May 13, 1868, to one Francis R. Hughes; and then by regular conveyances of warranty deeds this tract came into possession of Sowers on February 14, 1880; and he asked that he be allowed to purchase.

Your office decision of August 1, 1895, passing upon the issues thus joined, rejected the application of Lincoln and allowed Sowers to purchase under the act of March 3, 1887; from which action Lincoln appealed.

The section under consideration is as follows (24 Stat., 556, Sec. 5):

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company, to make payment to the United States for said lands, at the ordinary government price for like lands, and thereupon, patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That

all lands shall be excepted from the provisions of this section, which, at the date of such sales, were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupations have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries, and receive patents therefor: *Provided further*, That the said section shall not apply to lands settled upon, subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same, as aforesaid, shall be entitled to prove up, and enter, as in other like cases.

In the case of *Jenkins et al. v. Dreyfus* (19 L. D., 272), in construing said section, it was said (syllabus):

The right of purchase under section 5, act of March 3, 1887, is not defeated by an adverse application to enter made after the passage of said act, nor by an application to enter pending at the passage of said act under which no settlement right is alleged.

And on the same line was decided the case of the Union Pacific Railroad Company *v. Norton* (on review), 19 L. D., 524; and also the case of *Sethman v. Ulise*, 17 L. D., 307.

It is further objected by the appellant, that this land being a part of an even numbered section, the above cited opinions have no bearing. While the even numbered sections within the primary limits were not specifically granted as lands in place, they were by the act of 1864 made subject to indemnity selection in satisfaction of a loss in place. See case of *Cedar Rapids and Missouri River Railroad Company et al. v. Herring* (110 U. S., 27), wherein it was held that the purpose of the said act of 1864, among other things, was—

To adjust the amount of lands, to which the company would be entitled under this new order of things, and to enlarge the source from which selection might be made for the loss of that not found in place.

And the court further said—

This latter is accomplished by declaring that *all* the sections within the fifteen-mile limits shall be subject to such selection on the same terms on which only alternate sections could previously be selected.

Your office in its decision erred in treating this land as land within the primary limits and that the entry of Becketts excepted it from the operation of the grant. Being lands whereof indemnity selection could be made, the right of selection would exist at any time when the record was clear.

In the case of *Pierce et al. v. Musser-Sauntry Company* (19 L. D., 136) it was held (syllabus):

Lands lying within railroad indemnity limits, not required in the final adjustment of the grant, nor selected on behalf of the same, but sold as a part of said grant to purchasers in good faith, are of the character subject to purchase under section 5, act of March 3, 1887.

This would seem to be ample authority for holding that Sowers' application to purchase should be allowed, though no selection was made of this tract by the company.

In the opinion *supra* it was said, in speaking of the title of the railroad company, "It is not necessary that it should be a legal or valid one. It is sufficient if it be colorable."

For the reason given your office decision is hereby affirmed.

CONTEST AFFIDAVIT—ATTORNEY—NOTARY PUBLIC.

TALLEY *v.* GASS.

In those States or Territories whose laws do not forbid an attorney to administer an oath to a client, the necessary oath to a contest affidavit may be administered by an officer or notary who is also the attorney of the contestant; but in States where the local laws forbid such practice it will not be allowed by the Land Department.

The case of *Werden v. Schlecht*, 20 L. D., 523, overruled, and section 13, instructions of December 15, 1885, 4 L. D., 297, modified.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (C. W. P.)

George I. Talley has appealed from the decision of your office of July 27, 1895, dismissing his contest against the homestead entry, No. 933, of Addie E. Gass, of the SE. $\frac{1}{4}$ of Sec. 15, T. 28, R. 11, Alva land district, Oklahoma Territory.

The ground of said decision is that the affidavit of contest was made before the contestant's attorney.

At the hearing the defendant moved to quash the proceedings, on the ground that the affidavit of contest was not properly verified, it being sworn to before the contestant's attorney. The register and receiver overruled this motion, and the case was heard upon the testimony offered. The local officers found for the defendant. The contestant appealed. Your office held that it was error in the local officers not to dismiss the contest on said motion of the defendant, saying:

The affidavit was made before the contestant's attorney. The evidence was before you that such was the case at the time it was filed, as the affidavit and power of attorney were on one and the same sheet of paper, and it should not have been received by you. No notice should have been issued thereon. The Department has ruled that the affidavit of a party taken before his attorney as notary public, will not be accepted by the Department,

And you cite the case of *Werden v. Schlecht*, 20 L. D., 523, as authority for your decision.

Upon further consideration of the question presented, the Department is led to the conclusion that the doctrine announced in the case of *Werden v. Schlecht*, cited by your office, is not sound, and the same will not be followed.

In the case of *William R. Sutley*, 3 L. D., 248, it was held, after a thorough discussion of the subject, that the Code of Dakota, fairly construed, did not forbid an attorney to administer the necessary oath to a contest affidavit, and that the contest affidavit, which was executed

before the contestant's attorney, was not invalid. This decision was followed in the case of *Hopkins v. Daniels*, 4 L. D., 126.

The laws of Oklahoma on the subject of affidavits and depositions are the same as those of Dakota, cited in the case of William R. Sutley, *supra*, and such laws not forbidding it the contest affidavit as made in this case will be accepted.

The rule in such cases hereafter will be that in those States or Territories whose laws do not forbid an attorney to administer an oath to a client, the necessary oath to a contest affidavit may be administered by an officer or notary who is also the attorney for the contestant; but in States where the local laws forbid such practice it will not be allowed. Section 13 of the circular of instructions issued December 15, 1885 (4 L. D., 297-9), is to that extent modified; and the case of *Werden v. Schlecht*, so far as in conflict with these views, is overruled.

Your office having dismissed the contest without considering the case on its merits, the record is returned for such consideration, and in view of the delay caused by the proceedings already had you are requested to act upon the case as early as practicable.

FOOTE v. McMILLAN.

Motion for review of departmental decision of March 7, 1896, 22 L. D., 280, denied by Secretary Francis, January 18, 1897.

COAL LAND—FINAL PROOF—LIFE OF FILING.

SKOYEN v. HARRIS.

A coal land claimant who appears, on the last day of the life of his filing, at the local office and within the business hours designated by official regulations, and is prevented from submitting his final proof and making payment at such time by the receiver's office being closed contrary to said regulations, should not be regarded as in default, where such proof and payment are tendered on the next business day.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (E. B., Jr.)

This is a contest under the coal land law—sections 2347 to 2352, inclusive, of the Revised Statutes.

The record shows that John Harris filed his coal declaratory statement No. 992, March 23, 1893, for the SE. $\frac{1}{4}$ of Sec. 16, T. 21 N., R. 7 E., Seattle, Washington, land district, alleging that he came into possession thereof on the twentieth of the same month, and had located and opened a valuable mine of coal and expended \$100 in labor and improvements thereon; that on March 30, 1894, Peter O. Skoyen filed his coal

declaratory statement No. 1028, for the same land; alleging possession on and since March 21, 1894, and that he had located and opened a valuable mine of coal and expended \$20.00 in labor and improvements thereon; that on May 21, 1894, Harris applied to purchase the land, and offered proof and tendered payment therefor; that on July 7, 1894, after notice of Harris' application, proof and tender, Skoyen filed a protest against the same, on the ground that Harris' declaratory statement

had fully expired by limitation of law before he tendered proof and payment for said land, more than fourteen months having intervened between the date of his alleged possession and the date of his said proof;

that a hearing was duly had in January following; that on April 2, 1895, the local office decided that although the evidence showed "that Harris has expended about \$2,000 in money and work upon this land and has acted in apparently good faith," yet by his failure to apply to enter and tender proof and payment therefor within one year and sixty days from the commencement of his possession and improvements he forfeited his right thereto "as against an adverse claimant," and rejected his application to purchase, and, in effect, recommended the cancellation of his coal filing; that on appeal by Harris your office, on July 2, 1895, decided that Skoyen had failed to show that he had opened and improved a coal mine on the land, or that he was acting in good faith, that he did not therefore have a valid adverse claim to the land when Harris applied to purchase, that Harris, having otherwise complied with the law, might enter the land after one year and sixty days from the commencement of possession and improvements, in the absence of any valid adverse claim, that Skoyen's filing should be canceled and Harris' final proof received, and he be allowed, upon payment, to make entry of the land; and that a motion by Skoyen for rehearing was denied by your office October 7, 1895.

An appeal by Skoyen brings the case before the Department, error being assigned as follows:

I. Error to decide that the proof of contestee's good faith is ample and entirely satisfactory.

II. Error to decide that contestant has failed to show that he was acting in good faith.

III. Error to decide that contestee's possession must be regarded as having commenced upon March 20, 1893, instead of about the middle of February, 1893, the time he states in his testimony that he came into possession.

IV. Error to decide that Harris made tender of payment on May 21, 1894, or at any other time; it appearing that tender was not made by him, and that he had no money of his own or in his possession for such purpose.

V. Error to decide that on said 21st day of May, 1894, when such tender is alleged to have been made, there was "no valid adverse claim" to the land applied for by him.

VI. Error to decide that said application of Harris to purchase said land to be allowed.

VII. Error to decide that the coal declaratory statement No. 1028 of protestant be canceled.

VIII. Error to decide that it is immaterial what contestant has done in the way of improvements upon said land since the day when contestee (Harris) tendered proof and payment therefor.

IX. Error to refuse said petition for re-hearing.

X. Error to decide that said petition for re-hearing alleged no sufficient grounds for a re-hearing.

XI. Error not to decide—

First: That said final proof and payment by Harris were not made in time.

Second: That the possession of said Harris was commenced in February, 1893, and that proof and payment should have been tendered in April, 1894.

Third. That the declaratory statement No. 1028 of contestant is a valid adverse claim to said land and that said contestee had no right thereto as against said adverse claim.

Fourth: That the work done by the said Skoyen as a basis for said coal declaratory statement filing was sufficient and that he was entitled to his full time of one year and sixty days after taking possession of said land in which to open and develop the coal deposits thereon and to show his good faith in the premises, and that the amount of his improvements was not a material question in the hearing upon the right of Harris to enter said land, it being true that his application to enter was made too late.

Fifth: That said Skoyen has since and within the life of said filing made such improvements, and that his good faith is thus demonstrated.

Sixth: The application of Harris to enter said land should be denied and his coal declaratory statement No. 992 canceled, and that said land be awarded to Peter O. Skoyen under his coal declaratory statement No. 1028 and the final proof and payment tendered thereon.

Upon the question of Harris' good faith the evidence abundantly sustains the conclusions of your office and the local office. His possession and improvements have been continuous during all the period in controversy. He has opened and improved a valuable mine of coal, and expended \$2,000 in money and improvements to that end on the land. At the hearing his good faith, except as alleged in the protest and hereinbefore indicated, was openly admitted by the protestant. Upon the contention of the appeal that Harris' "possession" commenced "about the middle of February, 1893," instead of March 20, 1893, it is sufficient to say that although the evidence shows that Harris commenced prospecting for coal on the land and did some work thereon and discovered coal during February, 1893, it does not show that he had possession of the land or went upon it to take possession as a claimant under the coal land law until, as alleged in his filing, on March 20, 1893.

Under the coal land law, as contained in the sections of the Revised Statutes above indicated, a claimant seeking a preference right to purchase, and coming lawfully into possession of public coal land, is entitled, upon continued compliance therewith in good faith, to hold and possess the same as against any other party claiming under the same law, for the period of one year and sixty days "after the date of actual possession and commencement of improvements on the land" (sections 2349 and 2350, Revised Statutes). This period, in the case of Harris' filing, within which he might make entry of the land, expired on Saturday, May 19, 1894.

Harris testifies that by reason of an attack of rheumatism during three days preceding the 19th, he was delayed in reaching the local office, and did not, therefore, arrive there until about three o'clock P. M. of the 19th with his proof, and money to pay for the land, when he found the office closed. It appears from the register's statement that only the receiver's office was closed, that office closing regularly at one o'clock P. M. on Saturday to enable the receiver to make deposits of public money. The record, as already stated, shows that tender of proof and payment was made on Monday, March 21, following.

There is no evidence to controvert the truth of Harris' testimony as to his previous sickness, and his presence at the land office on Saturday, May 19, 1894, with his proof and money to pay for the land. The register's statement corroborates Harris as to the receiver's office being then closed. Under the law as expressed in official regulation governing his attendance, the receiver should have been there at the time Harris arrived, and thence on until four o'clock P. M. (General Circular, p. 120.) The law gave Harris until that hour within which to comply with its requirements. Standing ready to comply within the time allowed, and being prevented from so doing only by the previous closing, contrary to law, of the receiver's office, his right should not thereby suffer any prejudice or impairment. Harris' tender of proof and payment should be regarded in contemplation of law as duly made at the hour he alleges, and therefore within the specific statutory life of his claim.

It is unnecessary in this view of the case to pass upon any other question sought to be raised by the appeal.

The contest of Skoyen is dismissed, and your office decision of July 2, 1895, as herein modified, affirmed.

Harris will be allowed to duly complete his entry, subject, however, to any valid adverse claim of the State of Washington under its grant of school lands.

SETTLEMENT RIGHT—SUCCESSFUL CONTESTANT—RELINQUISHMENT.

GOURLEY v. COUNTRYMAN.

While as between two parties claiming the same tract, the settlement right of one may not defeat the superior right of the other as a successful contestant, yet if such contestant thereafter enters the land, and relinquishes the entry, such settlement right, if maintained, will defeat the subsequent entry of a third party.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (C. W. P.)

This case involves the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 28, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma.

The record shows that on May 11, 1889, A. G. Blauvelt made homestead entry of the above described land; that on October 17, 1889, William Gourley contested said entry, on the ground that the entry-

man had executed, for a valuable consideration, a relinquishment of his entry, and had asserted afterwards no claim to the land; that on September 30, 1890, Thomas W. Pence contested the entry of Blauvelt, charging abandonment and the relinquishment of his entry, and that the contest of Gourley was instituted when the relinquishment was in his possession, and was speculative and intended to prevent others from securing any rights upon the land, until he could sell the relinquishment, or hold the land until such time as suited him to make entry thereof; that on December 21, 1891, Gourley filed the relinquishment of Blauvelt and made homestead entry of the said land, together with the S. $\frac{1}{2}$ of the said NE. $\frac{1}{4}$. A hearing was had, the contest of Pence was dismissed. On appeal, your office sustained the action of the local officers. But upon a further appeal, the Department reversed your office decision. A motion for review of this decision was denied on December 24, 1894. See *Pence v. Gourley*, 18 L. D., 358; *Id.* on review, 19 L. D., 588. Your office, on January 17, 1895, canceled Gourley's *entire entry*. On February 14, 1895, Pence made homestead entry for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 28, and relinquished the same on July 26, 1895, and on the same day George W. Countryman was allowed to make homestead entry of the said N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$. On October 15, 1895, Gourley filed an affidavit of contest against Countryman's entry, alleging settlement dating from November, 1889, and that he was a resident of the land at the date of Pence's relinquishment and Countryman's entry. On February 10, 1896, Gourley filed an application for reinstatement of his homestead entry, alleging, in addition to the allegations in his contest affidavit, that Countryman knew of his settlement and residence when he made entry, and that said entry was made with the intent to defraud the petitioner of his improvements.

Your office, by decision of May 14, 1896, held that it was error to cancel Gourley's *entire entry*, and reinstated his entry as to the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, improperly canceled, but denied his application for reinstatement as to the N. $\frac{1}{2}$ of said quarter section.

On June 6, 1896, Gourley filed a motion for review of your office decision, and with said motion he filed an amendment of his application for reinstatement, in which it is represented by him, under oath, that when he purchased the relinquishment of Blauvelt's entry, he did so in good faith, with no intent of defrauding any one; that he was first awarded the land by the register and receiver, and the Commissioner of the General Land Office, and that he felt that he had been greatly wronged and injured by the departmental decision reversing the action of your office and the local officers and holding that his contest against Blauvelt's entry was not in good faith; that the entry made by Pence was with the intent and design of speculation, and that he never intended to submit final proof in support of said entry, and that he

is informed and believes he (can) establish by proof that there was a conspiracy between said Pence and said Countryman to hold said land by said entry so made by

each of them as aforesaid, for speculative purposes and for the purpose of availing themselves of the benefit of the amount of money, which said affiant has put into said tract involved; that each of said parties has known all the time of the claim of said affiant by virtue of having observed him in open, notorious, visible and adverse possession of said tract, exclusively occupying and cultivating the same.

Upon this motion for review, your office on July 28, 1896, held as follows:

Gourley's contention that he was unjustly dealt with by the Department can not be considered by this office. The action of this office in such cases is subject to review by the Department, and this office is bound by the final judgment of the Department. Nor do I see any reason why office decision of May 14, 1896, should be disturbed on Gourley's charge (that he) was a settler on the land. The Department held that Gourley had shown bad faith in his dealing with the government and declared that Gourley had acquired no right by his settlement and residence.

It is true that Pence who secured the cancellation of Gourley's entry has relinquished his entry, but it is also true, as held in office decision of May 14, 1896, that before Gourley asked for a reinstatement of his entry, Countryman's rights acquired by virtue of his entry had attached.

It does not appear to me that the charge in reference to Pence's bad faith, or fraudulent design in prosecuting his contest against Gourley's entry is a material one. Pence's entry is not now the subject of attack. Whatever right was accorded him by virtue of his contest, has been waived and relinquished to the government.

The fact that Countryman made entry for the land with the knowledge that Gourley had improvements on it, and had asserted ownership thereto, does not invalidate his entry. Gourley's entry had been canceled as the result of a contest that had been prosecuted to a final judgment before the Department, and in that judgment it was held by the Department that Gourley acquired no right to the land by reason of his improvements and "continuous residence." The land, after Pence's entry was canceled by relinquishment, became a part of the public domain, subject to appropriation by entry, and it was not unlawful for Countryman to enter the same even though he knew of the improvements made by Gourley and his residence on the land;

and denied the motion for review.

Gourley appeals to the Department.

While I concur in that part of your office decision which holds that the decisions of the Department of April 5, 1894, and December 24, 1894, are final, as to all matters that preceded the entry of Pence by virtue of his preference right, as contestant, and think that Gourley's application for reinstatement of his entry was properly denied, I can not agree with you that Gourley could acquire no rights by virtue of settlement and continuous residence upon the land, after the cancellation of Pence's entry.

In the case of *Pence v. Gourley* the Department did not decide that Gourley could not acquire a right to the land as against a third party by his settlement and residence upon the land, but simply as against the contestant Pence. When Pence relinquished his entry, the land was restored to the public domain, and if Gourley was then residing on the land, his settlement right would attach *eo instanti* upon the filing of Pence's relinquishment, and could not be defeated by Countryman's entry. (*Rickers v. Fisher*, 19 L. D., 421.) I therefore think a hearing should be had on Gourley's affidavit of contest, as amended by his affidavit filed June 6, 1896, and direct that a hearing be had for the

purpose of determining the rights of the parties, which will be confined to the question of Gourley's residence upon the land at the time of Pence's relinquishment and his allegation that there was a conspiracy between Pence and Countryman to hold the land by the entries made by each of them, respectively, for speculative purposes and for the purpose of availing themselves of the benefit of his improvements upon the land, both parties knowing him to be in possession of the land, actively occupying and cultivating it.

Your office decisions of May 14, 1896, and July 28, 1896, are modified accordingly.

ORDER OF CANCELLATION—RESIDENCE.

UNITED STATES *v.* MONTOYA ET AL.

The cancellation of an entry without notice to the entryman is void for want of jurisdiction.

A homestead entry will not be defeated by the fact that the entryman, through mistake, builds his house outside the lines of his land, where in good faith he resides in the house so located.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (E. B., Jr.)

This is an appeal by Juan de los Reyes Martinez from your office decision of November 9, 1895, in the case of the United States *v.* Deciderio Montoya and others by which the final homestead entry, No. 685, made by Montoya September 18, 1892, for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 20, T. 24 N., R. 32 E., now in the Clayton, formerly in the Santa Fe, New Mexico, land district, was reinstated and the pre-emption declaratory statement No. 84, filed May 28, 1890, by said Martinez, for the same tract, was held for cancellation.

It appears that said final entry was canceled by your office February 3, 1886, without notice to the entryman, or his transferees, on the ground that, as reported by a special agent, "Montoya never lived on the land embraced in his entry," and "the county records show that Montoya conveyed the land to S. W. Dorsey October 31, 1882, who conveyed the same to the Palo Blanco Cattle Co. March 7, 1884," that at the instance of said Dorsey, and after a report September 3, 1892, by another special agent, showing due residence, improvements and compliance otherwise with the homestead law by Montoya, and recommending the reinstatement of the entry, your office, on September 29th following, ordered a hearing "in order to determine the rights of the parties to the land involved;" that the hearing was duly held, at which the government, Martinez and the transferees were duly represented, Martinez having filed, on the second day of the hearing, an affidavit charging failure to reside on the land on the part of Montoya; and

that "from the testimony presented" the local office found briefly, "that the land embraced in said homestead entry has not been resided upon by Deciderio Montoya as required by law," and recommended that his entry "should be canceled."

The appeal is largely made up of assignments of error relative to the consideration by your office of "the report of the special agent" and to the status given Martinez in the case. It is unnecessary to consider them at any length. Martinez appears to have been accorded all the rights of a contestant at the hearing, among which were those of cross-examining witnesses and objecting to testimony, and "the report of the special agent" (which evidently has reference to the second such report mentioned above) was only preliminary to the hearing, and is only referred to in that connection in said decision. The remaining assignments of error are as follows:

Fifth. In failing to hold that the decision of the local officers was binding.

Sixth. In failing to hold that the cancellation of the homestead entry in October, 1885, and all the accompanying proceedings were, at least, *prima facie*, valid, and must stand as the valid act of a government official until the illegality of the proceedings be shown.

Seventh. In reinstating the homestead entry.

Eighth. In holding for cancellation the D. S. filing, and

Ninth. Because of other errors both of law and fact appearing upon the face of the record.

The cancellation of this entry without notice to the entryman was void for want of jurisdiction (*Drew v. Comisky*, 22 L. D., 174, and *Castello v. Bonnie*, 23 L. D., 162): so that the cancellation was a nullity, and in law the entry was intact as though the order of cancellation had not been made when Martinez's declaratory statement was filed. Such filing therefore, equitable title having vested in Montoya, gave Martinez no right whatever to the land.

The testimony taken at the hearing shows that, of the five years immediately preceding his final entry, Montoya had resided upon the land in a log house thereon until about 1881, when he moved into a stone house just built by him about two hundred yards south of the log house, and which (stone house), as was afterwards ascertained, had been located, apparently by reason of mistake as to the south boundary line of the tract above described, upon the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of the said section. In this house he lived until after he made his final entry for the said tract. It does not appear that he was aware, at any time prior to final entry, that the stone house was not actually on his own land. It is well settled that residence in good faith in a house built by an entryman by mistake outside the lines of his land will not defeat his entry (*Talkington's Heirs v. Hempfling*, 2 L. D., 46; and *Smith v. Brearly*, 9 L. D., 175).

The Department would doubtless be justified, in view of the evidence and all the circumstances of this case, in holding that this entry is confirmed by the seventh section of the act of March 3, 1891 (26

Stats., 1095), on the ground that there was no claim adverse thereto prior to final entry, and that after such entry and prior to March 1, 1888, it had been sold to a *bona fide* purchaser for a valuable consideration. No question has been raised at any time by appellant as to the *bona fides* of the alleged sales. In view, however, of the facts that the evidence established the good faith of the entryman as to residence and shows compliance otherwise with the homestead law, and that no record evidence of these sales appears among the papers in the case, only parol evidence appearing on that point, the Department does not deem it necessary to pass upon the question of confirmation of the entry under said section.

Your said decision is affirmed. Montoya's entry will be reinstated, and passed to patent. Martinez's filing will be canceled.

SCHOOL LAND—INDEMNITY SELECTION—SURVEY.

STATE OF CALIFORNIA *v.* WRIGHT.

The date of the survey of a township is not fixed by the date of the work in the field, but by the approval of the plat.

An alleged loss in an unsurveyed township will not authorize a school indemnity selection.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (C. J. W.)

On July 8, 1895, M. J. Wright, as locating agent for the State of California, made application for, and selected, the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 20, T. 11 S., R. 9 E., Mount Diablo meridian, as indemnity for deficit in school land, viz: the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 36, T. 9 N., R. 22 W., forty acres; the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 36, T. 9 N., R. 22 W., 38.78 acres, and Sec. 36, T. 1 N., R. 16 E., 1.22 acres—eighty acres.

On December 21, 1895, by letter ("K"), your office held said selection for cancellation as invalid, because the plat of township 9 north, range 22 west, S. B. M., on file in your office, showed that the only portion of the township surveyed was section 24.

On March 24, 1896, by letter ("K"), your office acknowledged receipt of evidence showing service of notice of letter "K" of December 21, 1895, upon the surveyor general of California, and his failure to appeal from the decision holding selection for cancellation; whereupon the cancellation was ordered. The local officers were directed to note the cancellation on the records of their office and to advise the surveyor general. They were also directed to give notice to W. W. Wright of this action, and to advise him that his application to have a portion of section 20, township 11 south, range 9 east, M. D. M., reserved and held for him, for the purpose of a reservoir and dam which he wished to construct, would be made the subject of a separate letter.

On June 12, 1896, by letter "G" of that date, referring to office letters "K" of December 21, 1895, and March 24, 1896, in which school indemnity selection R. & R. No. 216 (State No. 2934) was canceled, your office instructed the local officers, as follows:

I now advise you that the action above set out is revoked because it was founded upon a misapprehension of facts and consequently was erroneous. The said application is therefore reinstated. You will note such reinstatement upon the records of your office, referring to this letter, and notify the State surveyor general of California accordingly. And give notice of this action also to W. W. Wright, who filed in your office a protest against the said selection on November 2, 1895. The misapprehension above mentioned was caused or at least contributed to by the U. S. surveyor general for California, who furnished Mr. Wright with a certificate to the effect that the only surveyed land in the township was section 24, while, as a matter of fact, the whole township was surveyed, and a portion of school section 36 therein returned as mineral in character.

After the cancellation of the selection and before its reinstatement, the surveyor general of the State of California made application for its reinstatement, and on April 21, 1896, your office, in passing upon the same, said in reference to the cancellation formerly ordered: "As I can see no reason for doubting the propriety of this action, I must decline to revoke it, and to reinstate the selection upon the records." Afterwards, in the letter of June 12, 1896, your office, of its own motion, as for the correction of a mistake in fact, reinstated the State's canceled application.

On November 2, 1895, W. W. Wright filed application to have the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 20 reserved for his use for reservoir and right of way, under the act of March 3, 1891 (26 Stat., 1095), and appended to said application is the certificate of W. S. Green, U. S. surveyor general for California, in which it is stated that the plat of township 9 north, range 22 west, S. B. M., on file in his office, approved by Theo. Wagner, U. S. surveyor general, December 12, 1879, shows the only portion of said township surveyed to be section 24, and that a copy of said plat was duly filed in the United States land office at Los Angeles, January 19, 1880.

On November 16, 1896, your office forwarded a map and papers filed in the Stockton, California, land office, by W. W. Wright, in which you recommend that the map be considered in connection with this case, and be approved subject to all valid subsisting rights, with or without exception, as to the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 20, so as to harmonize with the disposition to be made of said land.

W. W. Wright has appealed from your office decision of June 12, 1896, reinstating the said school indemnity selection, which was canceled March 24, 1896.

The errors specified are:

1. In failing to adhere to and sustain the decision of December 21, 1895, which held that there was no valid basis for said indemnity selection at the date when it was filed, and held the same for cancellation.

2. Due notice of said decision of December 21, 1895, having been given to the proper officer of the State of California, and no appeal having been taken from said decision, the same became final, and said indemnity selection was duly canceled by office letter "K" March 24, 1896, and it should not be disturbed.

3. After said final action of March 24, 1896, had been taken, an application to reinstate the selection was made by the surveyor general for the State of California, which, on April 21, 1896, was refused, and should have been final.

4. Error in undertaking to reinstate said selection upon the ex-parte application of the attorney here for the State of California, improperly made, and filed without any notice thereof to applicant Wright.

5. Error not to deny action on such application until due notice was given to Wright.

6. It was error, after having, on June 1, 1896, recognized Wright as an applicant for reservoir rights on the land, to reinstate the selection without considering his intervening rights.

7. In not holding that said alleged basis, T. 9 N., R. 22 W., was not surveyed until the official township plat and field notes thereof had been duly approved by the United States surveyor general on January 8, 1896.

The last proposition announced, if found to be true, would control the case, and render unnecessary the consideration of the minor grounds of error.

Your office allowed the State's selection in the first instance on an apparent state of facts, which entitled it to such selection. Afterwards, your office canceled the selection, on the ground that the facts were not as alleged, and that no proper basis for the selection existed; subsequently, your office reached the conclusion that a mistake was made in the facts, which demanded the reinstatement of said canceled selection, and thereupon ordered its reinstatement.

In office letter "K" of December 21, 1895, it is stated that the plat of township 9 north, range 22 west, S. B. M., on file in your office, shows the only portion of the township surveyed to be section 24. This was the reason for holding the application for cancellation. In your office letter "G" of June 12, 1896, it is stated: "I now advise you that the action above set out is revoked, because it was founded upon a misapprehension of facts, and consequently was erroneous." The application was for this reason reinstated.

The township map referred to has been examined. The surveys included in it run through a series of several years, the actual surveys in the field closing January 2, 1894, thus antedating the application of the State to make the selection in question. The plat, however, was not approved by the surveyor general of the United States for California and filed in office until January 8, 1896, which is after the filing of Wright's application to have the land reserved for reservoir purposes,

this application having been filed November 2, 1895. The fact to which your office refers, as having been misapprehended, is not purely a question of fact, but one of mixed law and fact.

The actual survey of the township in question had been made at the time the State filed application to make indemnity selection, but the survey had not been approved and the map filed, so the question remains: Was the township surveyed at the time the State's application was filed. The basis of the selection is the mineral character of a part of section 36 of said township. In the case of *Pereira v. Jacks* (15 L. D., 273), it is held, that if land is shown to be mineral in character by return of the surveyor-general at completion of the survey, it is excepted from the school grant to California. In the case of *Niven v. State of California* (6 L. D., 439), it is held that the grant to the State takes effect as of the date of the survey.

In the cases cited it is clearly indicated that the date of a survey is fixed not by the date of the work in the field, but by the approval and filing of the map. In the case of *Southern Pacific Railroad Company v. Burlingame* (5 L. D., 415), it is held that the date of a survey is determined by the date of its approval. This ruling is not only well founded, but has been very uniformly followed by the Department, which is in accord with the ruling of the courts.

The supreme court of California, in the case of *Michael Finney v. James N. Berger* (50 Cal., 249), say:

The statutes of this State do not contemplate a sale of the sixteenth and thirty-sixth sections until the title to the same has vested in the State, and the title to said sections does not vest in the State until the plat of the survey is approved by the United States surveyor general.

In the case of *Medley v. Robertson et al.* (55 Cal., 396), the court hold:

The title to a particular sixteenth or thirty-sixth section does not vest in the State before the plat of the survey of the township has been approved by the United States surveyor general; and an application to purchase such land made before the approval of the survey is unauthorized and void.

The application of the State, as was first held by your office, showed no proper basis for the selection applied for, for the reason that the township in which the alleged deficit existed was unsurveyed, and such application was unauthorized and void, and the selection under it was properly canceled. It would seem to follow that its reinstatement was erroneous.

Your office decision of June 12, 1896, is accordingly reversed, and selection R. & R. No. 216, State No. 2934, is canceled; the map filed by W. W. Wright is in accordance with your recommendation approved.

CONFIRMATION—SOLDIERS' ADDITIONAL HOMESTEAD.

DAVID WALTERS.

The confirmation of a soldier's additional homestead entry under section 7, act of March 3, 1891, is not defeated by the failure of the register to issue the formal final certificate, where it appears from the record that the soldier complied with all the requirements of the law and regulations thereunder.

The departmental decision herein of August 3, 1892, 15 L. D., 136, revoked.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (W. A. E.)

The Department is in receipt of your office letter of September 24, 1896, asking for instructions relative to the soldier's additional homestead entry of David Walters, made July 1, 1875, for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 29, T. 28 N., R. 6 E., Susanville, California, land district.

It appears that your office suspended said entry, for reasons not necessary to set out here, and called for additional affidavits; that the Sierra Lumber Company, claiming to be the transferee of Walters, applied to have said entry confirmed under the act of March 3, 1891, or to purchase the land under section 2 of the act of June 15, 1880; that your office denied this application, and held the entry for cancellation, the reason assigned for the ruling that said entry had not become confirmed under the act of March 3, 1891, being that no final certificate had issued on said entry; that on appeal to the Department your office decision was affirmed, in so far as it refused to hold said entry confirmed, but the company was awarded the right to purchase the land under the act of June 15, 1880 (see 15 L. D., 136).

The company having failed to perfect the entry as authorized by said departmental decision, instructions are now asked as to what action shall be taken in regard to said entry, in view of the recent decision of the Department in the case of the Sierra Lumber Company (22 L. D., 690), wherein it was held that a soldier's additional homestead entry, similar to this, and upon which, as stated by your office, no "final certificate" had issued, was confirmed under the seventh section of the act of March 3, 1891.

The original holding of the Department in this case, that Walters's said additional entry was not confirmed under the act of March 3, 1891, was based upon the ruling in the case of the United States *v.* Bush (13 L. D., 529). The Bush case, however, involved a cash entry made under the act of May 23, 1880 (21 Stat., 143), for Osage Indian lands. This act provided that actual settlers on the Osage Indian trust and diminished reserve lands in Kansas might, within a certain fixed time, make proof of their claims, and pay one-fourth of the purchase price, the balance of the purchase price to be paid in three equal annual installments thereafter. It was held in the case cited that an entry of Osage

land is not confirmed under the proviso to section 7 of the act of March 3, 1891, until two years have elapsed from date of final payment, as "final certificate" is not issued until all the payments have been made.

Afterwards, in the case of William R. Sisemore (18 L. D., 441), the Bush case was overruled, and it was held that when a claimant for Osage land under the act of May 28, 1880, submits proof of his qualifications to enter, shows due compliance with law, and makes his first payment for the land, his right thereto is a vested interest, subject to the lien of the government for the unpaid purchase money; and the receipt then issued to him is a "final receipt" that entitles a subsequent purchaser of the land to the benefit of the confirmatory provisions of section 7, act of March 3, 1891, if otherwise within the terms of said section.

Clearly, these rulings in regard to entries for Osage lands have no direct bearing upon the question of confirmation of soldiers' additional homestead entries. There are no annual payments, no final proof, to be made on the latter. All that is required of the soldier is that at the time he makes his application for an additional entry, he shall file, in addition to the regular homestead affidavits, special affidavits showing his identity as the soldier he represents himself to be, his military service, the description of his original entry, his compliance with law in regard to said original entry, and his unimpaired right to make additional entry. He then pays the fees and commissions prescribed by law, and the receiver's receipt and the register's certificate are issued. "Final certificate" should also be issued at the same time (General Circular of 1895, page 29).

The difference between an Osage entry and a soldier's additional entry is thus very apparent, and the question as to what is sufficient to bring the latter within the confirmatory provisions of the act of March 3, 1891, is entirely distinct from the question involved in the Bush and Sisemore cases.

The seventh section of the act of March 3, 1891, provides that:

All entries made under the pre-emption, homestead, desert land, or timber culture laws, in which final proof and payment may have been made and certificates issued, and to which there is no adverse claim originating prior to final entry, and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty, and after final entry to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation of a government agent, fraud on the part of the purchaser has been found, be confirmed and patented.

As said above, no final proof is required on a soldier's additional homestead entry, and the soldier is supposed to do, at the time of making entry, all that the law requires of him in the matter of filing the proper affidavits and paying the prescribed fees and commissions.

When the record shows, as it does in the present case and the Sierra Lumber Company case, that the soldier has complied with all the requirements, will the failure of the register to issue formal final certificate defeat confirmation under the act of March 3, 1891? It was held

in the Sierra Lumber Company case that it would not, and this ruling seems to be in accordance with law and equity.

It is a well established rule of the Department that rights of parties are not impaired through the negligence of the local officers.

As the present case (which has not yet been closed) is identical in all essential particulars with the Sierra Lumber Company case, and as the former holding of the Department that Walters's said additional entry was not confirmed under the act of March 3, 1891, was erroneously based upon the ruling in the Bush case, the former action of the Department herein is revoked and set aside, and the entry will be passed to patent.

It is not intended by this ruling to change the procedure heretofore followed in regard to soldiers' additional homestead entries. In other words, you will still require the receiver to issue "final receipt," and the register to issue "final certificate," in accordance with the circular instructions. This ruling merely protects the entryman against the consequences of neglect on the part of the local officers.

HOMESTEAD—PRE-EMPTION—ALIENAGE.

BUTLER *v.* DAVIS.

A pre-emption filing, or application to make homestead entry, made by an alien prior to declaration of intention to become a citizen, confers no right either under the pre-emption or homestead law, and a settler occupying such status is without protection as against an intervening adverse claim of record.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897.
(I. H. L.) (A. E.)

On June 17, 1886, James J. Butler filed a pre-emption declaratory statement of his intention to purchase the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 28, and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 29, T. 4 N., R. 24 W., S. B. M., Los Angeles, California. On December 11, 1891, Butler applied to make homestead entry of the same land; his application was rejected because he failed to show that he was a citizen, or had declared his intention to become such. On February 12, 1892, Butler declared his intention to become a citizen, but did not make new application to enter the land, nor offer to make proof on his pre-emption filing.

On February 9, 1894, Silas R. Davis made homestead entry for the land.

On February 17, 1894, Butler's naturalization being completed, he applied to make homestead entry of the land, and his application was rejected, because covered by Davis's entry.

On March 4, 1894, Butler filed a contest against Davis's entry, alleging that Davis had full knowledge of Butler's residence and improvements when he made his entry.

After a hearing the local office recommended that the entry of Davis be canceled.

On appeal, your office, on August 21, 1895, held that the declaration of intention made by Butler to become a citizen

could not relate back to the filing of his pre-emption declaratory statement, and thus benefit him; and his settlement and declaratory statement could not become operative from its date, because the pre-emption law had been repealed prior thereto. While it is true that defendant knew of the residence, improvement and claim of plaintiff at the time he made his entry, yet the plaintiff's failure to properly assert his claim in time is in no manner due to any act of the defendant.

Your office then decreed that the contest of Butler be dismissed and the entry held intact.

From this Butler has appealed to the Department.

No argument accompanies the appeal, and the appellant does not show specifically wherein your holding was contrary to law.

The case has, however, been carefully considered. While the loss of his home is a misfortune to the appellant, this Department is without authority under the law to protect him in the face of the intervening adverse claim of record, which claim was initiated in accordance with law. The homestead entry of Davis was made at a time when the land was subject to entry.

Butler was not a citizen and had not declared his intention to become a citizen at the time of making his pre-emption filing in 1886, or when he first applied to make homestead entry in 1891.

Said filing and application were therefore without any force or validity whatever and he could acquire no right thereunder. Before he applied as a qualified claimant to make homestead entry of the tract it had been entered by Davis, whose entry is protected by the law, provided he complies with its requirements in the matter of settlement, residence and cultivation.

Your office decision must be and it is therefore affirmed.

SECOND CONTEST—OKLAHOMA LANDS.

CLARK *v.* RENFRO ET AL.

In a contest between applicants for land in Oklahoma, involving priority of settlement, the question of "soonerism" is necessarily raised as to each party thereto, whether formally charged or not, and where, in such a contest, evidence is submitted on said question, and a decision rendered thereon, a second contest should not be allowed on that question.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (J. L. McC.)

On May 25, 1889, William T. Renfro made homestead entry for lots 6, 8, 9, and 10, of Sec. 31, T. 12 N., R. 2 W., Oklahoma City land district, O. T.

On June 14, 1889, Daniel Page, Jr., initiated contest against Renfro's entry, alleging prior settlement.

The local officers found that Renfro was the prior settler. Your office, on January 23, 1892, sustained the local officers, and dismissed the contest.

Ten days later—to wit, on February 2, 1892—Will H. Clark filed an application to contest Renfro's entry. No action was taken thereon except to note the date of filing.

On April 3, 1893, Clark filed an amended affidavit, in which he charged upon information and belief, that Page's claim and contest were fraudulent, illegal and void, for the reason that he went into the territory during the prohibited period. His charges were corroborated merely upon information and belief. This amended complaint was not acted upon by the local office.

Page in due time appealed from your office decision of January 23, 1892; and on December 5, 1894, the Department reversed said decision, held that Page had a prior adverse claim, and directed that Renfro's entry should be canceled upon the completion of entry by Page.

Renfro filed a motion for review of said departmental decision; but said motion was denied, and the decision of December 5, 1894, re-affirmed on September 12, 1895 (314 L. and R., 314).

On April 10, 1896, Clark renewed his charges against Page, in a "supplemental and amended affidavit of contest," in which he alleged that Page's homestead entry was illegal, for the reason that at the time it was allowed he (Clark) had a contest pending, which charged that Page had occupied a portion of the land described in the President's proclamation of March 23, 1889, during the prohibited period; therefore Clark asked a hearing.

Your office on August 19, 1896, denied a hearing, holding:

Inasmuch as Renfro's entry has been canceled, Clark's application to contest the same is hereby dismissed.

The matter of Page's entering upon the territory during the prohibited period *has been adjudicated*; therefore Clark's application to contest Page's entry is dismissed.

The above language has reference to the fact that, on the trial of the case of *Page v. Renfro*, Page, on cross-examination by counsel for Renfro, acknowledged that he passed through the territory in the night, on a railroad train, two or three days (or nights) before the land was opened to settlement.

Clark has appealed from said decision on the following grounds:

First. The Honorable Commissioner erred in holding and finding that the question of defendant Page's qualifications was *res judicata*, for the reason that the qualifications of Page as charged in this affidavit of contest were never adjudicated except upon the statements of the said Page, no disqualification ever having been charged against him or evidence introduced against him in the trial of the case of *Page v. Renfro*, the sole issue in that case being prior settlement.

Second. The Honorable Commissioner erred in holding and finding that the decision of the government or any officer thereof upon an *ex parte* showing is an

adjudication binding upon claimants not parties to that suit, unless the charge of disqualification was formerly made by way of contest, and evidence introduced thereunder.

The departmental decision of September 12, 1895 (on review), explained how the question of Page's premature entry into the Territory arose:

A motion (for review) has been filed on behalf of Renfro, the only ground of error in which that was not considered in the previous decision is the first, namely: "in not considering the testimony of the contestant, Daniel Page, Jr. (see page 37 of the record, question 2), in that contestant admits that he crossed the corner of Oklahoma Territory in travelling from Purcell to the Pottawatomie country, April 18, 1889."

A further examination has been made of the testimony upon this point, and it is found, as alleged, that Page admits that, on April 18, 1889, he crossed from the Chickasaw country at Purcell, passing through Oklahoma Territory to the Pottawatomie country. The distance across the Oklahoma Territory at this point to the Pottawatomie country is about five miles. After reaching the Pottawatomie country he appears to have followed the Pottawatomie line, travelling north until about opposite the land in question, being a distance of about thirty-five miles. It was from this point in the Pottawatomie country that he made his run to the land in question.

* * * * *

I am of the opinion that the fact of his having crossed the Territory from Purcell to the Pottawatomie country after which he traveled about thirty-five miles north within the Pottawatomie country to the point from which he made his run on April 22, did not disqualify him. He certainly gained no advantage by reason of knowledge of the country acquired in crossing from Purcell to the Pottawatomie country; and while he may be within the strict letter of the law, having entered the country after the President's proclamation and prior to the day set for the opening, yet under the peculiar circumstances, I do not think he transgressed the spirit of the law, and should not be held to be disqualified thereby.

It will be seen that the question of Page's disqualification upon the allegation of premature entry has been adjudicated; but the applicant herein contends that such adjudication is not "binding upon claimants not parties to that suit, unless the charge of disqualification was *formally made by way of contest.*"

The case (between Page and Renfro) arose upon Page's allegation of priority of settlement. Before either of them could be permitted to make entry, he must take the following oath (see General Circular, page 239):

I, ———, of ———, applying to enter a homestead, do solemnly swear that I did not enter upon and occupy any portion of the lands described and declared open to entry in the President's proclamation dated March 23, 1889, prior to 12 o'clock, noon, of March 22, 1889.

When the hearing was ordered to determine whether Page or Renfro was the prior settler, the question as to whether *either* of them could take that oath (without which he could not be a legal settler) was necessarily involved—whether "formally" raised or not. It was raised; testimony bearing upon that point was taken; and the question has been adjudicated by the Department. The case at bar, in my opinion,

comes within the rule that an issue once tried and determined will not be made the issue of a second contest (*Curtin et al. v. Morton*, 22 L. D., 91). And this rule is applicable to contestants, claiming a prior right to lands, as was held in the case of *McEvers v. Johnson*, 23 L. D., 472.

The decision of your office denying a hearing is affirmed.

SMITH ET AL. v. TAYLOR.

Motion for review of departmental decision of November 12, 1896, 23 L. D., 440, denied by Secretary Francis, January 30, 1897.

RAILROAD LANDS—REIMBURSEMENT—ACT OF MARCH 3, 1887.

JOSEPH PRETZEL.

The right to reimbursement under the act of March 3, 1887, cannot be recognized if the title conveyed by the government is paramount to the claim of the railroad company.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (P. J. C.)

This is an application for reimbursement under the act of March 3, 1887, 24 Stat., 550 (5 L. D., 627), made by Joseph Pretzel. The government issued its patent to him, August 20, 1881, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 27, Tp. 3 N., R. 1 E., 6th P. M., Beatrice, Nebraska.

He alleges that the tract was embraced in the grant to the State of Kansas for the use of the St. Joseph and Denver City Railroad Company, by act of July 23, 1866 (14 Stat., 210); that the Kansas and Nebraska Railway Company of Kansas, the transferee of the grant, by its trustees, on November 15, 1881, conveyed the tract to one W. Pringle Mitchell; that, in order to remove the cloud from his title, he did, on June 7, 1883, pay to Mitchell, "who claimed prior and paramount title to said land" by virtue of his deed aforesaid, the sum of eighty dollars, and received a quitclaim deed from Mitchell for the land; "that he has not been sued and subjected to any judgment, but that he paid the sum demanded of him," and believes he ought to be reimbursed under said act of March 3, 1887.

It appears that your office, by letter of May 16, 1895, addressed to an attorney in Nebraska, in relation to "the claims of Franz Rothemier and Joseph Pretzel for reimbursement," stated,

that the title held by said parties from the railroad company is paramount to the title given by the government, as the land had passed to the railroad company prior to the date of the patents issued to Rothemier and Pretzel.

Your office required some additional evidence to show no transfer or incumbrance of their title under government patents. This additional evidence was also required by letter of July 25, to the Nebraska attorney, also of August 22, 1895, to local attorneys.

By letter of December 19, 1895, in passing upon the Pretzel claim, it was said:

I have to inform you that upon a re-investigation of the evidence and facts in the case, I fail to find that there has ever been a similar case presented and acted upon by this office, in which a decree of court was rendered on account of priority of the railroad grant.

The records of this office show that on March 7, 1870, Gerhard Busch made homestead entry No. 3914, for the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 27, Tp. 3 N., R. 1 E., canceled for abandonment April 5, 1872.

The rights of the St. Joe and Denver City Railroad Company did not attach until March 28, 1870, and as this land was segregated by virtue of prior homestead entry No. 3914, it was excepted from the grant to said railroad company.

On April 22, 1872, Joseph Pretzel made homestead entry No. 6509 for the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 27, Tp. 3 N., R. 1 E., and at that date the railroad company had not selected said tract, and hence the title derived from the United States, based upon homestead entry No. 6509, is a valid one.

The claimant does not show that the government patent has been set aside by a decree of court on account of priority of the railroad grant, nor am I aware of a case similar to this, in which the court held that the railroad had the paramount title.

The claim was therefore denied, and the patent and quitclaim deed to the government made by Pretzel were returned to him.

A motion for review of this decision was filed by applicant, and as a ground therefor it was contended that the letters of your office of May 16, July 25, and August 22, 1895, were a final adjudication of the right of Pretzel to reimbursement; that by reason of these decisions this question was *res adjudicata*. This motion was denied on the ground that the prior instructions given were upon the hypothesis that the railroad title was paramount, when, as a matter of fact, it was shown not to be by the records of your office, and the whole matter still being within the jurisdiction of your office, it had the authority to revoke the former decision and render judgment in accordance with the record. (*Littlepage v. Johnson*, 19 L. D., 312.)

The applicant prosecutes this appeal, assigning error in your office decisions in holding that his claim does not come within the provisions of the act of March 3, 1887; that the railroad company's title was not paramount to that of appellant, and in overruling the motion for review.

It was not error in your office to decide this matter according to the record facts as subsequently disclosed in your office. Even if the former letters could be dignified into a decision, the later discovery of the actual condition of the subject-matter of the controversy, while your office still retained jurisdiction, would not prevent it from deciding it according to the facts.

The fact that the land was excepted from the grant by reason of a prior homestead entry is sufficient in itself to defeat the claim for reimbursement. By reason thereof the title conveyed by the government is paramount to the claim of the railroad company.

This finding renders it unnecessary to discuss any other feature suggested by the record.

FEES—DESERT LAND - STATE SELECTIONS.

T. J. FOSTER ET AL.

On the location of desert lands by a State under the fourth section of the act of August 18, 1894, the register and receiver are each entitled to a fee from the State of one dollar for each final location of one hundred and sixty acres.

*Secretary Francis to the Commissioner of the General Land Office, Jan-
(I. H. L.) uary 30, 1897. (J. L.)*

This case involves a question of law affecting administration:

Have the registers and receivers, in the location of lands by a State under the fourth section of the act of August 18, 1894 (28 Statutes, 372-422), the right to demand a fee of one dollar for each officer for each final location of one hundred and sixty acres, to be paid by the State making such location, in accordance with the first clause and the seventh subdivision of section 2238 of the Revised Statutes of the United States?

The case arose in this way. On August 28, 1896, the register and receiver at Buffalo land district, Wyoming, telegraphed your office as follows:

Are we to accept State selections under act of August 18, 1894, without fees.

On the next day, August 29, your office replied by telegraph as follows:

Accept lists under section four act of August 18, 1894, without fees, according to office letter of March 21, 1896. Copy will be sent.

And on the same day your office by letter "F" confirmed the telegram, and transmitted "a copy of so much of said letter to the Hon. Secretary in relation to Idaho list 1, under the same act, as decides this question of fees." Said letter to the Secretary was dated March 21, 1896.

On August 31, 1896, your office by letter "M" instructed the receiver of public moneys at Buffalo, Wyoming, to return to the State of Wyoming all moneys paid as fees on selections of desert lands under the 4th section of the act of August 18, 1894 (28 Statutes, 372-422) "as fees are not properly chargeable on such selections."

On September 20, 1896, the register, T. J. Foster, and the receiver, F. B. Proctor, in a joint letter respectfully requested your office to review and reconsider the decisions aforesaid affecting their fees and greatly reducing their official compensation.

On October 5, 1896, your office by letter "M" denied the application for review, but said:

If you are under the impression that fees are properly chargeable on selections under the act of August 18, 1894, the proper course for you to pursue is to appeal from the decision of this office.

Whereupon the register and receiver jointly appealed to this Department.

By reference to the Secretary's letter, dated April 21, 1896, in reply to the Commissioner's letter dated March 21, 1896, it will appear that the Secretary did not consider or decide the question raised in respect to the fees in controversy. That question is now distinctly presented for adjudication, unembarrassed by any previously expressed opinion by this Department.

The opinion and ruling contained in your office letter "F," dated February 20, 1895, and addressed to the register and receiver at Cheyenne, Wyoming, is clearly right. The opinion expressed in your office letter "F," dated March 21, 1896, and addressed to the Secretary, is erroneous.

Section 2238 of the Revised Statutes provides that:

Registers and receivers, in addition to their salaries, shall be allowed each the following fees and commissions, namely:

* * * * *

Seventh. In the location of lands by States and corporations under grants from Congress for railroads and other purposes (except for agricultural colleges), a fee of one dollar for each final location of one hundred and sixty acres; to be paid by the State or corporation making such location.

By the fourth section of the act of August 18, 1894, Congress agreed upon certain terms and conditions prescribed, to bind "the United States to donate, grant and patent to the State free of cost for survey or price, such desert lands not exceeding one million acres in each State," as the state might within ten years after the passage of the act, cause to be irrigated, reclaimed, occupied and cultivated (to the extent of not less than twenty acres in each one hundred and sixty acre tract) by actual settlers. There is nothing in this act tending to repeal, modify or in any way affect the law contained in section 2238 aforesaid. The express limitations—*free of cost for survey*, and *free of price*—by necessary implication exclude any other exemption from the usual costs, fees, charges and expenses attending the administration of the Land Department in such matters.

Your office decisions appealed from are hereby reversed. Your office will direct registers and receivers, on the location of desert lands by a State under the fourth section of the act of August 18, 1894, to require the State to pay for each officer a fee of one dollar for each final location of one hundred and sixty acres, as prescribed by section 2238 of the Revised Statutes. Your office will also notify any State or States having applications under said fourth section pending and undetermined in which said fees have not been paid, that action upon their applications will be suspended, until after they shall have paid to the local officers the fees due in accordance with the aforesaid section 2238, and this decision.

SWAMP LAND—SURVEY—CHARACTER OF LAND.

STATE OF CALIFORNIA ET AL. v. UNITED STATES ET AL.

Where it is apparent from the record that in the survey of a township, a large body of land adjacent to a navigable lake has been omitted from actual survey, through the establishment of a meander line between alleged swamp and dry lands, instead of at the true shore line of the lake, a survey of the lands so omitted should be made.

The claim of a State under the grant of swamp lands must fail if it does not appear that the lands were of the character granted at the date of the grant.

*Secretary Francis to the Commissioner of the General Land Office Jan-
(I. H. L.) uary 30, 1897. (J. L.)*

This case involves the lands described in the following petition, situated in San Francisco land district, California.

By a petition dated May 29, 1890, John A. Fairchild, Annie Fairchild, Jerome P. Churchill, F. E. Wadsworth, Mary Wadsworth, F. S. Ackerman, Elisha De Witt, Helen Martin and William Lennox, describing themselves as "applicants for the government title to the swamp and overflowed lands hereinafter described," requested the governor of the State of California to apply to the United States surveyor general for the State of California, for an immediate survey of the following described swamp and overflowed lands, to-wit:

Fractional portions of sections twenty-two (22), twenty-seven (27), twenty-six (26), twenty-five (25), thirty-five (35), and thirty-six (36), all in township forty-eight (48) north of range one (1) east, M. D. M.

Fractional portions of sections seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), and thirty (30), all in township forty seven (47) north of range two (2) east, M. D. M.

In support of this petition and as part thereof, they filed the affidavits of Jerome Churchill, John A. Fairchild, John Q. Hendricks, and David Ream, respectively.

David Ream made oath:

That all of the unsurveyed land in townships 48 north of range 1 east M. D. M., and 47 north of range 2 east, M. D. M., which lies west of a meandering ridge or elevated strip of land extending from a point near the center of the eastern boundary of section sixteen (16) in township forty-seven (47) north of range two east, M. D. M., northerly to the northern boundary line of said Siskiyou county, which is also the northern boundary line of the State of California, (and which said ridge or strip of elevated land forms the natural western boundary of the shore of Little Klamath lake—a portion thereof), was in the said year of 1874, and ever since it has been, swamp and overflowed land.

John Q. Hendricks in his affidavit, qualified the foregoing statement of David Ream, by inserting after the word "all," the words, "or nearly all;" and by substituting the year 1872 instead of "1874."

Jerome Churchill in his affidavit made oath that:

All the unsurveyed portion of said last mentioned townships lying west of a certain ridge, or elevated strip of land, which forms the western boundary of Little

Klamath lake proper, (and which said ridge or strip of elevated land extends from a point near the center of the eastern boundary line of section sixteen (16) in township forty seven (47) north of range two (2) east, M. D. M., in a general northerly direction, with various indentations, until the said ridge reaches the northern boundary line of said Siskiyou county), was, on the occasion of affiant's first visit in 1865, and ever since it has been, swamp and overflowed land.

John A. Fairchild in his affidavit, modified Churchill's statement aforesaid by inserting the year 1858 instead of "1865."

In pursuance of said request, the governor of California, on September 3, 1890, in accordance with section 4 of the act of July 23, 1866, entitled "An act to quiet land titles in California," (14 Statutes, 218—U. S. Rev. Stat., Sec. 2488), filed with the United States surveyor general an application to have segregation surveys made of the above described lands, representing and describing what land of the said lands, was swamp and overflowed under the grant, according to the best evidence that can now be obtained. The governor forwarded with said application the petition and affidavits aforesaid, and a copy of a plat of survey of said land as made by the county surveyor of Siskiyou county, California. Counsel were employed by the State authorities to represent the State and the swamp land claimants; upon condition that the State "shall not be held responsible for any costs or expenses in the matter."

On March 2, 1891, the U. S. surveyor general transmitted to your office for instructions, all the papers in the case, including all papers, plats and field notes that had accumulated in his office in consequence of correspondence with the State surveyor general.

On May 29, 1891 (by letter "E"), your office, "without passing upon the merits of the application," denied it, because there were "no funds applicable for such character of surveys." Subsequently the swamp land claimants deposited money to pay the expenses of the survey requested by the governor. And on September 11, 1891, eighteen persons claiming to be homestead settlers upon the lands involved, to-wit: Will B. McGill, Henry N. Beal, M. Brownell, James Hayes, Joseph Knight, J. Thackery (or Thackara), J. Doyle, A. Defreits (or Defratas), J. Randall, F. Kenney, C. McManners, B. F. Oatman, S. Andrews, J. Browning, F. Oatman, T. Smith, Augustus Mansfield, Jack White and D. W. Inman, intervened, by filing a petition in which they deny the claim of the State of California and the swamp land claimants, that the lands involved are or were swamp and overflowed lands made unfit thereby for cultivation. On the contrary, they alleged that said lands were and are good agricultural lands, susceptible of cultivation by the ordinary means of farm tillage; and that crops of wheat, oats, barley, corn, grasses and garden vegetables, now grow upon said lands by the application of the ordinary processes of agriculture. In their petition they described severally the tracts of land occupied by the settlers respectively, and upon which—they alleged—they reside with their families, forming a prosperous agricultural community, with dwelling

houses, barns and fences, public roads, a United States post office (Brownell), and a public district school house attended by fifteen pupils. They pay taxes, and are in all respects under the government of the regular State and county officers.

Thereupon the homestead settlers prayed that the lands be officially surveyed, with a view to determining the respective rights of the State of California and the swamp land claimants on the one hand, and of the United States and the homestead settlers on the other; in order that they may be able to make their entries according to law.

All parties to this controversy in their statements or pleadings agreed, (1) that the lands involved have never been officially surveyed; (2) that said lands lie outside of Little Klamath lake; (3) that the true boundary of the lake is the ridge or elevated strip of land hereinbefore described; and (4) that said lands should now be officially surveyed. They differed only as to the character of the lands; which can be determined as to each smallest subdivision, only after an official survey.

On January 7, 1892 (by letter "E"), your office rejected the application of the governor of California "to have segregation surveys made of the above described land;" but instructed the surveyor general to call a hearing as provided in the fifth subdivision (or paragraph) of section 2488 of the Revised Statutes of the United States, "to determine the character of the lands in question at the date of the swamp-land grant, namely, September 25, 1850."

The hearing began on June 14, 1892, and was closed on August 20, 1892.

On September 16, 1892, the surveyor general rendered his decision as to the lands situated in township 48 range 1 east, as follows:

In view of this undisputed evidence, corroborated by a personal inspection of the land, I am of the opinion and so decide that the land in question was swamp and overflowed at the date of the passage of the swamp land act of September 28, 1850, and as such should inure to the State.

On May 6, 1893, the surveyor general rendered his finding as to the lands situated in township 47 north, range 2 east, as follows:

In conclusion it is my opinion that the lands under consideration embraced both swamp and overflowed land and public land (meaning dry and arable lands), at the date of the passage of the swamp land act of September 28, 1850; but as the official subdivisional surveys have not been extended over this land, it is impossible to give either public, or swamp land an official designation. Such being the case, a decision must be postponed until the necessary survey shall have been made.

It is my judgment that the official plat on file in this office, of township 47 north, range 2 east, M. D. M., is erroneous; that there is a body of land in said township which did and does exist, where a lake is alleged to exist; that the same is not a tract of land notoriously and obviously swamp and overflowed.

That a portion of said land is public land fit for, and now settled upon and improved as, agricultural land; that portions of the said tract are swamp and overflowed; that before the character of these lands can be fully determined by legal subdivisions necessary to final adjudication, the public surveys must be extended over the same; and until such is done a decision as to the character of each forty acre tract must be

postponed, and for that purpose I recommend an immediate survey of all surveyable land in said township lying outside of the meander line shown on the official plat.

On March 20, 1894, your office decided that the lands described in the governor's application for a survey, were not swamp and overflowed lands made unfit thereby for cultivation, within the intent and meaning of the swamp land grant of September 28, 1850, and thereupon disallowed the claim of the State thereto and rejected the governor's application for a survey. Your office further found and decided:

That "for many years (prior to 1874 and doubtless in 1850), the waters of Little Klamath lake covered all of the lands which were subsequently found to be situate outside of the meander line established by McKay in his survey of 1874 and 1879," and "that lands covered by an apparently permanent body of water at the date of the swamp land grant are not of the character contemplated by said grant." . . . "It therefore follows that as the lands which were embraced in the so-called 'impassible tule swamp'" in T. 47 N., R. 2 E., M. D. M., at the date of the official survey in 1874 and 1879, were in 1850 no doubt fully and completely covered by the waters of the Little Klamath lake, no testimony to the contrary having been submitted, and as the lands are now admitted to be in the main adapted to agriculture, it is apparent that the State of California has no claim thereto under the swamp land act of September 28, 1850. The application of the governor of the State of California on September 3, 1890, for a segregation survey of said lands was rejected for reasons set forth in office letter "E" of January 7, 1892. The claim of the State to said lands, on the assumption that the same were swampy and overflowed on September 28, 1850, is hereby disallowed.

Your office then proceeded to state, that

an examination of the official records shows that all of the lands in the several lots in sections 18, 19 and 30, abutting on the official meander lines of Little Klamath lake, have been disposed of; also, with the exception of two lots, all of the similar lots in sections 17 and 20. With the exception of lot 1 in section 34 and lots 1 and 6 in section 35, the title to all of the remaining lands adjacent to and closing on the meander lines, is still vested in the United States.

And after referring to the case of "Lake Malheur" reported in 16 L. D., 256, and others, your office decided as follows:

It therefore seems clear that the requisite exterior, meander and subdivisional lines in T. 47 N., R. 2 E., M. D. N., should be extended, where the title to the lands up to the shore line remains in the government, and you are accordingly hereby authorized to award a contract to a competent and reliable deputy surveyor for the extension of said lines. This authorization, however, must not be applied to any portion of the uncovered or recession lands in said township where the titles to the lots adjoining the original meander lines of Little Klamath lake in sections 17, 18, 19, 20, 30, 34 and 35, as hereinbefore detailed, have been disposed of; it being held in those cases that the riparian rights of said adjoining proprietors must be recognized.

In respect to "the alleged swamp and overflowed lands in the fractional portions of sections 22, 25, 26, 27, 35 and 36, in township 48 north, range 1 east, M. D. M., as claimed by the State of California under the swamp land grant of September 28, 1850, your office found the facts as follows:

1. In the absence of evidence to the contrary, and in view of the admitted condition of the lands in 1887, as shown by the returns of the county surveyor, it appears

fair to presume that at the date of the swamp grant in 1850 the lands in question were covered with water, and were in no sense swamp land as contemplated by the statute. It is held by the Department that land covered by an apparently permanent body of water at the date of the swamp grant is not of the character contemplated by said grant.

2. The official records do not show that the title to any of the lands in T. 48 N., R. 1 E. (except to the swamp lands in sections 21, 22, 27, 28, 33, 34 along Hot creek, and in section 36, all of which are designated as swamp on the official plat), has passed from the government.

And thereupon your office decided as follows:

For reasons herein set forth, the application of the State of California that the lands in the designated fractional sections in T. 48 N., R. 1 E., M. D. M., be declared as swamp and overflowed land within the intent and meaning of the swamp land grant of September 28, 1850, is hereby rejected.

The application for the survey of these lands was rejected for reasons stated in office letter "E" of January 7, 1892; I know of no reason why the said action should be reversed, and the same is reaffirmed.

Subsequently your office overruled a motion for a review of said decision; and thereupon the homestead settlers aforesaid appealed to this Department.

The State of California and the swamp land claimants have not appealed; and to that extent at least they seem to have acquiesced in the decision of your office, and to abandon all claim of the lands in question under the acts of September 28, 1850, and July 23, 1866 (14 Statutes, 219). This conclusion is placed beyond all doubt by the fact, that the swamp land claimants have employed special counsel to resist and oppose the homestead settlers' appeal. On page 2 of the brief filed by said counsel it is said:

The present brief is filed on behalf of John A Fairchild and others, who are owners of tracts adjoining a portion of the land in controversy, and who seek an affirmation of the Commissioner's decision establishing their title as riparian owners.

The plaintiffs manifestly expect, under color of riparian rights as recognized and enforced by your office decision, to accomplish the same practical results that they had hoped to attain by their petition as swamp land claimants.

Following the method adopted by the surveyor general and also by your office, this Department will consider the two townships separately.

Township 47 N., R. 2 E., M. D. M.

This Department concurs in your office finding that on September 28, 1850, the lands embraced in T. 47 N., R. 2 E., M. D. M., were not swamp and overflowed lands made unfit thereby for cultivation; and your office decision disallowing the claim of the State of California to said lands under the swamp land act of September 28, 1850, is hereby affirmed.

As was said in the case of *Oregon v. Porter*, 22 L. D., 156-159:

When after the lapse of more than (forty) years,—after the death of a generation of men—persons claiming to be assignees of the State, go out to search for lands

which were swamp and overflowed in (1850), they must expect to find the burden of proof aggravated, but not shifted: Especially if the lands they may select, be not now swamps, but the productive farms and healthy homes of industrious citizens.

Your office erred in assuming that Little Klamath lake is a non-navigable lake. In fact, it is a navigable lake, eighteen or twenty miles long and ten or twelve miles wide, lying about one half in California and half in Oregon, with well-defined shores full of deep water, over which there is now, and for many years has been, carried on useful and profitable interstate commerce of freights and passengers, in steamboats and other vessels. (See record of testimony, pages 614, 615, 621 and 622.) The cases cited and quoted in your office decision, in respect to riparian rights, and lands acquired by accretion or reliction, are not relevant in this case.

Your office erred in finding as follows:

In the absence of any testimony showing the character of the lands in T. 47 N., R. 2 E., at the date of the swamp land grant (September 28, 1850), taken in conjunction with the admitted condition of the "impassable tule swamp" in 1874 and 1879, the conclusion is reached that for many years (prior to 1874 and doubtless in 1850), the waters of Little Klamath lake covered all of the lands which were subsequently found to be situate outside of the meander line established by McKay in his survey of 1874 and 1879.

The testimony does not sustain said "conclusion." The topography of the neighboring country as shown in evidence, proves conclusively, that it is physically impossible, that the lands referred to, could have been covered in 1850, or in 1874, or in 1880, or at any other time, since 1850, by the waters of Little Klamath lake.

In the month of July, 1874, when United States deputy surveyor Alexander McKay made his survey of said township, he ran and established a meander line to mark the boundary between the "plateau" of arable public land and the lands which he considered swamp and overflowed and unfit for cultivation. Then and there, between that meander line and the shore or water line of the distant lake itself, there lay uncovered and visible to the eye, a tract estimated to contain 7,080.69 acres of land, which he, the deputy surveyor, did not survey, but designated on his plat and in his field notes as "swamp and overflowed land."

Moreover, if it were true that in the year 1850, said 7,080.69 acres constituted part of the bed of Little Klamath lake and were entirely covered by its waters, that fact (if shown), would be immaterial and irrelevant in this case. If in the interval between 1850 and 1874, said 7,080.69 acres had been brought to the light, by accretion or by reliction—by the gradual accumulation of earthy matter or by the recession of the waters of the lake—such increment of land would have been in 1874 the property of the United States as the sole owner during that period of time.

The only colorable evidence to be found in this record tending to support your office finding "that for many years (prior to 1874 and

doubtless in 1850), the waters of Little Klamath lake covered all the lands which were subsequently found to be situate outside of the meander line established by McKay in his survey of 1874," is one of the plats or maps of T. 47 N., R. 2 E., M. D. M., now on file in your office. This map bears the certificate of the surveyor general in the following *unusual* form:

The above map of township No. 47 north, range No. 2 east, Mount Diablo meridian, has been constructed in accordance with instructions from the General Land Office dated November 26, 1879, from the field notes of the surveys thereof on file in this office.

THEO. WAGNER,
Surv. Genl. Cal.

SURVEYOR GENERAL'S OFFICE,
San Francisco, California, February 3rd, 1880.

There is another plat or map of said township also on file in your office (and bound in the same volume 27 with the other), which bears the surveyor general's certificate in the usual form, as follows:

The above map of township No. 47 north, range No. 2 east, Mount Diablo meridian, is strictly conformable to the field notes of the surveys thereof, on file in this office, which have been examined and approved.

THEO. WAGNER,
Surv. Genl. Cal.

SURVEYOR GENERAL'S OFFICE,
San Francisco, California, November 13, 1879.

The history of these two maps of the same township as compiled from the official papers now before me, will make it clearly manifest that your office committed errors in holding (1) that the lands in question were once part of the bed of Little Klamath lake; (2) that the fractional lots shown upon said maps, abutted upon or were adjoining to the shore line of said lake; and (3) that the owners of said lots had riparian rights which must be recognized.

The date of McKay's contract with surveyor general Hardenburg was October 6, 1873. McKay began his survey on July 7, 1874, and finished it on July 20, 1874:—*except* as to four courses, which he (the deputy surveyor), in his field notes calls, "Meanders of Little Klamath lake and *outer line* of tule and swamp unfit for cultivation." "This water line was run on the ice February 19, 1879," as hereinafter stated.

McKay did not return his field notes to the surveyor general's office until 1877; when they were returned to him for the reason "that they were not sufficiently explicit as to the meander line of Klamath lake as run by him." "The notes were again returned by Mr. McKay April 3, 1879, with the explanation that the long delay had been occasioned by the necessity of waiting until the ice had formed so he could re-run the meander line as directed by the office;" and with an amendment to the field notes in the following words:

Meanders of Little Klamath lake and outer line of
tule and swamp unfit for cultivation.

Commencing at the end of the 13th course as reported,
in the meanders of Sec. 25 of the inner meander line
between arable land and swamp and overflowed land
unfit for cultivation.

Course.	Dist.	Remarks.
S. 75° W.	101.50	
N. 20° W.	253.00	
N. 3° W.	50.00	
N. 33° W.	100.00	To $\frac{1}{4}$ Sec. and meander cor. between Secs. 4 and 33 on the north boundary of the township. Note. This water line was run on the ice Feb. 19, 1879.

Surveyed by

ALEX. MCKAY.

On September 29, 1879, Surveyor General Theo. Wagner, accompanied by one of his deputies as compassman, went in person upon the premises, and "carefully retraced the line of segregation of the swamp and overflowed land from the dry land."

I found (he said in his report to your office of November 14, 1879), that said line was properly established; and that the meander line of Mr. McKay's survey had been properly run upon the shores of the lake, and might have been established at any time by submitting to a little inconvenience and wading through the mud—the waiting for the formation of the ice being wholly unnecessary.

And on November 13, 1879, the surveyor general certified the map which had been prepared in strict conformity with the field notes of the surveys of the township examined and approved, as first made by Deputy Surveyor McKay and afterwards by the surveyor general in person. The face of the map itself, and the application to the map of the calls of the field notes of the meanders of the swamp and the lake respectively, show that in 1874 and 1879 there was in existence, uncovered and visible to eye, a body of land called "swamp" by the surveyors, and containing by estimation 7,080.69 acres, which was carefully segregated from the arable land and from the lake, by the inner and the outer meander lines delineated and described.

On November 26, 1879, by letter "E" addressed to the surveyor general, your office,

found the returns of survey defective and irregular in that neither the exterior meanders nor subdivisional lines were actually established in the field; but the line called the outer line of tule &c., or segregation of the impassable swamp from the open lake, although run and measured on the ice, was not marked in any manner, neither was there any subdivisional corner set or driven in any part of the "impassable swamp."

Your office then proceeded to say:

Under these circumstances the survey as a whole, cannot be approved by this office, and is therefore rejected in so far as relates to the running of said "outer meander line" and the consequent platting of swamp lands.

I have to direct that upon receipt hereof, you will make annotation upon the plat and field notes of this survey, of my decision, and prepare a new plat showing the survey of the township only to the "inner meander line," so called by the surveyor.

It is plain that the phrase "inner meander line" was understood by all parties to mean the meander line between arable land, on the one side, and swamp and overflowed land unfit for cultivation, on the other; and that the phrase "outer meander line," meant the line along the shore of the lake proper, close to the water's edge, separating the water

of the lake from the swamp and overflowed land. The objection of your office embraced only the four meander courses copied above, which were run and measured on ice (and which on the map first returned, marked the western boundary of Little Klamath lake); and "the consequent platting (imaginary) of swamp lands." Your office distinctly recognized "the inner meander line so called by the surveyor"—not as a meander of Little Klamath lake—but as the line of demarkation between the lands high and arable, and the lands alleged to be swamp and overflowed; and plainly directed the surveyor general to "prepare a new plat showing the survey of the township only to that line," which was in fact the extent of McKay's actual survey. Your office thus approved the plat and survey and field notes first returned, so far as courses had been run, lines meandered, and corners established, actually, in the field; and rejected them only as to the residue of the township. The new plat was intended to show that the township was only partially surveyed; and that all the lands north and east and northeast of the arable land aforesaid were unsurveyed. Your office gave this direction with knowledge of the fact, that said unsurveyed portion of the township embraced (by estimation) 7,080.69 acres said to be swamp and overflowed, and 7,619.13 acres said to be covered by the waters of Little Klamath lake. The new map was to be ancillary to the first map, and prevent confusion by showing separately the arable public lands open to settlement and entry: Reserving for future consideration all questions between the United States and the State of California, in respect to the alleged swamp and overflowed lands.

On February 4, 1880, the surveyor general furnished the new plat or map "constructed in accordance with instructions." It shows only the arable public lands which had been actually surveyed. The lines of the survey were closed upon the "inner meander line," separating the arable from the swamp lands; and the fractional subdivisions thereby made necessary, were divided into lots and numbered. The new plat and the first plat were bound together in volume 27 of the official maps of California, and thus remain of record in your office jointly as a delineation of the township. They show conclusively that none of the lots surveyed and numbered therein abut upon or adjoin Little Klamath lake;—except lots 4, 5 and 6 in section 25, which have not been disposed of by the United States.

A further examination of the records of your office shows that only four patents have been issued for said lots, as follows:

On May 6, 1887, to Jerome Churchill for lots 1, 2, 3, 4 and 5 of section 18 and lot 2 of section 19.

On April 29, 1889, to Manuel J. Miller for lot 1 of section 30.

On January 28, 1890, to Norris F. Skeen for lots 3, 4 and 5 of section 35.

On November 9, 1891, to Annie E. Fairchild for lots 1, 2 and 3 of section 17, and lots 1 and 2 of section 20.

Two of said patentees, Jerome Churchill and Annie E. Fairchild were original plaintiffs in this controversy. None of them have any riparian rights whatever. The lands granted by their patents were limited by the straight subdivisional and meander lines which defined the lots on the face of the map.

The voluminous testimony in this case has been carefully examined. There appear such discrepancies as usually appear when interested parties, very much in earnest, are called to testify against each other. The witnesses all agreed that in 1874, there was no lake upon the land in controversy; and that the estimated tract of 7,080.69 acres, designated on the first map as "swamp and overflowed land," was land in full view. They differed as to the *character* of the land, whether it was in whole or in part, wet or dry—arable or unfit for cultivation. It is not necessary for the disposition of this case to decide between them. It is enough to find, as this Department does, that there is a large body of public lands belonging to the United States which has never been surveyed now occupied by homestead settlers.

Your office decision of March 20, 1894, in respect to the lands in T. 47 N., R. 2 E., M. D. M., is hereby reversed so far as it conflicts with the opinions herein expressed. Your office is hereby instructed to cause an official survey to be made of all the lands in said township lying north of the meander line established in the field by deputy surveyor McKay and delineated on the maps of said township on file in your office; and cause said survey to be closed upon the true shore or water line of Little Klamath lake, as ascertained, meandered and established by actual survey.

Township 48 N., R. 1 E., M. D. M.

In respect to the lands in T. 48 N., R. 1 E., your office decision found that they were not in 1850 swamp and overflowed and unfit for cultivation; and decided that they did not pass to the State of California under the act of September 28, 1850. This finding and decision are hereby approved and affirmed.

Your office further found that on September 28, 1850, said lands were probably a part of the bed of Little Klamath lake, and covered with water. The only evidence in this case tending to support this finding is the official map of said T. 48 N., R. 1 E., approved by the surveyor general on April 21, 1875, and now on file in your office. Said map purports to be a complete plat of the whole township and its correctness does not appear to have been called in question before this controversy arose. On the face of the map 772.40 acres of "swamp and overflowed land" are designated within the surveyed portion of the township, to-wit: 40 acres in section 36, 200 acres in section 34, 80 acres in section 33, 280 acres in section 28 and 172.40 acres in sections 21 and 22. "The meanders of Little Klamath lake," which were run on May 30, 1874, are plainly drawn upon the map, and seem to mark

the boundary between the arable public lands and the waters of the lake, as they stood on that day. The area of the lake was estimated at 5,622.65 acres. The plaintiffs in their application claimed only 1,685.60 acres; which according to Mitchell's map filed by them, appears to be an increment of land developed since the date of the official survey; and which has been caused, perhaps in part, by the fact that Little Klamath lake has been tapped to irrigate large areas of arid lands in Oregon, which lie below the level of the lake.

Your office decision certifies that,—

The official records do not show that the title to any of the lands in T. 48 N., R. 1 E. (except to the swamp lands in sections 21, 22, 27, 28, 33 and 34 along Hot creek and in section 36, all of which are designated as swamp on the official plat), has passed from the government.

So that the government remains the sole owner, except as to said "designated" swamp subdivisions.

The testimony in respect to the lands in this township is comparatively meagre (Record pp. 1 to 52). Only seven witnesses were introduced by the plaintiffs, and none by the defendants, of whom, only one ever claimed a settlement on this township, to-wit: "D. W. Inman, on portions of section 36, T. 48 N., R. 1 E."; and he appears to have abandoned his settlement. The concurrent testimony of all of said witnesses shows that in the year 1874, there was no lake, at the places where the lands claimed by the plaintiffs in this township now appear; which accords with the affidavits filed with the plaintiffs' application, and appears to be true notwithstanding the official map.

This Department does not concur in your office opinion that "it appears fair to presume that at the date of the swamp grant in 1850 the lands in question were covered with water."

That part of your office decision which rejects the application of the governor of California for a survey of the lands claimed in this township 48 N., R. 1 E., is hereby affirmed; but without prejudice to the jurisdiction and authority of your office, at any time, upon the application of any other person interested, or of your own motion, to direct an extension of the lines of the former survey over the whole township, in order that the meander lines now appearing on the map may be readjusted; that the true shore or water lines of Little Klamath lake, and of other meanderable lakes that may be found in said township, may be meandered and definitely established; and that the character of the lands now apparent, down to the smallest subdivision, may be determined.

ALIENATION-HOMESTEAD ENTRY.

WALKER v. CLAYTON.

A written agreement to convey the land covered by a homestead entry, made prior to the submission of final proof, will defeat the right of the entryman to perfect his entry.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (E. B., Jr.)

I have considered the case of *L. M. Walker v. Charles J. Clayton*, on appeal by the latter from your office decision of October 29, 1895, holding his homestead entry, No. 7386, made December 27, 1889, for the NE. $\frac{1}{4}$ of section 32, T. 26 S., R. 23 E., M. D. M., Visalia, California, land district, for cancellation on the ground, in effect, of his bad faith, as evidenced by his agreement with one May, to convey the land to him, prior to final proof. The only question necessary to be discussed is that of bad faith.

A contest charging generally, that Clayton made the entry for speculative purposes and specifically that on July 14, 1894, he entered into a written contract with E. F. May, to convey to him for a valuable consideration in money and land the tract above described and certain other property, was initiated by said Walker, February 7, 1895. He had, on August 30, 1894, filed a contest affidavit of the same tenor, which was dismissed December 13, 1894, upon Clayton's motion, "for want of prosecution." A hearing, in March, 1895, upon the contest first above mentioned, resulted adversely to the entryman, the decision of your office being an affirmance of the decision of the local office.

The record shows that Clayton entered into a contract as charged, which was to be executed within sixty days from the date thereof, the party making default to forfeit to the other "one thousand dollars as liquidated damages, and such other damages as may in consequence of such failure be legally established." An endorsement on the contract shows that Clayton sought an extension for ninety days of the time within which the contract might be executed. No extension was agreed to by May. The contract has not been executed in any particular, so far as appears, on the part of either party. It is admitted by Walker that Clayton had complied with the homestead law up to the time of the hearing in respect to residence and cultivation.

Clayton commenced to reside upon the land in February, 1890. He was allowed leave of absence under the act of March 2, 1889 (25 Stat., 854), from May 13, to December 13, 1890, a period of seven months. The five years of residence and cultivation necessary to acquire title by that means under the homestead law would not end, therefore, until September, 1895. The agreement to convey was thus made about fourteen months before he could submit his final proof or acquire any title

to the land, unless by purchase under section 2301 of the Revised Statutes, and it is not shown that he had any intention to so purchase. In his homestead affidavit he had sworn that the entry was made for his exclusive benefit and not directly or indirectly for the benefit or use of any other person or persons whomsoever, and he knew that in his final affidavit he would be required to make oath, subject to an exception not here in point, that he had not alienated any part of the land (Sections 2290 and 2291, Revised Statutes). It was evidently implied, if not expressed, in his contract with the United States, that he would continue to hold, reside upon and cultivate the land for his exclusive use and benefit until the time should arrive, when, after the submission of final proof as required by law, he had earned his right to receive patent therefor.

It is no adequate defence that May could not enforce specific performance of the contract. Clayton might, of his own volition, have carried it out, and it is this mischief that the statute is designed to remedy (*Molinari v. Scolari*, 15 L. D., 201). Neither is it any sufficient answer that by its terms the agreement had come to an end long before contest was initiated. It was in force when the first contest affidavit was filed, and was sought by Clayton on August 29, 1894, to be continued ninety days beyond the limit first agreed upon. If when threatened with exposure of bad faith a homesteader could in each instance avoid the consequences by simply repudiating his contract to convey, the sanction of the law would be overthrown.

In the case of *Tagg v. Jensen* (16 L. D., 113), it was laid down as the settled construction of the pre-emption law relative to alienation "that any agreement to convey any part of an entry or claim to another made prior to final proof will defeat the claim." While the language of the pre-emption law was more explicit than that of the homestead law as it stood at the date of this entry, the spirit and intent of each on the point at issue was the same; and section 2290 of the Revised Statutes, as amended by the act of March 3, 1891 (26 Stat., 1095), was made to conform substantially to the language of the former. See in this connection *Bashford v. Clark et al.* (22 L. D., 328).

The suggestion in the argument of counsel that Clayton "may have been inveigled into making" said contract by the contestant Walker, should receive some attention. It appears that the initiative in the matter of said contract was taken by Clayton himself; that he came to the office of Walker who was then a member of a firm of real estate agents in San Francisco, California, and employed him to effect the sale or exchange of this tract and other real estate then held and claimed by him (Clayton); and that Walker had no knowledge that any of the property thus sought to be sold or exchanged was government land, until on August 29, 1894, when Clayton sought the ninety day extension of the contract hereinbefore mentioned, which extension was not made. Walker was then informed by Clayton for the first time

that this tract and another, for which the latter had made timber culture entry, and which were both included in the contract to convey, were government land upon which he had not made final proof, and that he wanted the extension to give him time within which to make such proof. He had up to that time successfully concealed from Walker the fact that the contract embraced government land, concerning which the former was apparently attempting to commit a fraud against the government. The next day after hearing this fact Walker filed his first contest affidavit against the entry. The evidence does not in any way connect Walker with the attempted fraud.

The decision of your office is affirmed, Clayton's entry will be canceled, and Walker given the preference right to enter the land.

APPLICATION TO ENTER—CONTEST—RELINQUISHMENT.

COWLES *v.* HUFF ET AL.

An application to enter should not be received during the time allowed for appeal from a judgment canceling a prior entry of the land applied for; nor the land so involved held subject to entry, or application to enter, until the rights of the entryman have been finally determined.

The case of Allen *v.* Price, 15 L. D., 424, cited and followed; and the case of Henry Ganger, 10 L. D., 221, overruled.

Where an entry is under contest, and a relinquishment thereof is filed, followed by an application to enter, made by a stranger to the record, such application should be held to await the expiration of the time allowed a successful contestant for the exercise of his preferred right of entry, or may be allowed if it appears that such contestant is disqualified to make entry, or has waived his preferred right.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (W. M. W.)

In the case of R. Jay Cowles *v.* James L. Huff *et al.* Cowles appealed from your office decision of March 31, 1894, rejecting his application to enter the NE. $\frac{1}{4}$ of Sec. 7, T. 22 S., R. 34 W., Dodge City, Kansas, land district.

On October 31, 1895, my predecessor rendered a decision reversing the judgment of your office in said case. By letter of November 14, 1895, the Department requested your office to re-transmit the papers and decision in the case for re-examination, which request your office complied with on the 20th of November, 1895; and also advised the Department that said decision had not been promulgated.

Such re-examination has been made. It appears that on April 28, 1885, one Mary J. Moore made timber-culture entry for the land in question.

On May 11, 1889, A. C. Brady filed a contest against Moore's entry, charging failure to comply with the law.

On December 19, 1891, your office held Moore's entry for cancellation upon Brady's contest.

On December 26, 1891, James L. Huff applied to make homestead entry for the tract. His application was rejected by the local officers, and he appealed to your office.

On January 8, 1892, Moore appealed to the Department from your office decision of December 19, 1891, holding her entry for cancellation.

On July 7, 1893, the Department affirmed the judgment of your office holding Moore's entry for cancellation.

On July 22, 1893, said departmental decision was promulgated.

On August 19, 1893, Huff filed a motion for review.

On December 26, 1893, Moore's relinquishment was filed in the local office, bearing date August 21, 1893.

On December 26, 1893, at the same time Moore's relinquishment was filed in the local office, Cowles presented his application to enter said land, which was rejected by the register and receiver because of Brady's preference right and the rights of Huff under his appeal.

Moore's relinquishment having been forwarded to the Department to accompany the motion for review filed by her in the case, thereupon, on January 25, 1894, the motion for review was returned to your office, with the statement that action by the Department was rendered unnecessary by said relinquishment.

Cowles appealed on February 10, 1894, from the action of the local officers rejecting his application to enter said land, urging that he was the first legal applicant for this land; that Brady was not qualified to enter the tract, and that he had sold his interest to Huff before the latter presented his application to enter; that Huff gained nothing by his application, for the reason that the land applied for was not subject to entry at the time the application was made; and that he (Cowles) was a bona fide settler on the land.

In reply to Cowles' appeal, Huff denied the alleged superior right of Cowles, and furnished an affidavit of Brady, sworn to February 7, 1894, stating that he (Brady) brought his contest against Moore in good faith, expecting to make a timber culture entry for the tract in question; that by reason of the repeal of the timber culture law "he is not now a qualified entryman (having used his homestead right), and that he can not enter said tract." He also stated that he informed Huff of these facts, and that Huff has paid the expenses of said prosecution to him (Brady), and "in consideration of which affiant agreed to assert no claim to said tract, and that with this understanding said Huff made application for said tract."

Cowles' appeal and Huff's answer were forwarded by the local officers to your office on the 19th day of February, 1894, and though received on the 23d day of February, 1894, by your office, they did not reach the files in time to be considered in your office decision of February 27,

1894, which closed the case of *Brady v. Moore*, and held that the local officers

erred in *rejecting* Huff's application to enter *after* this office had held Moore's entry for cancellation and *before* Moore had appealed from such action (see *Henry Gauger*, 10 L. D., 221, and *Patton v. Kelley*, 11 L. D., 469), as you should have held such application to await the termination of the right of the prior parties; directed you (the local officers) to allow Huff to enter the land in controversy, if qualified to do so, in the event Brady did not exercise his preference right of entry;

and instructed the local officers to forward the appeal of Cowles in case he should file one.

By your office decision of March 31, 1894, Cowles' appeal was dismissed, without prejudice to his right to contest Huff's entry, should the latter make entry, upon any sufficient ground: Huff was allowed by the local officers to make homestead entry for said land on March 29, 1894.

Cowles appeals.

The errors assigned substantially amount to two propositions: (1) That Huff acquired no rights by virtue of his application or appeal of December 26, 1891, for the reason that at that time the land in question was covered by the uncanceled entry of Moore. (2) That Moore's relinquishment, filed on the 26th day of December, 1893, served to release the land, and that Cowles' application to enter the land, made on the same date, should have been allowed.

Counsel for appellant has filed a brief, wherein he contends that the case of *Henry Gauger*, 10 L. D., 221, cited in your office decision, is distinguishable from the case at bar, and that the other case cited, *Patton v. Kelley*, 11 L. D., 469, is not in point.

In order to determine the questions presented, it seems proper to refer at some length to the rulings of the Department on the points raised.

In the case of *Henry Gauger*, *supra*, a timber culture entry had been made and contested; on such contest said entry was held for cancellation; before the time in which the entryman might have appealed and that allowed the contestant to assert his preference right of entry had expired, Gauger made application to enter said land under the timber culture law. His application was rejected by the local officers, and their judgment was affirmed by your office. The Department reversed the decision of your office upon Gauger's appeal, holding as follows:

A judgment rendered by your office holding an entry for cancellation is final as to your office, and an application to enter during the time allowed for appeal from such judgment "should be received subject to the right of appeal, but not made of record until the rights of the former entryman are finally determined, either by the expiration of the time allowed for appeal or by the judgment of the appellate tribunal" (*John H. Reed*, 6 L. D., 563); and an application to enter, made before the time allowed the successful contestant to assert his preference right has expired, should be allowed subject to such preference right, and, on its subsequent assertion within the prescribed time, "due notice thereof should be given the intervening

entryman, with opportunity to show cause why his entry should not be canceled, and the contestant allowed to perfect his entry" (Geo. Premo, 9 L. D., 70; Welch v. Duncan, 7 L. D., 186).

The record in the John H. Reed case shows that, at the time said Reed applied to enter the tract there in question, it was shown by the records of your office and the local office, to be open and subject to entry by the first legal applicant; of this there can be no question, for the entry of George G. Reed for the tract was canceled and so noted on the records of the local office on January 5, 1885, and thereafter there was no entry or application to enter prior to January 23, 1885, when John H. Reed made his application to enter it. It thus appears that the date of the cancellation of George G. Reed's entry was not material in determining the case before the Department. The reasoning in the Reed case quoted in the Gauger case was based solely on an immaterial issue, not involved in the case. The quotation in the Gauger case from the Reed case is mere *dicta*, and can not be accepted as authority.

In Patton v. Kelley, 11 L. D., 469, the facts are, that on December 20, 1886, Kelley made homestead entry for the land involved; Patton contested said entry, and on June 1, 1889, your office held the entry for cancellation; on July 10, 1889, the widow of the entryman appealed from your said office decision; on August 8, 1889, the widow of the contestant filed an application to make homestead entry of the tract; the register and receiver rejected her application, because the tract was covered by Kelley's entry; on her appeals, respectively, to your office and the Department, the decision of the local officers was affirmed. It is clear that Patton v. Kelley does not follow the Gauger case.

In Perrott v. Connick, 13 L. D., 598, the Gauger case is referred to, but the record shows that Perrott's application to purchase the land in question was made *two days after* the final judgment of the Department cancelling the cash preemption entry of Setchel and at a time that the land was clear and open to entry.

The right of Henry Gauger to the land involved in his case, reported in 10 L. D., 221, was also involved in the case of Owens v. Gauger, 18 L. D., 6. It was there held that Gauger acquired no rights to the land under his contest, for the reason that the entry of Sheppard was canceled upon a prior contest of one Bunce, and that Owens was the first applicant to enter the land after Sheppard's entry was canceled. Thereupon Gauger's entry was canceled and Owens' former entry reinstated.

In McNamara v. Orr *et al.*, 18 L. D., 504, the Henry Gauger case was referred to, but the doctrine announced was not a controlling factor in determining that case.

In McMichael v. Murphy *et al.*, 20 L. D., 147, the Henry Gauger case was cited with approval. The facts showed that the entry under attack was held for cancellation March 7, 1890, and four days thereafter an application to make soldier's additional homestead entry of the tract

was made; that such application was not placed of record, but held under the rule announced in the Gauger case. These facts clearly brought the case within the rule laid down in the Gauger case, and was governed by that rule.

In *Allen v. Price*, 15 L. D., 424, it was held (syllabus) that:

On the successful termination of a contest the land embraced within the canceled entry should be reserved for the benefit of the contestant during the statutory period provided for the exercise of his preferred right of entry. If an application to enter is presented during said period, by a stranger to the record, it should be held in abeyance to await the action of the contestant. If a waiver of the preference right, duly executed by the contestant, is filed, the tract will be thereafter held subject to entry.

On March 30, 1893, the Department issued a general circular respecting the practice under motions for review, and after referring to *Allen v. Price*, *supra*, it was said:

In cases where an entry is canceled by reason of contest, the land covered by the same is to be reserved from entry for the period of thirty days from due notice to the contestant of his preference right of entry thereof. Should an application to enter the land be presented by a stranger to the record, you will receive and hold the same in abeyance to await the action of the contestant, and should such contestant fail to exercise his right, such application or applications must be disposed of in accordance with the law and rulings of the Department. Should a waiver of the preference right of entry duly executed by the contestant be filed, the tract will at once become subject to entry. (See 16 L. D., 334.)

The Henry Gauger case was referred to in *McDonald et al. v. Hartman et al.*, 19 L. D., 547, 557.

Allen v. Price has been referred to and followed in the following cases: *Severy v. Bickford* (on review), 16 L. D., 135; *Newell v. Pete-fish*, 20 L. D., 233; *Mayers v. Dyer*, 21 L. D., 187, and *McCormack v. Violet*, *Id.*, 451.

The several points decided by the Gauger and *Allen v. Price* cases may be summarized as follows:

The Gauger case held, (1) That an application to enter made during the time allowed for an appeal from a judgment of your office holding an entry for cancellation, should be received subject to the right of appeal but not made of record until the rights of the former entryman are finally determined. (2) That an application to enter, made before the time allowed the successful contestant to assert his preference right has expired, should be allowed subject to such preference right. (3) On the subsequent assertion of the preference right by the contestant within the time prescribed, notice thereof should be given the intervening entryman to show cause why his entry should not be canceled.

Allen v. Price held, (1) That on the successful termination of a contest and the cancellation of an entry the land embraced in such entry should be reserved for the benefit of the contestant during the period allowed by law for the exercise of his preferred right of entry. (2) If an application to enter is presented by a stranger to the record, during

the time allowed the successful contestant to make entry of the tract involved, such application should not be acted on by the register and receiver when presented, but should be held in abeyance to await the action of the contestant. (3) If a successful contestant files a duly executed waiver of his preference right, the tract involved will thereafter be subject to entry.

This summary shows beyond any question that there is, in some particulars, at least, an irreconcilable conflict between these cases. To the extent of such conflict, one or the other of them must be overruled. From a careful examination of the subject I am convinced that the doctrine announced in *Allen v. Price* furnishes the better practice and it will be followed. The case of *Henry Gauger*, 10 L. D., 221, is therefore overruled. All other cases following it, in so far as they may be in conflict with the views herein expressed, are also hereby overruled.

In the case at bar, *Huff* made his application to enter while *Moore's* entry was still in existence, and continued to exist for over a year and a half thereafter. His application was rejected, and he appealed. The question is, whether he acquired any rights under his application under the law, or rulings of the Department. This question can best be determined by reference to the rulings of the Department and courts.

The Department has repeatedly held that an entry segregates the land covered thereby, and so long as such entry exists, it precludes any other disposition of the land. *Whitney v. Maxwell*, 2 L. D., 98; *Schrotberger v. Arnold*, 6 L. D., 425; *Allen v. Curtius*, 7 L. D., 444; *James A. Forward*, 8 L. D., 528; *Russell v. Gerold*, 10 L. D., 18; *Swims v. Ward*, 13 L. D., 686; *Hauscom v. Sines, et al.*, 15 L. D., 27; *Faulkner v. Miller*, 16 L. D., 130.

The courts have held the same view. *Witherspoon v. Duncan*, 4 Wall., 210; *Hastings and Dakota R. R. Co. v. Whitney*, 132 U. S., 357; *Starr v. Burk*, 133 U. S., 541, 548.

If the land covered by a subsisting entry is not subject to disposition, it follows that an application to enter such land confers no rights whatever upon the applicant. If such application shall be rejected, and an appeal be taken from such action, it is not a pending application that will attach on the cancellation of the previous entry, for the appeal can not operate to create any right not secured by the application itself. See *Patrick Kelley*, 11 L. D., 326; *Goodale v. Olney* (on review), 13 L. D., 498; *Maggie Laird, Id.*, 502; *Holmes v. Hockett*, 14 L. D., 127; *Swanson v. Simmons*, 16 L. D., 44; *Mills v. Daly*, 17 L. D., 345; *Cook v. Villa* (on review), 19 L. D., 442; *Walker v. Snider* (on review), *Id.*, 467; *Gallagher v. Jackson*, 20 L. D., 389; *McMichael v. Murphy et al.* (on review), *Id.*, 535; *McCreary v. Wert et al.*, 21 L. D., 145.

In view of these authorities, it is held that *Huff* did not acquire any rights, either by his application to enter, or by his appeal.

The procedure in such cases ought to be:

1. That no application to make entry will be received by the local

officers during the time allowed for appeal from a judgment of cancellation of an entry; but in all such cases the land involved will not be subject to entry or application to enter until the rights of the entryman have been finally determined until which time no other rights, inchoate or otherwise, can attach.

2. If during the time accorded a successful contestant to make entry of the land involved an application or applications to enter should be made by a stranger or strangers to the record, such application or applications will be received and the time of presentation noted thereon, but held to await the action of the contestant, and should such contestant fail to exercise his preference right, or duly waive it, then such application or applications must be acted upon and disposed of in accordance with law and the rulings of the Department.

The only remaining question to be determined is, whether Cowles acquired any rights under his application to enter, dated December 26, 1893.

At the time Cowles made his application to enter, Moore's relinquishment was filed in the local land office. When said relinquishment was filed, it took effect at once, so far as releasing the land covered by it from the existing entry was concerned. *McCall v. Molnar*, 2 L. D., 265; *David J. Davis*, 7 L. D., 560, 561; *Dunn v. Shepherd et al.*, 10 L. D., 139.

Under *Allen v. Price*, and the instruction of March 30, 1893, it was the duty of the local officers to have held Cowles's application during the period allowed a successful contestant to exercise his preference right of entry; therefore the action of the local officers in rejecting his application and your office in affirming the judgment was erroneous.

Brady, the successful contestant, stated in his affidavit, dated February 7, 1894, hereinbefore referred to, that he "is not now a qualified entryman . . . and that he can not enter said tract," and that in consideration of Huff paying the expenses of the contest, "affiant agreed to assert no claim to said tract."

If these facts had been before the register and receiver at the time Cowles made his application to enter, his entry should have been allowed under *Allen v. Price*, and the departmental instructions thereunder, for they show: (1) that he was disqualified to make entry of the tract, and therefore could not lawfully exercise the preference right accorded a successful contestant; (2) that he relinquished his preference right. In such cases the land is subject to entry by the first legal applicant. In the case at bar, Cowles was such applicant.

Huff's entry was erroneously allowed by your office decision.

Your office decision appealed from is accordingly reversed. Huff's entry will be canceled, and Cowles will be allowed to make entry of the tract under his application of December 26, 1893.

The conclusion reached in the departmental decision of October 31, 1895, rendered in this case, is adhered to, but inasmuch as said decision did not overrule the Gauger case, *supra*, and give the reasons therefor, it is hereby recalled, and this decision substituted therefor.

TIMBER LAND—APPLICATION—PROTEST—PRACTICE.

HARRIS *v.* BELKNAP.

Prior to the issuance of final certificate under a timber land application the local office has full jurisdiction to order a hearing on a protest, or adverse claim, filed against such application.

An appeal will not lie from an interlocutory order of the local office made during the progress of a hearing, and if the party adversely affected thereby withdraws from the case, he is not entitled to have it remanded for further hearing even though it may appear that the local office erred in its ruling.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (R. W. H.)

It appears from the record in this case that, on June 6, 1894, William H. Belknap filed his sworn statement with his application to purchase the land in question under the act of June 3, 1878, and notice by publication was given that his proof would be offered September 15, 1894. September 14, 1894, Arthur Corning as agent for Wm. H. Carpenter, filed a protest against the acceptance of Belknap's final proof, alleging that the land contains valuable deposits of coal and is chiefly valuable therefor, and proposing, as such agent, to purchase the same under the coal land act. On the following day, to wit, September 15, 1894, James R. Nesbit filed a protest of similar purport—claiming that he had possession of the tract under the coal land law, and that Belknap was conspiring to secure the land for the benefit of others. On the same day Belknap offered his proof, which was suspended by the local office subject to action on said protests.

October 22, 1894, Burdette R. Harris made application to enter the land as a homestead, at the same time filing a protest against the allowance of Belknap's proof, alleging that the tract is practically devoid of timber and only valuable for agriculture.

A hearing was ordered for December 5, 1894, at which Harris and Belknap appeared in person and by counsel—Carpenter and Nesbit making default. Harris made affidavit asking for a continuance of the case for thirty days because of the absence of a material witness, one Wm. Yantis, whose attendance at the hearing he had used due diligence to procure, but without success. Upon Belknap's agreement, however, to admit that the witness would, if present, testify to the statement set out in the application for continuance, the local office, under Rule 22, denied the motion and proceeded with the hearing.

Harris did not support his protest by his own testimony, and introduced only one witness, who testified that there were not more than seven or eight acres of green timber on the forty acres in dispute, and that it was all in a "burn". He made no other examination of the soil except "in digging for coal along the hill side near the land." To the

question, on cross examination: "Did you find any coal?" the witness answered: "Yes, I did, I found coal on the south line that we run." At this stage the protestant rested, and the attorney for timber claimant moved the dismissal of the protest on the ground that a *prima facie* case had not been shown.

The register and receiver ruled that

if the case proceeds the costs will be taxed to the protestant, and if he does not see fit to proceed with the case and pay the costs, and the timber land claimant wants to introduce his evidence and is willing to pay his own costs it makes no hardship on the protestant, and the case will proceed.

The homestead claimant (Harris) objected to any further proceeding in the case on the ground that as the timber land claimant (Belknap) had interposed a demurrer, and said demurrer had been sustained, that the case was closed so far as the jurisdiction of the local office was concerned; that its decision sustaining the demurrer was equivalent to a decision on the merits, and that no further evidence could be considered, or proceedings had, until the protestant could secure a ruling of the Commissioner upon the question of costs.

The local office adhered to its ruling, and Belknap thereupon protested against paying any of the costs, and moved that in the event of the homestead claimant persisting in his refusal to pay the costs that the whole proceeding be dismissed, and his timber land entry be made a matter of record.

The case was proceeded with, Belknap and his witnesses giving in their testimony, and the protestant declining to take further part in the hearing.

The local office considered the case on its merits, found that the land is chiefly valuable for its timber, and that it is timber land in the meaning and intent of the act of June 3, 1878, and recommended that Harris' homestead application be rejected, his protest dismissed, and that Belknap be permitted to make payment for and perfect his title to the land.

Your office held that there was nothing in the record to show that Harris gave notice of an appeal from the ruling of the local office in the matter of costs, but as it was an interlocutory order, it was not of itself the subject of an appeal, and furthermore there was nothing to show that Harris was denied the privilege of cross-examining the defendant's witnesses, as he had absented himself voluntarily.

You further held that it was not error under the circumstances to allow Belknap to submit his testimony and to decide the case on its merits. You accordingly affirmed the decision of the local office dismissing Harris' protest, and holding the sworn statement and application of Belknap subject to final action in the case.

Harris' appeal to the Department makes but one assignment of error, to wit:

"Error not to have remanded the case for further hearing."

Paragraphs 14 and 15, page 45, G. L. O. Circular (1895), prescribes

the mode of procedure under the timber and stone act of June 3, 1878, as follows:

14. When an adverse claim, or any protest against accepting proof or allowing an entry, is filed before final certificate has been issued, the register and receiver will at once order a hearing, and will allow no entry until after their written determination upon said hearing has been rendered. They will report their final action in all protest and contest cases and transmit the papers to this office.

15. After certificate has been issued, contest, applications, and protests will be submitted to this office as in other cases of contest after final entry.

It will thus be seen that the jurisdiction of the local office is complete as to all matters arising at hearings under the timber and stone act until certificate has been issued, after which, contest, applications, and protests are to be submitted to your office as in other cases of contest after final entry.

The ruling of the local office upon the question of costs being made in the progress of the hearing, was interlocutory, and not subject to appeal, it matters not whether the ruling was erroneous or not. No right of the protestant was denied. Its exercise was only coupled with the condition that he should pay all the costs as in hearings under Rule 54. This he refused to do and withdrew from the case, after giving notice of appeal. It would seem, therefore, if his interests were in any wise prejudiced, that it was the result of his own premature action.

While your office did not concur in the ruling of the local office that the protestant should pay all the costs of the hearing as in regular contest cases under the act of May 14, 1880, it was held not to be error under the circumstances to allow Belknap to submit his testimony, and to decide the case upon its merits, inasmuch as there was "nothing in the record to indicate that Harris was denied the privilege of cross-examining the witness introduced by Belknap," and "in his brief did not claim that he was denied this privilege, but stated, after it was ruled that he should pay all the costs, he "gave notice of appeal and did not appear further in the case," clearly showing that he absented himself voluntarily."

In deciding that the hearing should have been held under Rule 55, instead of Rule 54, you have afforded Harris the only relief of which the case admits. It was entirely within the jurisdiction of your office for decision upon its merits as it came from the local office, and there was no error in your refusal to remand the case for further hearing.

Your office decision is therefore affirmed.

ADDITIONAL HOMESTEAD—ACT OF FEBRUARY 10, 1894.

ELBERT HURST.

The special right to enter additional lands conferred by the act of February 10, 1894, when such additional lands become subject to entry, is defeated by a prior selection of the land as school indemnity under the provisions of the act of March 2, 1895.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (C. J. G.)

Elbert Hurst has appealed from your office decision of September 20, 1895, sustaining the action of the local office in rejecting his homestead application made July 3, 1895, for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 8, T. 4 N., R. 2 E., Indian Meridian, Guthrie land district, Oklahoma.

The basis for said action was that the land is embraced in Oklahoma clear list No. 6, school indemnity lands, approved May 17, 1895, and therefore not subject to homestead entry.

On October 22, 1891, the appellant made original homestead entry for that part of the NE. $\frac{1}{4}$ of Sec. 8, T. 14 N., R. 2 E., lying north or on the left bank of the Deep Fork river. He claims the right to make homestead entry of the land in question by virtue of the act of Congress approved February 10, 1894 (28 Stat., 37). That act provides as follows:

That every homestead settler on the public lands on the left bank of the Deep Fork river in the former Iowa reservation, in the Territory of Oklahoma, who entered less than one hundred and sixty acres of land, may enter, under the homestead laws, other lands adjoining the lands embraced in his original entry when such additional lands become subject to entry, which additional entry shall not, with the lands originally entered, exceed in the aggregate one hundred and sixty acres.

The record shows that the land in question is situated on the right bank of the Deep Fork river, and was included in the Kickapoo reservation. The act of Congress approved March 2, 1895 (28 Stat., 899), gave the Territory of Oklahoma the right to select school indemnity lands in this reservation. That act provides as follows:

That any State or Territory entitled to indemnity school lands or entitled to select lands for educational purposes under existing law may select such lands within the boundaries of any Indian reservation in such State or Territory from the surplus lands thereof, purchased by the United States after allotments have been made to the Indians of such reservation, and prior to the opening of such reservation to settlement.

The instructions of May 18, 1895 (20 L. D., 470), issued in connection with the proclamation of the President opening the Kickapoo Indian lands to settlement, contains this language:

It must be remembered that, while the parties coming under the provisions of the said act of February 10, 1894, are permitted the privilege of making an additional entry, based on the original entry theretofore made by them, there is no provision permitting the reservation of any particular tracts for their benefit, and, therefore, their claims to any lands under said statute will rest upon a priority of initiation as in other cases.

The lands to be so opened to settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of lands within the Kickapoo Reservation, Oklahoma Territory, to be opened to settlement by proclamation of the President," but notice is hereby given that should any of the lands described in the accompanying schedule be properly selected by the Territory of Oklahoma under and in accordance with the provisions of said act of Congress approved March second, eighteen hundred and ninety-five, prior to the time herein fixed for the opening of said lands to settlement such tracts will not be subject to settlement or entry.

Your office decision is hereby affirmed.

HENSLEY v. WANER.

The conditions attendant upon opening lands to settlement in Oklahoma require the recognition of extremely slight acts of settlement in determining priorities between adverse claimants.

I have considered the case of *Elbert S. Hensley v. John Waner*, involving the homestead entry made by the latter for the NW. $\frac{1}{4}$ of Sec. 27, T. 12 N., R. 1 E., Oklahoma land district, Oklahoma Territory.

The land was embraced in the former Pottawattomie Indian reserva-

tion, but was purchased from that tribe, and by act of March 3, 1891, directed to be opened to settlement and entry. An executive proclamation to carry said act into effect was issued September 18, 1891; and the land was so opened to settlement and entry on September 22, 1891. The particular tract in controversy had at some previous time been the allotment of an Indian named "High," but said allotment had been canceled, and the land restored to the public domain.

John Waner made entry of the tract in controversy on September 26, 1891.

On November 14, 1891, Elbert S. Hensley applied to make homestead entry of the tract; but his application was rejected because of the prior entry of Waner. He alleged settlement prior to entry or settlement by Waner, whereupon a hearing was ordered and had, commencing July 25, and continuing until August 22, 1894.

From the voluminous testimony taken the local officers found in favor of Waner.

Hensley appealed to your office; which, on October 12, 1895, reversed the decision of the local officers, and held Waner's entry subject to Hensley's superior right.

Waner has appealed to the Department.

In the arguments filed upon appeal, a number of questions are presented, to which no reference is made either in the decision of the local officers or of your office, some of which are new and deserving of consideration.

Hensley had resided and leased farms from different parties in the Indian Territory for years prior to the passage of the act of March 3, 1891; first in the Chickasaw country; afterwards, upon invitation of his brother, he came to the Pottawattomie country, and the two took a lease jointly of the allotment of one Daniels. This was some time in the last week of 1890. From that date until he went out of the territory preparatory to "making the run" back into it (with one exception, to be noted hereafter), Hensley, with his wife and five children, occupied said Daniels allotment.

The Department has held that

one who is rightfully within the territory during the prohibited period, but goes outside prior to the hour of opening, and gains no advantage over others by his presence in the territory during the prohibited period, is not by such presence disqualified as an entryman (*Metz v. Seely*, syllabus, 21 L. D., 148).

But counsel for Waner contend that the above ruling can not apply to Hensley, inasmuch as he was *wrongfully* within the territory; that the leasing of an allotment from a Pottawattomie Indian was in violation of law; in support of which they copy a letter from the then acting Commissioner of Indian Affairs to one George L. Young, at Sacred Heart, O. T., dated April 2, 1891, which says:

In reply to your communication dated March 16, 1891, you are advised that the leasing of lands by members of the Citizen band of Pottawattomies is illegal and

void, and that parties within the reservation under such pretended leases have no rights whatever on the reservation. The allotments have not been approved, and the allottees as yet have no title to the land. Prior to the passage of the act of February 28, 1891, an allottee or patentee had no right to lease his land for any purpose.

It may be true that there was no departmental approval of the lease from the Indian, Daniels, to Hensley. But if there were not, what penalty could properly and legally be inflicted upon Hensley? Simply removal from such reservation, as an intruder. But if the passage of the act found within the limits of the territory opened to settlement by it, a person residing, or farming, or engaged in business, without the written permission of the Department, does that fact forever disqualify such person from acquiring title to land within such territory? I find no statute imposing such penalty; and it appears to me improper, unjust, and unwarranted to give so broad a construction to the prohibition contained in the act in question. The Department in its recent decision in the case of *Brady v. Williams* (although that case is not in all respects the exact parallel of the one here under consideration), enunciates a ruling equally applicable to Hensley—to-wit: that even if a settler on an Indian reservation, under a lease that had not received the affirmative sanction of the Department, “were guilty of a crime either against the United States or the Indians, he would not” thereby “be disqualified from availing himself of the right to make a homestead entry” (23 L. D., 533-537).

In my opinion, therefore, the fact that at the date of the passage of the act of March 3, 1891, Hensley was found in the Pottawattomie country, occupying land under a lease that had not been approved by this Department, would not, *per se*, disqualify him from acquiring land in the territory then and thereby opened to settlement and entry.

Counsel for Waner contend that, whether or not Hensley was rightfully in the country prior to March 3, 1891, he certainly was not after that date—in view of the fact that the prohibition against going into the territory began to run at the date of the passage of the law. Furthermore, that Hensley was ordered out of the territory, and left it—but returned, without legal authority to do so. In support of this contention they introduce a copy of a letter of instructions from Mr. Secretary Noble to the Commissioner of Indian Affairs, dated March 30, 1891 (twenty-seven days after the passage of the act). That letter said (*inter alia*):

It is reported by the governor of Oklahoma that large numbers of persons are invading the recently purchased land from the Sac and Fox, Cheyenne and Arapahoes, and others, with a view to gaining an undue advantage in the selection of homesteads, etc.; and I have to call your attention to the necessity of excluding them by whatever degree of force it may be necessary to obtain from the army for that purpose Not only should those intruding be peremptorily removed, but all private stakes or monuments, or other indications of possession that they may endeavor to establish should also be destroyed.

The Commissioner of Indian Affairs issued instructions to Indian Agents in the vicinity of the lands above named, directing them to carry out the above order.

But the question arises as to whether the above order was aimed at Hensley, or persons in his position. It would not on its face appear to do so, unless he was "invading" the land "with a view to gaining an undue advantage in the selection of homesteads, etc."—which is a question that will be inquired into hereafter; and it is not alleged by anybody that he was establishing "private stakes, or monuments, or other indications of possession."

Whether this order was intended for him or not, Hensley in some way became acquainted with the substance thereof, and did move out, with his family; but about a fortnight afterward returned.

Counsel for Waner contend that he returned without authority.

When Hensley left the territory he went out into what was commonly known as "Old Oklahoma," that had been opened to settlement and entry in 1889, and camped upon the "ranch" of a friend named Powers. At the hearing Powers testified:

Mr. Hensley camped on my place for about two weeks; he had been ordered out of the Pottawattomie country, he said; he then went back to finish up his crops; it was the general understanding among the people that they had received permission to return and take care of their crops.

The testimony of J. W. Daniels, from whom Hensley leased the allotment, will throw some further light upon this branch of the case:

As I understand the matter, there was an order issued notifying all white people that wanted homes there, to leave the reservation; that was about the last of May or the first of June—I wouldn't be authentic in regard to the time. I remember well that Hensley did move his family and himself out of said reservation. The Pottawattomie Indians made complaint to the Department that they would be seriously damaged by removing the renters from said Indian lands. John Anderson, and others, told me that the order had been rescinded, and that the renters could return and cultivate their crops. It was a question that concerned me considerable; and Mr. Outcalt told me that an order would be made that they could go back, and then they would be told when to go out again.

George W. Outcalt, a merchant of Choctaw City, testified:

A number of persons holding leases had moved out of the Pottawattomie country and were camped at Choctaw City and around there. I talked with Judge Harvey in regard to the matter, and we both thought it was a great inconvenience and wrong to the settlers to force them to leave their lands and crops. I wrote to Col. Patrick, the Indian Agent, in reference to the matter, and told him the situation; and he told me that the order was not intended to compel *tenants* to leave the Pottawattomie country or their homes, and to tell them to go back. I told Mr. Hensley, and a number of others, that Col. Patrick had instructed me to tell them they could go back to their homes. . . . Col. Patrick told me this personally, at my store; he explained that the order of expulsion was intended only for three or four persons, who had made themselves objectionable, and was given to an Indian policeman, who, not understanding the matter, had served the order on *all parties*. He said that his understanding was that, before the opening, all parties would have sufficient notice to enable them to get out in time.

On September 18, 1891—four days before the land in controversy was opened to settlement—the President issued the following proclamation (27 Stat., page 992, last six lines):

Notice, moreover, is hereby given that it is by law enacted that until said lands are opened to settlement by proclamation, no person shall be permitted to enter upon and occupy the same; and no person violating this provision shall be permitted to enter any said lands, or acquire any right thereto.

This proclamation came to witness Daniels' knowledge on the day of its date—he being at the time in Oklahoma City. Daniels explains how it was brought to Hensley's knowledge:

I was in Oklahoma City. Knowing Mr. Hensley to be a very poor man, and cultivating my place under a lease, I was anxious to see him get a home for himself and family. Riding home some time between 9 and 10 o'clock at night, accompanied by John Clinton, I remarked to Clinton that I had given the Hensley Brothers a lease of said place, and that as the president had declared said reservation opened so very unexpectedly, and being fully satisfied that said brothers had not come into possession of the fact, I thought it would be nothing more than right that we should drive around and notify them that the proclamation had been made. . . . He (Hensley), being a poor man, got my horses, and moved out of there about midnight.

Hensley and his family went again to the ranch of his friend Powers, on the border of "Old Oklahoma," and there remained until the morning of the day of the opening.

The local officers decided against Hensley on two points, one of which was:

We can not dispute the conclusion, from all the evidence, that Hensley knew this tract in dispute, and that, in a general way at least, he had an advantage over other homeseekers by reason of his stay in this reservation.

The Department has frequently held, as expressed in the syllabus to the decision in the case of *Monroe et al. v. Taylor* (21 L. D., 284):

Knowledge of lands within the territory, acquired by presence therein prior to the passage of the act, . . . can not disqualify a settler who subsequently complies with the prohibitive terms of said act.

In view of this ruling, the mere fact that a person, "in a general way," some time or other, learned something about a tract of land, is not sufficient reason for holding him disqualified. It must appear that such information was acquired subsequently to the passage of the act.

Upon this point the decision of your office is specific:

It does not appear that Hensley gained any advantage by his presence in the territory during the prohibited period. It is true he resided within a mile and a half of the land he now seeks to enter. It is also true that he had abundant opportunity to gain a knowledge of the land before the date of the act opening the country to settlement, March 3, 1891; and his residence within the country after that period did not, I think, give him any additional information.

An attempt was made at the hearing to show that Hensley had an opportunity to obtain "additional information." He worked one day, in the summer of 1891, for a man named Fansler, hauling to market

some hay that Fansler had cut upon the tract in controversy, and stacked (with other hay) near his (Fansler's) house. Fansler testifies that the land in controversy was "in plain view" from his house, and that "there was nothing to prevent him" (Hensley) "from looking at it." This is the sum total of the proof tending to show that Hensley learned anything additional regarding the tract after March 3, 1891.

Counsel for Waner specifies as one thing that Hensley learned while upon the reservation during the prohibited period, that the allotment for the land in controversy was fraudulent. But regarding this Hensley testifies:

The day before the opening, I learned, on the line there, that the soldiers had declared that what was called the "High allotment" was a fraud, and that it was then opened up as public domain.

Inasmuch as Hensley, "the day before the opening," was not in the Pottawattomie country, but in the Old Oklahoma country, it appears that the information obtained by him that the allotment was a fraud, was received by him while outside the Pottawattomie reservation.

I concur with your office in its finding that there is nothing in the testimony to indicate that Hensley gained any additional information regarding the land because of his presence in the territory after the passage of the act opening it to settlement and entry.

On the morning of March 3, 1891, Hensley started from the point in "Old Oklahoma," where he had been for three days camped upon the ranch of his friend Powers, and, going eastwardly, crossed the line into the Kickapoo Indian Reservation. He traveled through this a distance of about twelve miles, until he reached a point on the north bank of the North Fork of the Canadian river, as near the land in controversy as he could get and yet be outside of the prohibited territory. The question arises, does the fact that Hensley started from the Kickapoo country to make the run for the land in controversy, disqualify him from acquiring the land?

Some suggestive light may be thrown upon this question by reference to the departmental decision in the case of *Brady v. Williams* (23 L. D., 533, *supra*). That case arose upon the opening of the Cherokee Outlet, September 16, 1893. In that case the President's proclamation (August 19, 1893,) contained a proviso for a strip of land one hundred feet in width along the outer boundary of the country then opened, "open to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement" of said Cherokee lands. But this one-hundred-foot-strip proviso in no way invalidates the argument regarding the right of an intending settler to start from the margin of an Indian reservation that had not yet been opened to settlement and entry. In that decision the Secretary said:

It must be assumed that it was known to the President and the Secretary of the Interior, at the time the proclamation was promulgated, that the Indian reservations

of the Kansas, the Osages, the Poncas, and the Otoes and Missourias, immediately joined the Outlet on the east; yet there is no inhibition in the proclamation from settlers entering from those reservations.

In the case at bar, it must be assumed that the President and the Secretary of the Interior knew that the Kickapoo Indian reservation immediately joined the Pottawattomie reservation on the north; yet there is no inhibition in the proclamation from settlers entering from that reservation.

Again, the decision in the Brady-Williams case says:

The only theory upon which the Secretary of the Interior could possibly prevent persons from making the run from these Indian reservations was that, under the laws and treaties with the tribes, white people were not allowed therein, and were trespassers, and could be forcibly and summarily ejected as such. But . . . if they passed through the Indian reservations, and got on to the one-hundred-foot strip, and made the run from there in good faith, should they be deprived of their homestead rights? I find myself unable to yield assent to such a proposition. If the settler were guilty of a crime against the United States, or the Indians, he would not be disqualified from availing himself of the right to make a homestead entry.

In view of the above ruling in the Brady-Williams case, I must hold that in the case at bar the fact that Hensley started from the Kickapoo Indian reservation did not disqualify him from acquiring land in the former Pottawattomie reservation when it was opened to settlement and entry.

Hensley does not deny that he had the High allotment in view when he started from the Kickapoo country at noon of September 22, 1891—having that morning, while yet in the “Old Pottawattomie” country, learned from certain soldiers that said allotment had been declared fraudulent and invalid, and the land restored to the public domain. He does not deny, but acknowledges, that he sought a starting point as near said tract as possible, and yet be outside the prohibited territory. The route, after crossing the river (the North Fork of the Canadian) was steep and through timber for a short distance—about a quarter of a mile. The following is his own story of the run—omitting questions:

The horse I rode was a good horse—fast; he made the winning on the Oklahoma race track on the Fourth of July; I rode him just as fast as he could run; I got him headed in the direction and let him run; I lost my hat and blanket and one of my stirrups; the stirrup was torn off early in the race, by the horse running too close against a tree; when I reached the claim I jumped off the horse; as quick as I got off I saw parties coming from different directions; so I got back into the saddle and waved my flag over my head to the people coming in; I thought they could see the flag better with me on the horse than if I stood upon the ground.

An attempt is made to show that Hensley must have started from the Kickapoo line before noon, in order to reach the land in controversy before any of his competitors did. The principal reliance in support of this contention is the testimony of witness Ivy, who said of Hensley: “He was in there a minute or two before the other parties came; I don’t know whether they were slow or he was fast.” But this testimony

must be construed in connection with that previously given by the same witness:

A while before noon I had crossed the river into the Pottawattomie country; . . . I wasn't on the line when the rest of the people made the run; . . . The first I saw of Hensley he was coming on a run a quarter of a mile west of the claim, or about that.

So this witness, after all, does not say that Hensley was in the prohibited territory a minute or two before the other parties; but that he arrived "there"—where the witness was, nearly a mile inside the line—"a minute or two before the other parties came": which is precisely what Hensley himself asserts. After a careful examination of all the testimony bearing upon this branch of the question, I concur in the finding of the local officers, who say:

Evidence was also introduced tending to show that Hensley could not have reached the tract at the time he said he did without having started from the Kickapoo line prior to the noon hour. We do not think the evidence sufficient to find against him on that point.

Upon the question of fact as to whether Hensley made settlement on the land prior to the date of Waner's entry, the local officers found:

It is questionable whether the settlement he made, and his acts subsequent to his going on the land on September 22, are sufficient to hold in his favor on the ground of prior settlement.

In considering this branch of the matter it should be remembered that

the conditions attendant upon the opening of Oklahoma to settlement require the recognition of extremely slight initial acts of settlement in determining priorities between adverse claimants, if such primary acts are followed by residence within such time as clearly show good faith (*Penwell v. Christian*, syllabus, 23 L. D., 10).

Hensley slept upon the ground the night after the opening—under a wagon-sheet. He testifies that the next day, September 23, he plowed about a quarter of an acre. He began the foundation of a house before the date of Waner's entry (September 26, *supra*), which he afterward finished, and he and his family moved into it about the first of November, and has ever since resided there, with his wife and five children.

Waner, the entryman, testifies that on the 24th of September, 1891, when he first saw the land, he did not notice any plowing or other improvements. To one question addressed to him on cross-examination he made a peculiarly evasive answer:

Q. Did you not tell me in my office, here in Oklahoma City, in the fall of 1891, that you knew Mr. Hensley was the prior settler on this tract of land, but that he couldn't hold it, because he had been leasing land, and was a sooner?—A. I said he was a sooner, and that I believed I could prove every word of it at the trial.

Witness Kay testified that about September 24, or 25—he is positive that it was before the 26 (the date of Waner's entry)—he "saw a little patch of breaking done, and a log foundation laid."

The decision of your office, appealed from, finds that Hensley, "being the prior settler on the land, had the superior right thereto."

For the reasons hereinbefore given, I concur in the conclusion that Hensley acquired a superior right to the land in controversy, and therefore affirm said decision.

DESERT LAND ENTRY—ALIENATION.

WHEATON v. WALLACE.

An agreement by a desert land entryman to convey title to the land after the submission of final proof, will not operate to defeat the entry, where said agreement was entered into after the passage of the amendatory act of March 3, 1891, which recognizes the right of assignment in the entryman, and where the initial entry appears to have been made in good faith.

An agreement by a desert entryman, made subsequent to the initial entry, to convey title to the water supply after the submission of final proof, is not ground for cancellation, if it appears that such agreement was afterwards, and prior to final proof, repudiated.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (C. J. W.)

The land involved herein is the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ section 26, and the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ of section 35, T. 6 S., R. 32 E., M. D. M., Independence, California, land district.

The records of your office show that on May 4, 1888, Bion Samuel Wallace made desert land entry for said tract, together with one hundred and twenty acres of adjoining land, and that on February 10, 1891, shortly before the expiration of the time within which he was by law required to make final proof, he relinquished his entry, whereupon on the same day Daniel T. Wallace made desert land entry for the tract now in controversy, being three hundred and twenty acres.

September 13, 1893, the local officers issued notice of Wallace's intention to offer final proof on October 28, 1893. At the appointed time Wallace appeared with Samuel B. Wallace and J. H. Jackson, two of the witnesses named in his final proof notice. At the same time appeared Wesley J. Wheaton, and filed an affidavit of protest against the final proof on the following grounds:

1. That said Daniel T. Wallace does not own, nor have a clear right to the use of sufficient water to irrigate said land and to keep it permanently irrigated.
2. That the reclamation of said land has been effected by the use of water owned and controlled by another party, and not by the use of any water owned by this claimant.

That the said entry of Daniel T. Wallace is fraudulent and illegal in this, to-wit: That at the time said entry was made the said claimant made and entered into a contract by which he agreed to obtain title to said lands for another party, and that said entry was made for speculative purposes and not made in good faith.

3. That no water owned by this claimant has ever been conducted upon said land as required by law, or at all.

Thereupon on motion of Daniel T. Wallace the case was continued until October 30, 1893. On that day Wallace filed an affidavit as follows:

Daniel T. Wallace being first duly sworn, deposes and says; My name is Daniel T. Wallace, and I am the identical person who on the 10th day of February, 1891, made desert land entry No. 619, at the U. S. Land Office at Independence, California, which said entry embraces the [description of land in controversy].

That affiant never filed or caused to be filed in the U. S. Land Office at Independence, Cal., any notice of his intention to make final proof of the reclamation of said tract of land; that affiant never signed any such notice nor caused the same to be signed, and that such notice bearing affiant's signature thereto was signed by some person other than affiant and without affiant's authority or permission.

That affiant received no notice or information of the time or place of making final proof herein until the 20th day of October, 1893, on which day affiant received a letter from S. B. Wallace, dated and postmarked at Bishop, Cal., and addressed to affiant at "Midas, Nev.," which last mentioned place is more than two hundred miles from the U. S. Land Office at Independence, California; That affiant received said letter at his ranch, which is twenty-five miles further from said land office than the distance above stated.

That affiant is not now prepared to make said final proof, nor to prove the reclamation of said tract of land, and therefore prays that all proceedings heretofore had as to said final proof herein, be dismissed until such time as the same may be made after legal notice by affiant and claimant herein.

Wheaton filed an affidavit protesting against allowing the entryman to make proof at any other time, and alleging that Daniel T. Wallace and Samuel B. Wallace on May 31, 1893, entered into a written agreement, by the terms of which Daniel T. Wallace was to make final proof and receive final certificate for the benefit of Samuel B. Wallace.

The affidavit was accompanied by a copy of the alleged agreement.

Wheaton also on the same day, but at different hours, filed two affidavits executed that day by Samuel B. Wallace.

In the first he states that he was the authorized agent of Daniel T. Wallace in Inyo county. That S. B. Wallace and D. T. Wallace entered into an agreement by which S. B. Wallace was authorized to do all necessary things preparatory for the submission of final proof for the lands embraced in D. E. No. 619, so that D. T. Wallace could come from his home in Nevada and make final proof without delay. That the copy of the agreement attached to the affidavit of Wesley J. Wheaton is a correct copy of the original agreement. That at the instance of D. T. Wallace said S. B. Wallace caused notice of said final proof to be published, said proof to be submitted on October 28, 1893. That D. T. Wallace appeared with his witnesses at the time named, but when confronted with a protest refused to proceed with his final proof.

In the second affidavit he states that on said 28th day of October, 1893, D. T. Wallace did not even have the right to the use of sufficient water to irrigate said land, and does not now own or have such water or water-right, and that the water conducted upon the land belonged to affiant. That after the water had been run upon the premises,

affiant transferred to said Daniel certain stock in the Owens River Canal Company, and that said Daniel T. Wallace gave him bond and security for the return of said stock, after making his final proof.

The following letter in reference to the agreement is in evidence:

AUSTIN, NEV., *September the 18th, 1893.*

Mr. BION WALLACE, *Bishop.*

SIR: I have been waiting for some time expecting to hear from you in regard to proving up on that land. I am ready at any time to come down and do my part towards it, and would like to know whether you have got the land in shape so that it can be proved up on or not, and what you intend to do in regard to it. You know that the agreement was that it should be ready in August for me to do my share. Now, sir, I either want you to be ready soon for me to prove up on it, or else send me part of the money that is coming to me on it, so that I will know that you intend to keep your agreement with me in regard to it. Now let me hear from you in regard to it soon, for if I don't I shall have to come down there and see what I can do in regard to it myself.

Yours in haste,

(Signed) D. T. WALLACE.

Wheaton also on October 30, 1893, filed an uncorroborated affidavit of contest against the entry, alleging on information and belief

that the said Daniel T. Wallace at or before the date of said filing upon said lands made and entered into an agreement for the sale of said lands as soon as he obtained patent therefor, and that said entry was not made in good faith but was made and is now held for speculative purposes.

The local officers on November 11, 1893, granted the entryman's request to dismiss the proceedings in regard to the submission of final proof, and dismissed the protest on the holding that the entryman may offer final proof at any time within the lifetime of the entry. Wheaton appealed from said decision to your office.

During the pendency of the appeal the entryman, on December 20, 1893, gave notice of intention to make final proof, whereupon the local officers set February 5, 1894, as the date for receiving proof. At the appointed time the entryman appeared and submitted his proof, consisting of the testimony of himself and John Schober and William G. Dixon, two of the witnesses named in his notice to make proof, and the certificate of said William G. Dixon, as secretary of said Owens River Canal Company, to the effect that the entryman is the owner of sixteen shares of the capital stock of the Owens River Canal Company, entitling him to the use of one hundred and sixty inches of water measured under a four inch pressure from the canal of said company. Wheaton also appeared and protested against the reception of the final proof, but did not cross-examine the entryman and his witnesses, although he was advised by the local officers of his right of cross-examination. Wallace offered to make payment for the land, but the local officers refused to receive the money, and on the same day reported the facts to your office, stating that they will hold the final proof to await the disposition of contestant's appeal from their office decision of November 11, 1893, dismissing his former protest, and also to await the determi-

nation of the contest, should a hearing be ordered on the contest affidavit filed by Wheaton, October 30, 1893. April 21, 1894, your office considered Wheaton's appeal, and affirmed the decision of the local officers dismissing his protest, and also affirmed their action of February 5, 1894, holding the entryman's final proof subject to the contest proceedings. No comment was made in said decision on Wheaton's failure to cross-examine the entryman and his final proof witnesses and to fully present his case at the time of the submission of the final proof. The decision directed the local officers to allow Wheaton to proceed against the entry on his affidavit of contest of October 30, 1893, if they consider the allegations sufficient.

June 28, 1894, Wheaton filed an amended affidavit of contest alleging that the said entry is fraudulent and illegal because the said Daniel T. Wallace at or before the date of the said filing upon said land, made and entered into an agreement for the sale of said land as soon as he should obtain patent therefor; that said entry was not made in good faith but was made in the interest of another party, and is now held for speculative purposes.

This affidavit was corroborated by Samuel B. Wallace.

September 14, 1894, the local officers issued notice of contest setting the hearing for October 30, 1894. After several continuances had upon the agreement of the parties the case went to trial December 15, 1894. The contestant introduced only one witness, Samuel B. Wallace, to prove his allegations against the validity of the entry, while the defendant offered no testimony at all.

Samuel B. Wallace testified that on May 4, 1888, he made desert land entry for the tract in controversy together with one hundred and twenty acres of adjoining land under the name of Bion S. Wallace, and that on February 10, 1891, shortly before the expiration of the time within which he was by law required to make final proof he relinquished his entry for the reason that he had been unable to obtain water to irrigate the land; that prior to his relinquishment he induced Daniel T. Wallace to agree to make entry for the land immediately upon his relinquishment; that he went to the land office in company with Daniel T. Wallace and filed his relinquishment and furnished the money to pay the land office fees for Daniel T. Wallace's entry. He further testified on direct examination that he had an understanding with Daniel T. Wallace at the date of the entry that he was to receive one-half of the land after final proof, for which he was to give his nine shares of stock in the Owens River Canal Company, but that this understanding was never reduced to writing, and that in 1893, he entered into a written agreement with the entryman by the terms of which he was to do all the work required by law to be done on the land, and to pay for advertising the final proof notice, and to pay \$780 after final proof for a title to all of the land. On cross-examination, he contradicted his statement that he had had an understanding with Daniel T. Wallace at the date of the entry for the conveyance of

one-half of the land; and testified that he did not have such an understanding until after the entry was made. He further testified that he did the work required to be done on the land and paid for advertising first final proof notice; that he, on October 28, 1893, or a few days before that date, transferred to Daniel T. Wallace nine shares of stock in the Owens River Canal Company, but that he took a bond from the entryman for a reconveyance of the stock and that the transfer was not made in good faith, but solely for the purpose of enabling the entryman to make a satisfactory showing on final proof that he had a right to sufficient water to irrigate the land; that Daniel T. Wallace reconveyed the stock to him about December 3, 1893; that he did not induce Wheaton to bring the contest, but that he expected to acquire title to the land under his written agreement with the entryman, and that he had the money (\$320) ready to make final payment to the local officers in case the final proof should be accepted. No copy of the contract alleged to have been entered into between the witness and the entryman on May 31, 1893, was offered in evidence, but on January 9, 1895, after the hearing had been closed, the contestant without notice to the entryman filed a certified copy of the complaint in an action brought by D. T. Wallace against S. B. Wallace in the district court for the State of Nevada in and for the county of Lander, to recover damages for the breach of the alleged contract, which is set out in the complaint.

February 23, 1895, the local officers rendered decision as follows, after making a statement of the facts:

From the testimony presented it appears that the said Daniel T. Wallace at or before the date of the said filing upon the said lands, made and entered into an agreement for the sale of said lands as soon as he should obtain patent therefor, and that said entry was not made in good faith but was made in the interest of another party and is held for speculative purposes. We accordingly recommend that said entry be canceled.

On the entryman's appeal your office on October 10, 1895, rendered decision finding that the entryman made the entry in good faith, and without any agreement or understanding to convey any part of the land to Samuel B. Wallace; that at the date of the final proof he had a clear right to sufficient water to irrigate the land; that he made the final proof to acquire title for his own use and benefit and without any intention to convey the land to any other party; and that on May 31, 1893, he entered into an agreement to convey the land to Samuel B. Wallace after final proof in consideration of certain work to be done and money to be paid by him, but that said Samuel B. Wallace refused to keep his part of the agreement and did not expect the land to be conveyed to him. On this finding, your office held that the agreement to convey the land was a valid assignment of the entry under section 7 of the desert land act, as said act is amended by section 2 of the act of March 3, 1891 (26 Stat., 1095) and affords no ground for the can-

cellation of the entry. The decision of the local officers was therefore reversed and the contest dismissed.

Wheaton's appeal from said decision brings the case before the Department.

The contestant has failed to prove that the entryman had entered the land under any agreement or understanding to convey any part of the land to Samuel B. Wallace, or that he entered into the particular agreement alleged to have been made May 31, 1893. With reference to any written agreement, all that is proved in accordance with the rules of evidence, is that such agreement was entered into between the parties. The agreement itself was not offered in evidence. It was not shown that any effort was made to have it produced, and no foundation was laid to authorize the introduction of a copy or to allow its contents to be shown by parol evidence. If there is any record of the agreement, the fact does not appear. The paper which is denominated a certified copy of the agreement, which is found with the record, is not a certified copy of the agreement, but the certificate is to the effect that the paper is a true and correct copy of a complaint in the clerk's office. This paper was inadmissible, and is not in a legal sense a part of the record. It was filed with the local officers, without notice to the other side, after the case had closed. It does not appear what consideration was given to it by the local officers. Your office construed it, but it is harmless, since, if it were to be considered as evidence, its terms show that it has reference to a transfer to be made after final proof, and was entered into at a time when it would not have been unlawful to make an assignment of the entry under section seven of the desert land act, as amended by the act of March 3, 1891 (26 Stat., 1095).

It has never been carried into effect. S. B. Wallace, one of the parties to it, and protestant's chief witness, repudiates it and claims nothing under it, while the entryman submits his final proof on an entirely different basis from the one contemplated by the agreement. It is insisted, however, as testified to by S. B. Wallace, that there was an antecedent verbal agreement in reference to certain shares of water stock to be furnished the entrymen, but the witness admits that it was made subsequent to the date of the entry of D. T. Wallace, and this being conceded, it could only have reference to acts thereafter to be performed, and which were abandoned and never performed. If D. T. Wallace had carried out the scheme of submitting his final proof on a false basis, it would have been rejected, and his entry canceled.

The mental state, or mere purpose of an entryman, is only to be considered in connection with some material act to be performed by him, either in making the entry or perfecting it. A fraudulent agreement to be acted on in the future, entered into before or at the time of entry will vitiate it, because the illegal purpose and the act of entry are conjoined and coexistent. The contestant is in the attitude of denying that

an illegal purpose or scheme which has reference to a future act to be performed can be abandoned before it ripens into an act, and its consequences avoided. This may be true to a limited extent in the domain of morals, but, in law, the mere entertaining of an unlawful purpose, which is abandoned, while it is yet only a purpose, and never acted upon, is without penalty. The illegal purpose which the contestant charges against the entryman had its origin between the two material acts of making entry and offering final proof. We have already seen that the entry is untainted, and it now remains to be seen how it affects the final proof.

The offense of the entryman is that at one time he contemplated basing his final proof on the spurious ownership of certain water rights, but becoming alarmed, backed out from doing this, and became the owner in his own right of the necessary water and water rights on which he submitted his final proof. It is not denied that the land was reclaimed, and that the entryman was the owner of the water and water rights necessary for its proper irrigation, when his final proof was submitted. This proof meets the requirements of the law.

Your office decision is accordingly affirmed.

SCHOOL LANDS—INDEMNITY SELECTION—APPROVAL.

TODD v. STATE OF WASHINGTON.

The authority of the Secretary of the Treasury in the matter of school lands conferred by the act of May 20, 1826, was transferred to the Secretary of the Interior by the act organizing the Interior Department.

The approval of a school indemnity selection by the Secretary of the Interior passes the title thereto, and, in contemplation of law, makes such selection the act of the Secretary, and it is thereafter not material to inquire how such selection was made in the first instance.

The provisions contained in sections 10, and 11, of the act of February 22, 1889, in so far as in conflict with sections 2275 and 2276, R. S., are superseded by the act of February 28, 1891, amending said sections.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897.
(I. H. L.) (C. J. G.)

Thomas W. Todd has appealed from your office decision of September 23, 1895, sustaining the action of the local officers in rejecting his homestead application of August 5, 1895, for the NE. $\frac{1}{4}$ of Sec. 9, T. 38 N., R. 2 E., W. M., Seattle land district, Washington.

The ground for such action was that the said tract was not public land of the United States, the same being included in list No. 1 of school indemnity selections approved May 4, 1895, and certified to the State of Washington, and therefore not subject to homestead entry.

It would seem that the said selection was regular and valid notwithstanding the contention of the appellant to the contrary.

The appeal urges that the said selections are invalid for the following reasons:

1. The county commissioners were not authorized to select land in lieu of deficiencies for natural causes.
2. Because Washington was not entitled to indemnity on the basis employed.
3. Because the township in which this land was selected was not entitled to the amount selected.
4. Because the act of February 22, 1889, repealed the acts reserving said land, so far as they apply to Washington.
5. Because the act of February 22, 1889, has provided school lands for the State, and the manner in which she may acquire them.
6. Because the cause for the reservation of the land has ceased to exist.

It will not be necessary for the purposes of this decision to consider the foregoing assignments in regular order.

Section 20 of the act of March 2, 1853 (10 Stat., 172), establishing the territorial government of Washington, provides—

That when the lands in said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory. And in all cases where said sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof, the county commissioners of the counties in which said sections so occupied as aforesaid are situated, be, and they are hereby, authorized to locate other lands to an equal amount in sections, or fractional sections, as the case may be, within their respective counties, in lieu of said sections so occupied as aforesaid.

The act of February 26, 1859 (11 Stat., 385), authorized the settlers on sections sixteen and thirty-six, provided for in the above act, to pre-empt their settlement claims; and if said sections happened to be reserved or pledged for the use of schools, other lands were appropriated in lieu of such as might be patented by pre-emptors, the said lands to be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of May 20, 1826 (4 Stat., 179). The latter act provides that the selections shall be made by the Secretary of the Treasury; hence, the appellant contends that there is no authority under the act of February 26, 1859, for the said selections to be made by the county commissioners, they not being specifically mentioned as in the act of March 2, 1853.

The Department of the Interior was created by the act of Congress approved March 3, 1849 (9 Stat., 395). Section three of said act provides—

That the Secretary of the Interior shall perform all the duties in relation to the General Land Office, of supervision and appeal, now discharged by the Secretary of the Treasury.

In section 441 of the Revised Statutes the Secretary of the Interior is charged with the supervision of public business relating to the public lands.

Hence, all the powers relating to the public lands conferred upon the Secretary of the Treasury by the act of May 20, 1826, were transferred to the Secretary of the Interior by the act of March 2, 1849, organizing the Department. So, granting that the selections herein should be made in accordance with the provisions of the act of 1826, as contended by plaintiff, yet, by virtue of the organic act of 1849, as embodied in said section 441 of the Revised Statutes, the said selections could be made by the Secretary of the Interior, and still be in accordance with the provisions of the act of 1826. Notwithstanding no specific mention is made of the county commissioners in the act of 1859, still the power to make the selections remains with the Secretary of the Interior by virtue of legislation subsequent to the act of 1826. So long, therefore, as they are made under the authority and approval of the Secretary of the Interior it matters not how they were made in the first instance. When approved by the Secretary of the Interior they under the law become his selections. The fact that the selections were made in the first instance by the county commissioners, does not on that account invalidate them. The approval of the selections is the act that passes title, and as has been shown the Secretary of the Interior possesses the authority to make this approval.

Nearly all other propositions contained in the assignment of errors were definitely decided in the case of *Daly v. State of Washington* (20 L. D., 35). It was held in that case that a selection is not necessarily invalid though in excess of the basis on which it is made, for the reason that the excess was undoubtedly in compensation for a deficiency in some other selection embraced in the list; that the act of February 26, 1859, is applicable to the State of Washington, as previously held in the cases of *John W. Bailey et al.* (5 L. D., 216), *Hulda M. Smith* (11 L. D., 382), and *Sharpstein v. State of Washington* (13 L. D., 378); and that the reservation created by the act of March 2, 1853, is not released by the enabling act of February 22, 1889 (25 Stat., 676), as held in the case of *L. H. Wheeler* (11 L. D., 381). See also cases of *Levi Jerome et al.* (12 L. D., 165), and *Sharpstein v. State of Washington* (*supra*).

A lengthy argument is filed by the appellant in support of the errors assigned, and especially in an endeavor to show that the act of February 26, 1859 (R. S. 2275 and 2276), was repealed by the act of February 22, 1889. The act of February 26, 1859, was a general act, and the apparent conflict between said act and sections 10 and 11 of the act of February 22, 1889, has been recognized by the Department, and it has been held that the provisions contained in sections 10 and 11 of the last mentioned act are superseded by the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes. Thus, in the instructions to your office dated April 22, 1891 (12 L. D., 400), it was stated

that the provisions of the prior act of February 22, 1889, in so far as they are in conflict with those of said sections 2275 and 2276 of the Revised Statutes as amended

by the later act of February 28, 1891, are superseded by the provisions of said sections as amended, and the grants of school lands to those States mentioned in said act of February 22, 1889, are to be administered and adjusted under the provisions of this later general law.

The appellant herein makes no allegation of settlement prior to the survey of lands in the field, which would bring him within the provisions of sections 2275 and 2276 as amended. His homestead application was presented August 5, 1895, and hence was properly rejected, the land having been approved to the State May 4, 1895.

Your office decision is hereby affirmed.

PRIVATE LAND CLAIM—ACT OF JULY 7, 1838.

THE PERRINE GRANT.

The grant made to Dr. Perrine by the act of July 7, 1838, and subsequently conferred by Congress upon his heirs, was a grant *in praesenti*, conveying the legal title to the grantees, defeasible only by forfeiture duly declared by act of Congress; and until such forfeiture be so declared the grantees have the right to make the settlement required as a condition precedent to the issue of patent.

Where the attention of Congress has been called to the fact that the conditions subsequent in a grant have not been complied with, and no action is taken by Congress, such failure to act will be taken by the Department as an expression of the legislative will that the decisions of the courts be accepted as a guide in administering the law.

The right of settlement on the granted premises is restricted to the grantees or those claiming under them, and all other settlers thereon are naked trespassers; and their settlements may be claimed by the grantees as a fulfillment of the conditions of the grant, whenever the settlement is such as the grant requires.

If the terms of the grant are complied with it inures to the beneficiaries thereunder, and patent will issue accordingly; it is therefore not material for the government to inquire as to the interest of others in said grant.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (P. J. C.)

I am in receipt of your report, of date January 9, 1897, upon a communication addressed to this Department by the Honorable Thomas H. Carter, United States Senate, of date December 31, 1896, in reference to the Perrine grant in Dade county in the State of Florida.

The communication is as follows:

Referring to your recent communication concerning the Perrine land grant in Fla., addressed to the Senate Committee on Public Lands I, as chairman of the sub-committee having the matter in charge have been informed that proofs of compliance with the terms of the grant are now before the Commissioner of the General Land Office awaiting examination.

Desiring to dispose of the matter, I have the honor to request that the proofs referred to be taken up for examination at the earliest practicable date and that I be advised of the conclusion of your Department as to their sufficiency.

The subject of this inquiry, the Perrine grant, is a matter that has

been called to the attention of your office and the Department by those interested since the first grant to Doctor Henry Perrine in 1838. Its history, together with that of the original grantee, is replete with incidents in connection with the early settlements of South Florida and endeavors to cultivate and propagate the plants contemplated by the act, together with many distressing incidents brought about by the Seminole Indian War, which prevailed throughout that region for nearly a quarter of a century after the territory had been purchased from Spain. The history of it, so far as necessary to determine the matter that has been again recently brought to the attention of the Department, is as follows:

Congress by act of July 7, 1838 (5 Stat., 302), passed the following act:

Whereas in obedience to the Treasury circular of the 6th of September, eighteen hundred and twenty-seven, Doctor Henry Perrine, late American Consul at Campeachy, has distinguished himself by his persevering exertions to introduce tropical plants into the United States; and whereas he has demonstrated the existence of a tropical climate in southern Florida, and has shown the consequent certainty of the immediate domestication of tropical plants in tropical Florida, and the great probability of their gradual acclimation throughout all our southern and south-western states, especially of such profitable plants as propagate themselves on the poorest soils; and whereas, if the enterprise should be successful, it will render valuable our hitherto worthless soils, by covering them with a dense population of small cultivators and family manufacturers, and will thus promote the peace, prosperity, and permanency of the Union: Therefore, be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that a township of land is hereby granted to Doctor Henry Perrine and his associates, in the southern extremity of the peninsula of east Florida, to be located in one body of six miles square, upon any portion of the public lands below twenty-six degrees north latitude.

SEC. 2. And be it further enacted, that the said tract of land shall be located within *two years* from this date, by said Henry Perrine, and shall be surveyed under his direction, by the surveyor of Florida, provided, that it shall not embrace any land having sufficient quantities of naval timber to be reserved to the United States, nor any site for maritime ports or cities.

SEC. 3. And be it further enacted, that whenever any section of land in said tract, shall be really occupied by a *bona fide* settler, actually engaged in the propagation or cultivation of valuable tropical plants, and upon proof thereof being made to the Commissioner of the General Land Office, a patent shall issue to the said Henry Perrine and his associates.

SEC. 4. And be it further enacted, that every section of land in the tract aforesaid, which shall not be occupied by an actual settler, positively engaged in the propagation or cultivation of useful tropical plants, within eight years from the location of said tract, or when the said adjacent territory shall be surveyed and offered for sale, shall be forfeited to the United States.

It is shown by the voluminous correspondence of Doctor Perrine, after the passage of this act and until some time in the year 1840, that although the obstacles he was forced to encounter in order to carry out the terms of the grant were almost insurmountable, he did make an effort so to do, moved his family there and resided upon the land that he had selected in compliance with this act. It is shown by the same correspondence that he planted some of the plants that were contem-

plated, but owing to the unsettled conditions, marauding bands of Indians infesting the country, the efforts were confined to a very small area, upon which it seems he started a nursery for the purpose of producing the plants that he intended experimenting with. While engaged in this work at Indian Key, some time in the summer of 1840, Doctor Perrine was murdered by the Seminole Indians, his wife and children barely escaping with their lives; his house, furniture, library, out buildings, and other valuable improvements were burned and destroyed.

Congress, by the act of February 18, 1841 (6 Stat., 819), passed the following supplemental act:

Whereas, under the provisions of the act, to which this act is a supplement, Doctor Henry Perrine made, in the manner thereby required, the location therein authorized; and while engaged in the necessary measure to carry into effect the object contemplated by said act, was murdered by the Seminole Indians; and whereas Mrs. Ann F. Perrine, the widow of the said Doctor Perrine is anxious to continue the undertaking thus commenced by her late husband, but is prevented from so doing by the continuance of the Indian War in Florida: Therefore, be it enacted, etc., that Mrs. Ann F. Perrine, the widow of the said Henry Perrine, and Sarah Ann Perrine, Hester M. S. Perrine, and Henry E. Perrine, his surviving children, are hereby declared to be entitled to all the rights and privileges vested in and granted to the said Doctor Henry Perrine, by the act to which this is supplement, and that the time limited by said act, in which every section of said grant should be occupied to prevent the forfeiture of the same to the United States, be, and the same is hereby, extended to eight years from and after the time when the present Indian War in Florida shall cease and determine.

The land was officially surveyed in 1847 and the tract theretofore designated by Doctor Perrine in person was set aside for him, and embraces lands described as follows: Sections 12, 13, 24, 25 and 36 T. 55 S., R. 39 E.; Section 1, T. 56 S., R. 39 E.; Sections 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, T. 55 S., R. 40 E.; and Sections 2, 3, 4, 5, and 6, T. 56 S., R. 40 E., Tala. Mer.

It appears that after the passage of the supplemental act the widow and children of Doctor Perrine undertook to carry out the provisions of the same by establishing settlers on each section. Thirty-six families from the Bahama Islands were engaged came over and commenced to establish their homes on the land, but were soon compelled to abandon them by reason of being frightened or driven off by the Seminole Indians.

Some effort, however, was evidently made by these inhabitants, or the heirs directly, to comply with the terms of the act, as I find in the record the affidavits of Alexander Mackay, R. R. Fletcher and William H. Mears, sworn to on April 5, 1848, in which they say that they superintended the planting of "sea sal hemp" and lime seed; each of them enumerate the sections of land upon which this planting was done, and an examination of the same shows that it covered every one of the sections included in the grant.

It appears that the representatives of the heirs in 1850 presented a memorial to Congress praying that the terms of the grant be extended

owing to the unsettled conditions that then prevailed in that vicinity. No action, however, seems to have been taken by Congress in relation to the matter.

It is a matter of history that the Seminole War, which was referred to by Congress in the supplemental act, was one of long duration and seriously retarded the settlement of that part of the country. It appears, however, by the records in the War Department, that open hostilities officially ceased in December, 1855; yet it is certain that there were marauding bands still harassing the settlers for some time thereafter.

From 1862 down to the present time the heirs of Doctor Perrine have been before your office, the Department and Congress, persistently demanding that their rights to the grant should be recognized; but little seems to have been accomplished in the matter except by reports made from your office to Congress in relation to the status; and in that of March 17, 1887, your office recommended that patents be issued to three sections named, because proof had been made of compliance with the act.

It appears that the land embraced in the grant was regularly withdrawn and set apart under the provisions of said act of 1838, and although there had not been a strict compliance with its terms by the heirs of Doctor Perrine, and proof made as required, yet the lands had been held not subject to disposal on any account until Congress shall have given authority to restore the same to the public domain.

The State of Florida at one time laid claim to the land under the swamp act of 1850, and in 1873 made selection of the same, but in view of the priority of the Perrine grant these selections were suspended by your office and no steps taken in relation thereto until the rights of the grantees were fully determined.

The inquiry of Senator Carter, quoted above, in relation to this grant, seems to have been brought about because of the introduction of a bill in the first session of the fifty-fourth Congress to restore to the public domain in the lands within the grant, to enable settlers within the limits of the same to homestead the tracts actually occupied by them.

The report of your office has been forwarded to the Department, by reason of the request of Senator Carter, together with all the records in connection with the matter, and it has been deemed advisable to investigate the subject with a view of determining whether or not any further legislation is required or whether the parties have complied with the terms of the grant sufficiently to warrant the issuance of patents to them.

After mature deliberation upon this subject, I am convinced that the grant to Doctor Henry Perrine, subsequently conferred as it was by the act of Congress upon his heirs, was a grant *in praesenti*, conveying the legal title to the grantee, defeasible only by forfeiture duly declared by act of Congress. Until such forfeiture be so declared the grantee

has the right to make the settlement required by the grant as a condition precedent to the issuance of patent, as contemplated by the acts of Congress, and whenever the requirements of the grant have been complied with as to any section of the township, and proofs thereof submitted and accepted, a right to title thereto has vested, and Congress can not declare a forfeiture thereof without impairing the validity of the grant.

That the grant is one *in praesenti* is conclusively decided by the supreme court in *Schulenberg v. Harriman* (21 Wall., 44). The question before the court in that case was the construction of an act granting lands to the State of Wisconsin to aid in the construction of railroads, and by the first section it is declared, "that there be and is hereby granted to the State of Wisconsin," etc., certain sections of land enumerated. And it was provided further, in the fourth section, that,

if said road is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States.

Determining whether this grant should be forfeited because the road was not constructed strictly according to the terms of the statute, and referring directly to the last quotation above, the court say:

It is settled law that no one take advantage of the nonperformance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed.

In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement.

The doctrine here announced by the court has been followed by it in a great number of cases subsequently, notably those of *Van Wyck v. Knevals*, 106 U. S., 360; *St. Louis &c., Railway v. McGee* 115 U. S., 469; *Bybee v. Ore. and Cal. R. R. Co.* 139 U. S. 663; *Deseret Salt Co. v. Tarpey*, 142 U. S., 241; and *Lake Superior Ship &c. Co. v. Cunningham*, 155 U. S., 354.

The principle decided in these cases has been invariably applied by the Department in the construction of similar grant. See *Cooper et al. v. Sioux City R. R. Co.*, 1 L. D. 345; *in re Central Pacific R. R. Co.*, 2 L. D., 489; *Wisconsin R. R. Co.*, 5 L. D., 81; *Wisconsin Central R. R. Co.*, 6 L. D., 190; and *Plaetke v. Central R. R. Co.*, 10 L. D., 317.

It has also been decided by the Department that where the attention of Congress has been called to the fact that the conditions subsequent have not been complied with (as in this case by a petition of the grantees in 1850 and again in 1887), and no action is taken by the Congress, the Department accepts its failure to act as an expression of its will that the decisions of the court shall be taken as its guide in administering the law. *Daneri v. Texas and Pacific R. R. Co.*, 2 L. D., 548.

In view of these authorities it would seem that if there has been a compliance with the terms of the act upon the part of the grantees, even though it may have been since the close of the Seminole War, as contemplated by Congress in the supplemental act, the fee of the land still rests in them, and before final action by Congress, or judicial proceedings instituted, patents may be issued to the grantees.

It may be said further, that the right of settlement upon the granted premises would be restricted to the grantees or those claiming under them, and all other settlers thereon are naked trespassers and their settlement may be claimed by the grantees as a fulfillment of the condition of the grant whenever the settlement is such as the grant requires.

It appears that there were a number of settlers on the lands, and in December, 1896, all of them with the exception of John W. Roberts, Sarah M. Roberts, James A. Smith, John F. Roberts and George H. Mehring, made proof before a United States Commissioner, and the same was transmitted to your office. It is not deemed advisable to go into details regarding this proof. Its sufficiency is a matter your office must primarily pass upon, which has not yet been formally done. It is sufficient in this connection to say that in your office letter of January 9, 1897, reporting on reference of letters of Senator Carter, it is said, "the proofs appear to me to be in compliance with the provisions of Sec. 3 of the act of July 7, 1838."

Your office during the month of January, 1897, has forwarded to the Department several letters written by the three Roberts, Mehring and Smith, the persons who, as stated above, refused to make final proof, and one E. I. Robinson, who is acting as attorney for the others. The same parties have also written letters to the Secretary of the Interior; also to a United States Senator, who has forwarded copies of the letters he received to the Department. These letters are not deemed of sufficient importance as bearing upon any question as to the validity of the grant or the improvements placed thereon by themselves or those who did make final proof, to warrant more than a passing consideration.

In your office report to the Department, of January 9, 1897, you refer to the letter of Robinson and say:

I think no showing is made by the said letter which would warrant the sending of an inspector to Florida, or which would raise any presumption of bad faith against the claimants under the grant.

I concur in this. The statements are not under oath, and can not

therefore be accepted to overcome the final proof. Aside from this there is nothing charged, even if sworn to, that would defeat the grant or warrant sending an inspector. The parties do not state that there has been any failure to comply with the terms of the grant in regard to the particular tracts they occupy.

The particular grievance of these persons seems to be against certain railway companies which appear to have been instrumental to some extent in the development of the lands. It is not shown by the record before me what interest the companies have in this land, and it is wholly immaterial what their interest may be. If the terms of the grant are complied with, even if railway companies have assisted in doing so, the grant inures to the beneficiaries under the grant, and the patents will necessarily run to them. Any grievances, therefore, the settlers may have against the companies is a matter between themselves and not one the government will take part in.

These same parties have also forwarded a copy of an affidavit sent to the vice president of the East Coast Railway Company in which is recited at some length their grievances. But as said in reference to the letters, the matters therein contained do not raise any question the government can consider.

There is also a copy of another affidavit made by the same parties, not addressed to any one, but inasmuch as it says,

that if a government inspector authorized to take depositions of settlers and thoroughly honest should come down here he would be kept busy a long time investigating injuries to the settlers and frauds against the government,

I take it that it was meant for your office, yet why a copy and not the original should have been filed is unexplained. In addition to this suggestion in regard to sending an inspector it appears that all they ask is for the government to arrange so that they can deal directly with the government in regard to securing their titles.

As before said the Department is powerless to aid them even if the matter were properly presented for its consideration. By the terms of the grant patents must issue in accordance with the terms of the acts and could not be given either to the settlers or the railway companies.

The record is returned to your office with directions to examine the final proof submitted and if found satisfactory to issue patents to the beneficiaries of said grant.

It is so ordered.

SALT SPRINGS AND SALINE LANDS—SELECTION.

STATE OF OREGON ET AL. v. JONES.

The provisions in the act of February 14, 1859, granting salt springs and adjacent lands to the State of Oregon, and the act of December 17, 1860, amendatory thereof, so far as they fix a time for selections under said grant, are directory, and not mandatory; but as the grant so made only becomes effective as to specific tracts on selection by the State, the right to make such selections after the expiration of the time fixed therefor will be defeated by an intervening adverse right asserted under the general provisions made for the disposal of saline lands by the act of January 12, 1877.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897. (I. H. L.) (C. J. W.)

On September 11, 1895, David R. Jones filed an affidavit duly corroborated, alleging that the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 4 and NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 9, SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 8 and NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 17, T. 35 N., R. 25 E., W. M., Lakeview, Oregon, were lands unfit for cultivation and were saline in character, and should be disposed of as saline lands. On September 25, 1895, proof was submitted in support of said allegations, and on that day, based on the evidence so submitted, the local officers rendered a joint decision, finding the land to be saline in character and recommending its sale.

By letter "C" of date November 23, 1895, your office ordered said land to be advertised and offered for sale, in accordance with the provisions of the act of January 12, 1877 (19 Stat., 221). The land was advertised in accordance with departmental regulations and was sold on February 21, 1895 to David R. Jones, who was the highest and best bidder, and cash certificates Nos. 1867 and 1868 were issued covering said purchases. Subsequently J. K. Barry, who was present and a competitive bidder at said sale, filed a protest against the issuing of patents to Jones on his cash entries, and asking that said sales be set aside and declared void, and that no more lands in Oregon be sold under said act of 1877, until salt springs and contiguous lands granted to the State for its use by act of Congress of February 14, 1859 (11 Stat., 384), have been selected by the governor thereof to the extent named in the grant. On April 21, 1896, your office considered the report of the local officers, touching said sale and Barry's protest, and held that the sale of the lands was authorized by said act of January 12, 1877; that the proceedings connected with said sale were regular and that Jones was entitled to patents for the tracts sold. It was further held that Barry had no right or interest to be considered, and as he exhibited no authority to represent the State of Oregon, he had no right to intervene and his protest should be dismissed.

From this decision Barry appealed. Pending said appeal, but before the papers in the case were transmitted here, the governor of Oregon transmitted to your office an application to select the same lands included

in the sale to Jones, under the aforesaid act of February 14, 1859, which application was transmitted here by your office as a part of the record in said case. W. K. Barry filed his protest, but neither he nor his counsel exhibited any authority to represent the State of Oregon up to the time your office decision was rendered. Since the application of the governor to make selection of the land in question has been filed, the attorney who filed the protest, has also filed authority to represent the State, so that the State may now be considered as a proper party to the case and as properly represented. While your office properly held Barry's protest for dismissal as the record then stood, as the State now makes the protest its own by adoption, Barry's right to file and maintain it becomes inconsequent, and need not be further considered, inasmuch as said protest asserts the right of the State to be paramount. The application of the governor of Oregon to make selection of the land included in Jones' purchase is met by a protest filed by Jones in the form of a motion to reject the list of selections. The contentions thus presented call for an interpretation of the acts of February, 1859 (11 Stat., 384), of December 17, 1860 (12 Stat., 124) and of January 12, 1877 (19 Stat., 221). The contention of the State is that the provisions in the first named acts, as to the time within which the State shall make its selections, are directory and not mandatory, and therefore until the claim of the State is first satisfied, sales of saline lands under the act of January 12, 1877, are made subject to the existing prior right of the State to select such land under its grant.

The correctness of this contention is denied by Jones. Some of the questions presented by the present record and contentions were considered here in the somewhat similar case of State of Colorado, *ex parte* (10 L. D., 222), and the ruling in that case as far as the same is applicable to the present one will be followed. It is to be observed, however, that individual rights were not in issue in that case, and it is stated in the body of the decision,

Had third parties intervened prior to the selection and initiated proceedings under the act of 1877 touching the lands in question, the right of the State thereto might have been lost.

Here Jones initiated proceedings under the act of January 12, 1877; proved the lands to be saline in character; had become the purchaser of them; and had paid the purchase price to the government, before the State made any motion to select these lands under its grant. In the Colorado case, it was held, that the act of January 12, 1877, did not repeal the earlier act making the grant to the State, and that the two acts might stand together, each having a separate field in which to operate, and providing different methods of acquiring title to saline lands.

The act making the grant to Colorado was as follows:

That all salt springs, within said State, not exceeding twelve in number, with six sections of land adjoining, and as contiguous as may be to each, shall be granted to

said State for its use, the said land to be selected by the governor of said State within two years after the admission of the State, and when so selected to be used and disposed of on such terms, conditions and regulations as the legislature shall direct; *Provided*, That no salt spring or lands the right whereof is now vested in any individual or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall by this act be granted to said State.

The language of the act under consideration, granting salt springs to the State of Oregon, is in the same terms as the Colorado grant, except that the selection is to be made in one year after the admission of the State instead of two years as in the Colorado act. The act of 17th of December, 1860 (12 Stat., 124), amending this act, amends it only in the matter of time within which the selection is to be made, by extending it to any time within three years from the passage of the amendatory act. It appears therefore that the language to be construed in order to determine the character of the grant is the same in both grants referred to. As it was held in the Colorado case that the provision in reference to the time within which the selection should be made was directory, and that a failure to make such selection within that time would not of itself work a forfeiture of the grant, a different construction of this clause of the act can not now be given without overruling said decision, and no sufficient reason for doing this appears.

The act of February 14, 1859 (11 Stat., 334) took effect on its approval, and was a grant to the State of certain salt springs and lands in connection therewith, thereafter to be selected by the governor. The grant operated to pass the title to a certain number of salt springs and the prescribed amount of lands in connection with each, from the government; but it did not and could not attach to any specific salt springs or sections of land until selection was made. The act does not in any way limit the power of Congress to provide other methods of disposing of lands of the class contemplated, so long as the same remain unselected. Congress had the power to pass the act of January 12, 1877, and as the act of February 14, 1859, is not repealed or affected by it, effect should be given to both acts as far as may be.

We here have, therefore, a case where one of the principles announced in the case of *Shepley et al. v. Cowen et al.* (91 U. S., 330) is applicable. That is we have two modes of acquiring title to saline lands, both of which may stand. The rule announced in the case referred to, is that in a particular case, where two modes exist of acquiring title from the government, the one will prevail under which the first initiatory step was taken. Here the first step was taken under the act of January 12, 1877, and by Jones.

In support of the contention that title passed to the State of Oregon, to the particular land in question, on the approval of the act of February 14, 1859, the special report in reference to compromise and settlement between the United States and the State of Arkansas, No. 1958, is referred to as an official admission of the correctness of the construction contended for in this case. This report is not authority for the prin-

ciple insisted upon. It is nowhere conceded that the government had parted with the title to saline lands by its original granting act of salt springs to the State of Arkansas, and the very fact that the settlement recommended was recommended as a compromise only, deprives it of value as a judicial precedent. It is a mere recommendation of terms of compromise, which have not yet been approved by Congress. The construction of the act contended for by the State does not seem to be in harmony with the following *proviso* of the act:

Provided, that no salt spring or land, the right whereof is now vested in any individual or individuals, or which may hereafter be confirmed or adjudged to any individual or individuals shall by this article be granted to said State.

After due consideration of the several acts of Congress referred to, and the authorities cited, my conclusions are:

1. That the doctrine announced in the Colorado case, *supra*, construing a similar act to the one here in question to the effect that the provisions of said act relative to the time within which selections of salt springs are to be made by the State, are directory and not mandatory, will be adhered to.

2. That the grant becomes operative, in the sense of attaching to specific lands, only on selection by the State. (139 U. S., 1-5).

3. That the application of the State to make selection of the lands purchased by Jones should be rejected, because his right attached before it made the application, but the right of the State to make selection of any unappropriated saline lands in said State in satisfaction of its grant is recognized.

Your office decision is affirmed.

RAILROAD GRANT—SECTION 2, ACT OF APRIL 21, 1876.

GOODRICH v. CALIFORNIA AND OREGON LAND CO.

The provisions of section 2, act of April 21, 1876, are not restricted to persons who made entries under section 1, of said act, but apply, in the event of abandonment by such original entrymen, to cases where "under the decisions and rulings of the Land Department," the lands covered by such original entries have been "re-entered by pre-emption or homestead claimants who have complied with the laws governing pre-emption and homestead entries," and submitted satisfactory proof of such compliance.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897.
(I. H. L.) (E. M. R.)

This case involved the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 9, T. 30 S., R. 46 E., Lake View land district, Oregon, and is before the Department upon appeal, by the California and Oregon Land Company, from your office decision of October 21, 1895, awarding the tract in controversy to Amelia Goodrich.

The record shows that this tract is within the primary limits of the grant made by the act of July 2, 1864 (13 Stat., 355), to aid in the construction of the Oregon Central Military Road, as shown by the withdrawal made on account thereof on May 2, 1876. Two maps showing the definite location of this road were filed in the Department—one on March 17, 1869, and the other on February 28, 1870.

This tract was listed on August 23, 1883, by the California and Oregon Land Company, successor in interest to the aforesaid road company.

April 15, 1874, A. C. Goodrich filed declaratory statement for the tract in controversy, alleging settlement on July 1, 1873. May 2, 1889, Amelia Goodrich filed declaratory statement for the same tract, alleging settlement on November 18, 1888. After notice given, proof was made by the said Amelia Goodrich, and final certificate was issued January 7, 1891.

The land in question was withdrawn by your office letter of date April 15, 1876, which was received on May 2, 1876, upon which date the withdrawal became effective. At that date this tract was covered by the declaratory statement of A. C. Goodrich.

Your office decision held that this entry was confirmed under the second section of the act of April 21, 1876 (19 Stat., 35), which is as follows:

That when at the time of such withdrawal as aforesaid valid pre-emption or homestead claims existed upon any lands within the limits of any such grants which afterward were abandoned, and, under the decisions and rulings of the Land Department, were re-entered by pre-emption or homestead claimants who have complied with the laws governing pre-emption or homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto.

In the argument filed by counsel for the California and Oregon Land Company it is urged that the confirmatory provisions of the act of April 21, 1876, were intended solely for the benefit of the individual claimants who had abandoned such entries, and to sustain that proposition reference is made to the case of the Northern Pacific Railroad Company (20 L. D., 191), wherein it was held (syllabus):

The confirmation of entries under section 1, act of April 21, 1876, is solely for the benefit of the individual claimant, conditioned upon his compliance with law, and was not intended to confirm the entry absolutely, as against the right of the company, so as to except the land from the grant in favor of any other settler.

That case does not sustain the contention of counsel. The ruling therein laid down applies only to section 1. The second section of the act was not involved, and was not considered in that case.

The case at bar seems clearly to come within the provisions of the second section. That section provides "that when at the time of such withdrawal" (referring to the withdrawal mentioned in section one) pre-emption or homestead claims existed, which were afterwards abandoned, and "under the decisions and rulings of the Land Department, were re-entered by pre-emption or homestead claimants who have com-

plied with the laws governing pre-emption or homestead entries, such entries shall be valid, and patents shall issue therefor to the person entitled thereto." It does not say, "were re-entered by the *original* pre-emption or homestead claimants," but "were re-entered by pre-emption or homestead claimant."

In this case Amelia Goodrich made declaratory statement, and submitted proof upon which entry was allowed and final certificate issued. It therefore becomes pertinent to inquire whether her said filing and entry were made "under the decisions and rulings of the Land Department," as provided in said second section.

In the case of the Northern Pacific Railroad Company *v.* Burns, decided July 13, 1887 (6 L. D., 21), it was held (syllabus):

A homestead claim, existing prior to the receipt of notice of withdrawal on general route of the Northern Pacific, excepts the land covered thereby from the operation of said withdrawal.

Such being the law as then declared by the Department, it was immaterial whether the claim subsequently set up was by the original or a new claimant; and this view of the law remained in force and undisturbed until the decision of March 12, 1895, in the case of the Northern Pacific Railroad Company (20 L. D., 191), wherein said decision (*supra*) was specifically overruled.

In this case Amelia Goodrich filed her pre-emption declaratory statement in 1889, and made her proof and final entry before the Burns case was overruled, and during the time when that case was in force as a decision and ruling of the Land Department, and it is therefore clear that such filing and entry were made "under the decisions and rulings of the Land Department." Nor can it be said that the provisions of section two of said act operate solely to confirm entries and filings made prior to its passage, for this question was considered in the case of the Northern Pacific Railroad Company *v.* Symons (22 L. D., 686), wherein it was held (syllabus):

The confirmatory provisions of section 2, act of April 21, 1876, are not limited to entries made prior to the passage of said act, but are equally applicable to entries made thereafter.

See also, to the same effect, Northern Pacific Railroad Company *v.* Crosswhite (20 L. D., 526).

It is therefore held that the provisions of said section two are not restricted to persons who made entries under section one of the act but apply, in the event of abandonment of such original entrymen, to cases where, "under the decisions and rulings of the Land Department," the lands covered by such original entries have been "re-entered by pre-emption or homestead claimants who have complied with the laws governing pre-emption and homestead entries," and satisfactory proofs of such compliance have been submitted.

The appellee here having made her filing and entry "under the decisions and rulings of the Land Department," as shown, and having

furnished the required proofs of her compliance with the law thereunder, her entry is clearly confirmed by the second section of said act, and the decision of your office is therefore affirmed.

SURVEY—APPLICATION OF STATE—ACT OF AUGUST 18, 1894.

STATE OF WASHINGTON.

An application of a State for the survey and reservation of a township under the act of August 18, 1894, must be denied, where, prior to such application, a survey of the township has been ordered for the benefit of settlers.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897. (I. H. L.) (C. J. W.)

On May 28, 1896, application was duly made by the governor of the State of Washington for the survey and reservation, under the act of August 18, 1894 (28 Stat., 394), of certain townships, in the application designated and described.

On June 15, 1896, by letter "E," of that date, your office denied the application on the ground that other parties had applied for the survey of the same townships, and that they were under contract for survey on the applications and petitions of settlers, and were not subject to reservation under the terms of the act of August 18, 1894.

The State appealed from your office decision, alleging the following errors:

1. Error in holding that such lands were not unsurveyed within the meaning of the act referred to.
2. Error in holding that the State was not entitled to have the same surveyed and reserved from adverse claims in pursuance of said act.

Before considering said appeal, on January 7, 1897, your office was requested to report by virtue of what law or statute the applications of the settlers referred to were entertained. The Department is in receipt of your letter "E" of January 9, 1897, in response to said request, which contains the following report:

In reply I have the honor to report that section 453 of the Revised Statutes of the United States provides as follows:

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands."

Section 2218 of the Revised Statutes U. S. further provides as follows:

"The Secretary of the Interior shall take all the necessary measures for the completion of the surveys in the several surveying districts for which surveyors general have been, or may be, appointed, at the earliest periods compatible with the purposes contemplated by law."

In pursuance of the provisions of law embraced in the quoted statutes this office has from year to year issued to the surveyors general of the several surveying districts annual surveying instructions for their information and guidance.

The act of Congress making an appropriation for conveying the public lands for the fiscal year ending June 30, 1896, contains the following specific proviso: (29 Stat., 434)

"That in expending this appropriation preference shall be given in favor of surveying townships occupied, in whole or in part, by actual settlers and of lands granted to the States by the act approved February twenty-second, eighteen hundred and eighty-nine, and the Acts approved July third and tenth, eighteen hundred and ninety, and other surveys shall be confined to lands adapted to agriculture, except that the Commissioner of the General Land Office may allow, for the survey and re-survey of lands heavily timbered, mountainous, or covered with dense undergrowth, rates not exceeding thirteen dollars per linear mile for standard and meander lines, eleven dollars for township, and seven dollars for section lines, and in cases of exceptional difficulties in the surveys, when the work cannot be contracted for at these rates, compensation for surveys and resurveys may be made by said Commissioner, with the approval of the Secretary of the Interior, at rates not exceeding eighteen dollars per linear mile for standard and meander lines, fifteen dollars for township, and twelve dollars for section lines: *Provided*, That in the States of California, Idaho, Montana, Oregon, Arizona, Wyoming, Washington, Colorado, and Utah, there may be allowed, in the discretion of the Secretary of the Interior, for the survey and resurvey of lands heavily timbered, mountainous, or covered with dense undergrowth, rates not exceeding twenty-five dollars for township and twenty dollars for section lines."

In the annual surveying instructions issued for the fiscal year ending June 30, 1896, which were formally approved by the Department, are the following paragraphs, *viz.*:

"The law requires that in expending this appropriation preference shall be given in favor of surveying townships occupied, in whole or in part, by actual settlers, and of lands granted to the States by the act of February 22, 1889, and the acts approved July 3 and 10, 1890; hence in taking measures for the letting of contracts, it will be your first duty to ascertain the localities in which there are *bona fide* settlers, and the funds should be so applied as to benefit the greatest number of settlers."

"Contracts for subdivisional surveys, when transmitted to this office, should be accompanied by evidences of settlement on the lands embraced in such contracts. Said evidences are usually applications or petitions for survey signed by actual settlers on the lands, together with the affidavits of settlers, setting forth length of residence on their claims and the nature, extent, and value of the improvements made thereon."

It will be observed from the foregoing quotations of law, that in all cases where the rates of mileage to be allowed for public surveys exceed the so-called intermediate (\$13, \$11, \$7), that the same must be specially authorized by the Secretary of the Interior. To that end the Department requires this office to submit the application of settlers for survey, and descriptions of the class and character of the lands, in connection with the proposed public surveys, as provided in the annual surveying instructions herein referred to.

It may be further stated that the existing practice of authorizing the award of contracts for public surveys, on the applications of the settlers on the lands, has been in vogue since 1886, and that the annual surveying instructions from that time to the present, which require said applications, have been uniformly approved by the Secretary of the Interior.

The section of the act of August 18, 1894, under which the governor of the State of Washington makes the application under consideration, is as follows:

That it shall be lawful for the governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota and Wyoming to apply to the Commissioner

of the General Land Office for the survey of any township or townships of public land then remaining unsurveyed in any of the several surveying districts, with a view to satisfy the public land grants made by the several acts admitting the said States into the Union to the extent of the full quantity of land called for thereby; and upon the application of said governors the Commissioner of the General Land Office shall proceed to immediately notify the surveyor-general of the application made by the governor of any of the said States of the application made for the withdrawal of said lands, and the surveyor-general shall proceed to have the survey or surveys so applied for made, as in the cases of surveys of public lands; and the lands that may be found to fall within the limits of such township or townships as ascertained by the survey, shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any such lands not embraced in any valid adverse claim, for the satisfaction of such grants, with the condition, however, that the governor of the State, within thirty days from the date of such filing of the application for survey, shall cause a notice to be published, which publication shall be continued for thirty days from the first publication, in some newspaper of general circulation in the vicinity of the lands likely to be embraced in such township or townships, giving notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands: *And provided further*, That the Commissioner of the General Land Office shall give notice immediately of the reservation of any township or townships to the local land office in which the land is situate of the withdrawal of such township or townships, for the purpose hereinbefore provided.

The act also contains this provision:

Provided that in expending this appropriation preference shall be given in favor of surveying townships occupied in part, by actual settlers and of lands granted to the States by the act approved February twenty-second, eighteen hundred and eighty-nine, and the acts approved July third and July tenth, eighteen hundred and ninety, and other surveys shall be confined to lands adapted to agriculture &c.

Thus while the act makes no specific provision for the survey of townships on the application of settlers, it does recognize the right of homeseekers to make settlement on unsurveyed public lands, and directs that, in expending the appropriation, preference shall be given to the survey of townships occupied in part by actual settlers, and of land granted to the States. It was evidently not the purpose of the act to put any restriction or limitation upon the rights of actual settlers, not already existing, and the act is as favorable to them, in so far as the lands occupied by them are affected, as to the States. The effect is the same as to them whether the survey is made on their petition or request, or on the application of the State. In either event their existing settlement rights must be respected. Over the future or prospective settler, the State is allowed some advantage by this act. On its application the State may have the lands in the townships applied for withdrawn from settlement for sixty days during which period it may select the desirable lands, and leave the rest for settlers.

This privilege is in derogation of the common rights of settlers, and is not to be enlarged, by construction, but the act should be given the construction which is most favorable to the rights of settlers. The townships which remain unsurveyed are those for which the State may make application; under this act. The unsurveyed townships may therefore be surveyed on the application of the State, or your office may direct the survey without such application, if deemed advisable.

In the case under consideration, before the State filed its application your office had ordered the survey of the townships named, and the same were put under contract to be surveyed, so that they ceased to be townships for the survey of which applications would thereafter be received.

Inasmuch as prior to the application of the State, the survey had been determined upon and ordered by your office, with a view to the benefit of the settlers, the townships for the survey of which measures had thus been taken, were no longer within the provisions of said act of August 18, 1894, and your office properly so held, and the decision is affirmed.

RAILROAD GRANT—MODIFIED LINE—ADJUSTMENT.

IOWA RAILROAD LAND CO. (ON REVIEW).

The act of June 2, 1864, authorized a modification of the line of unconstructed road as located under the original grant of 1856, and provided for a branch line connecting said modified line with the line of the Mississippi and Missouri Railroad Company, so as to form a connection with the Union Pacific system. For the modified main line the company was entitled "to the same lands and to the same amount of lands per mile," as provided in the original grant, but for the connecting branch line a new grant was made, to be satisfied from lands within twenty miles thereof, hence in the adjustment of the grant, as made by the two acts of Congress, the "connecting branch line" cannot be regarded as a part of the modified main line.

The act of 1864, so far as the modified main line is concerned, enlarged the source from which the amount of lands granted by the act of 1856 might be satisfied; but the lands certified prior to said act of 1864, along unconstructed road, must remain a charge against the company in the final adjustment of the grant under the two acts.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897.

(I. H. L.)

(F. W. C.)

With your office letter of September 5, 1896, was forwarded a motion, filed on behalf of the Iowa Railroad Land Company, successor to the Cedar Rapids and Missouri River Railroad Company, for review of departmental decision of July 9, 1896 (23 L. D., 79), in the matter of the adjustment of the grant made by the act of May 15, 1856 (11 Stat., 9), and June 2, 1864 (13 Stat., 95).

The motion is based upon the following assignments of error:

1. The finding and holding that the original location is the measure of the grant for the constructed line of said road, and that the only purpose of the act of 1864, so

far as said line is concerned, was to authorize a change of line and, by enlarging the source from which selections might be made for losses in place along the original line, to fully satisfy the amount granted or intended to be granted for the road west of Cedar Rapids by the act of 1856.

2. The finding and holding that Exhibit A of the adjustment submitted by the Commissioner of the General Land Office is correct and proper "in so far as the extent of the grant is concerned."

3. The failure to find and hold that the 4th section of the act of June 2, 1864, is, as is found by the supreme court in *Herring v. Railroad Company* (110 U. S., 27), a new grant, and that under it the company is entitled to six sections of land per mile for every mile of road constructed by said company west of Cedar Rapids.

4. The finding and holding that the 2,569.75 acres erroneously certified to the railroad company, they having been theretofore disposed of by the United States, being outstanding must remain a charge to the grant unless reconveyed to the United States by said company.

5. The finding and holding that the 76,916.75 acres certified to the State and sold by the Iowa Central Air Line Railroad Company out of the grant of 1856, prior to resumption by the State of Iowa, and to the enactment of the grant of 1864, should not be deducted from the grant made for the modified line by the act of June 2, 1864.

The first three assignments of error question the directions given as to the measure of the grant.

Your office letter submitting this matter presented five plans of adjustment, the first, which was adopted in the opinion under review, being as follows:

Exhibit A is an adjustment upon the theory that the company takes under the original grant from Cedar Rapids, and that the only additional right given the company under the act of 1864 was to satisfy deficiencies within the grant in place, by resorting to the even numbered sections within the six mile limits and both even and odd within the fifteen mile limits, and if there was still a deficiency to resort to the even and odd sections along the modified line within twenty miles thereof. Under this settlement there have been excess approvals to the company of 57,570.24 acres.

To understand the real position of the company it is necessary to review, somewhat, the history of the grant.

The Iowa Central Air Line Company, upon which the State originally conferred the grant, filed a map of definite location of the line of road October 31, 1856, which was duly accepted and upon which the limits of the grant were adjusted and withdrawal ordered.

The road provided for by the act of 1856 was—

from Lyons City to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line, running as near as practicable to the forty-second parallel across the State, to the Missouri River.

Said Air Line Company failed to construct any part of the road and the State resumed the grant in 1860 and conferred the same upon the Cedar Rapids and Missouri River Railroad Company.

Prior to this time, however, a road had been built by the Chicago, Iowa and Nebraska Railroad Company (not a land grant road), from a point on the Mississippi River within three miles of Lyons City to Cedar Rapids, and practically upon the location theretofore made between said points by the Iowa Central Air Line Company.

The Cedar Rapids Company therefore began the construction of its road at Cedar Rapids and, prior to the year 1864, had completed about one hundred miles, or, as appears from your letter, to Nevada, Iowa.

This was the condition of affairs at the time of the passage of the act of June 2, 1864 (*supra*), the fourth section of which provides:

That the Cedar Rapids and Missouri River Railroad Company, a corporation established under the laws of the State of Iowa, and to which the said state granted a portion of the land mentioned in the title to this act, may modify or change the location of the uncompleted portion of its line, as shown by the map thereof now on file in the general land office of the United States, so as to secure a better and more expeditious line to the Missouri River, and to a connection with the Iowa branch of the Union Pacific Railroad; and for the purpose of facilitating the more immediate construction of a line of railroads across the State of Iowa, to connect with the Iowa branch of the Union Pacific Railroad Company, aforesaid, the said Cedar Rapids and Missouri River Railroad Company is hereby authorized to connect its line by a branch with the line of the Mississippi and Missouri Railroad Company; and the said Cedar Rapids and Missouri River Railroad Company shall be entitled for such modified line to the same lands and to the same amount of lands per mile, and for such connecting branch the same amount of land per mile, as originally granted to aid in the construction of its main line, subject to the conditions and forfeitures mentioned in the original grant, and, for the said purpose, right of way through the public lands of the United States is hereby granted to said company. *And it is further provided*, That whenever said modified main line shall have been established or such connecting line located, the said Cedar Rapids and Missouri River Railroad Company shall file in the general land office of the United States a map definitely showing such modified line and such connecting branch aforesaid; and the Secretary of the Interior shall reserve and cause to be certified and conveyed to said company, from time to time, as the work progresses on the main line, out of any public lands now belonging to the United States, not sold, reserved, or otherwise disposed of, or to which a pre-emption right or right of homestead settlement has not attached, and on which a bona fide settlement and improvement has not been made under color of title derived from the United States or from the State of Iowa, within fifteen miles of the original main line, an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of lands per mile granted, or intended to be granted, by the original act to aid in the construction of said railroad shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line and connecting branch within twenty miles thereof: *Provided, however*, That such new located or modified line shall pass through or near Boonsboro', in Boon county, and intersect Boyer river not further south than a point at or near Dennison, in Crawford county: *And Provided, further*, That in case the main line shall be so changed or modified as not to reach the Missouri River at or near the forty-second parallel north latitude, it shall be the duty of said company, within a reasonable time after the completion of its road to the Missouri river, to construct a branch road to some point in Monona county, in or at Onawa City; and to aid in the construction of such branch the same amount of lands per mile are hereby granted as for the main line, and the same shall be reserved and certified in the same manner; said lands to be selected from any of the unappropriated lands as hereinbefore described within twenty miles of said main line and branch; and said company shall file with the Secretary of the Interior a map of the location of the said branch: *And provided further*, That the lands hereby granted to aid in the construction of the connecting branch aforesaid shall not vest in said company nor be encumbered or disposed of except in the following manner: When the governor of the State of Iowa shall certify to the Secretary of the Interior that

said company has completed in good running order a section of twenty consecutive miles of the main line of said road west of Nevada, then the Secretary shall convey to said company one third, and no more, of the lands granted for said connecting branch. And when said company shall complete an additional section of twenty consecutive miles, and furnish the Secretary of the Interior with proof as aforesaid, then the said secretary may convey to the said company another third of the lands granted for said connecting branch; and when said company shall complete an additional section of twenty miles, making in all sixty miles west of Nevada, the secretary, upon proof furnished as aforesaid, may convey to the said company the remainder of said lands to aid in the construction of said connecting branch: *Provided, however*, That no lands shall be conveyed to said company on account of said connecting branch road until the governor of the State of Iowa shall certify to the Secretary of the Interior that the same shall have been completed as a first-class railroad. And no land shall be conveyed to said company situate and lying within fifteen miles of the original line of the Mississippi and Missouri Railroad, as laid down on a map on file in the general land-office: *Provided, further*, That it shall be the duty of the Secretary of the Interior, and he is hereby required, to reserve a quantity of land embraced in the grant described in this section, sufficient, in the opinion of the governor of Iowa, to secure the construction of a branch railroad from the town of Lyons, in the State of Iowa, so as to connect with the main line in or west of the town of Clinton in said state, until the governor of said state shall certify that said branch railroad is completed according to the requirements of the laws of said state: *Provided, further*, That nothing herein contained shall be construed as to release said company from its obligation to complete the said main line within the time mentioned in the original grant: *Provided, further*, That nothing in this act shall be construed to interfere with, or in any manner impair, any rights acquired by any railroad company named in the act to which this is an amendment, or the rights of any corporation, person or persons, acquired through any such company; nor shall it be construed to impair any vested right of property, but such rights are hereby reserved and confirmed: *Provided, however*, That no lands shall be conveyed to any company or party whatsoever, under the provisions of this act and the act amended by this act, which have been settled upon and improved in good faith by a bona fide inhabitant, under color of title derived from the United States or from the State of Iowa adverse to the grant made by this act or the act to which this act is an amendment. But each of said companies may select an equal quantity of public lands as described in this act within the distance of twenty miles of the line of each of said roads in lieu of lands thus settled upon and improved by bona fide inhabitants in good faith under color of title as aforesaid.

While this act authorized a change in the location of the *unconstructed* portion of the road, yet, it still provided that it should be built to the Missouri River, but permitted a change in order to secure a "more expeditious line."

The Pacific railroad system was not in existence at the time of the passage of the original act under which this company claims, viz., May 15, 1856, and a further and new object was included in the legislation made by the act of 1864, viz., a connection with the Iowa branch of the Union Pacific Railway.

To accomplish this latter purpose a branch line was provided for, on account of which a *new* grant was made, and this branch is referred to as the "connecting branch."

By the act of 1856 the line was to run as near as practicable to the forty-second parallel across the State of Iowa. Measurement made of

the locations shows that the old line of 1856 diverges to the north of that parallel twenty-four miles, while the modified line diverges to the south thirty miles, measured to a connection with the Sioux City and Pacific Railroad at California Junction.

By letter of July 5, 1865, William T. Steiger, as agent of the company, filed in this Department a map showing the amended line of location of said Cedar Rapids and Missouri River Railroad.

Said letter contained the following:

I have the honor to transmit herewith the letter of W. W. Walker, Esq., Vice President Cedar Rapids and Mo. Riv. R. R. Co., addressed to you on the 19th instant, together with the accompanying maps duly authenticated of the amended route of said road from Cedar Rapids to the Missouri River, which I beg leave to place on file as the basis of the adjustment of the additional grant of 2nd June 1864.

This map shows a connection with the Sioux City and Pacific Railroad at California Junction, about three miles from the Missouri River, and with this connection the river is reached as the Sioux City and Pacific Railroad crosses the Missouri River.

By letter of December 19, 1867, Hon. J. I. Blair, President of the Cedar Rapids and Missouri River Railroad, filed a second map, with a request that it be attached to the one before filed.

This map shows a line leaving the location made in 1865, at Missouri Valley, about six miles east of California Junction, and runs nearly due south for about twenty-one miles to a connection with the Mississippi and Missouri River Railroad, now the Chicago, Rock Island and Pacific Railroad, at Council Bluffs.

It is claimed by the company that this piece of road last described should be considered as a part of the amended main line.

This contention, if granted, makes the amended line, as constructed, 271.6 miles long, and it is claimed that this becomes the basis for the adjustment of the grant under the act of 1864, which is to be satisfied from the limits of the old location of 1856, as far as possible, the deficiency to be made up along the limits of the modified line, and that this deficiency is not only of lands lost in place along the old location, but that the constructed line, being longer than the old location, the grant was commensurably increased, and that this increase is to be also taken along the modified line.

In the decision under review it was held that (syllabus):

The grant to the State of Iowa by the acts of May 15, 1856, and June 2, 1864, is a grant in place, the extent of which is determined by the location under the original grant, and the amount of lands earned thereunder ascertained by the line of road constructed west of Cedar Rapids, with the additional right under the act of 1864, to satisfy deficiencies within the grant in place by resorting to even numbered sections within the six mile limits, and both even and odd within the fifteen mile limits, and if there is still a deficiency to resort to the even and odd sections along the modified line within twenty miles thereof.

After a careful review of the matter this position is adhered to, and even if the company's contention as to the length of the modified line

be acceded to, yet, the grant made by the act of 1856 for the main line cannot be enlarged under the terms of the act of 1864 for the "modified main line."

For this modified main line the company was to be entitled "to the same lands and to the same amount of lands per mile," and it was provided that—

the Secretary of the Interior shall reserve and cause to be certified and conveyed to said company, from time to time, as the work progresses on the main line, . . . within fifteen miles of the original main line, an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of lands per mile granted, or intended to be granted, by the original act to aid in the construction of said railroad shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line and connecting branch within twenty miles thereof.

The act of 1856, fourth section, provides that—

and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be sold, and so from time to time until said roads are completed; and if any of said roads are not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States.

Under this legislation, when twenty miles were certified as constructed along the modified main line, the company was authorized to sell one hundred and twenty sections along the original location, if the same shall be found within a continuous line of twenty miles along said original location, and so on until the entire road was built.

No new grant in place was made along the modified main line, but the lands within twenty miles thereof might be resorted to in order to satisfy any deficiency not to be found within the limits along the original location.

While it is undoubtedly true, as held by the supreme court in the Herring case (110 U. S., 27), that "it has been the invariable policy of Congress to measure the amount of public lands granted to a land-grant railroad by the length of the road as actually constructed, and not by its length as originally located," when the *entire* line as originally located is not constructed, as was the case with the Cedar Rapids grant, yet, it has never been held by that court that the grant, where one in place, as is the grant of 1856, which acquired precision by location, can be enlarged, by showing that the constructed road is longer than the located line.

In my opinion, however, the modified main line as provided for in the act of 1864, was designed to be a more direct and shorter route to the Missouri River than that shown by the location made under the act of 1856; further, that the location shown upon the map of 1865, satisfies

the terms for the modified main line, and that the location shown upon the map filed in 1867, was intended for, and should be held to be the "connecting branch," provided for in the act of 1864, for which a new grant was made, but which must be satisfied from the lands within twenty miles thereof.

It is true that the supreme court, in the Herring case (*supra*), held that the map of 1865 showed only a part of the modified line and that it was not completed until the filing of the map on December 1, 1867 (evidently meaning the map filed December 19, 1867), and the company urges that this holding is conclusive upon the Department, and that the line between Missouri Valley and Council Bluffs must be recognized as a part of the modified line and not as the connecting branch.

The question before the court in said case involved the recognition of certain entries made after the location of 1865.

As before stated, the act of 1864 had two objects, viz., the building of a more expeditious line to the Missouri River and the connection of this line with the Mississippi and Missouri River Railroad so as to form a running connection with the Iowa branch of the Union Pacific Railway; further, it coupled the two together so as to require that both objects be accomplished.

This is clearly shown from several provisions of the act of 1864.

To provide against the abandonment of the main line west of the point at which the connecting branch might be established, the act of 1864 provided, that the lands should not be conveyed on account of the connecting branch except upon the condition that—

When the governor of the State of Iowa shall certify to the Secretary of the Interior that said company has completed in good running order a section of twenty consecutive miles of the main line of said road west of Nevada, then the Secretary shall convey to said company one-third, and no more, of the lands granted for said connecting branch. And when said company shall complete an additional section of twenty consecutive miles, and furnish the Secretary of the Interior with proof as aforesaid, then the said Secretary may convey to the said company another third of the lands granted for said connecting branch; and when said company shall complete an additional section of twenty miles, making in all sixty miles west of Nevada, the Secretary, upon proof furnished as aforesaid, may convey to the said company the remainder of said lands to aid in the construction of said connecting branch.

It further provided—

That such new located or modified line shall pass through Boonsboro', in Boon county, and intersect the Boyer river not further south than a point at or near Dennison, in Crawford county.

Again, in the matter of the location of the modified line and the connecting branch, it provided—

That whenever said modified main line shall have been established or such connecting line located, the said Cedar Rapids and Missouri River Railroad Company shall file in the General Land Office of the United States a map definitely showing such modified line and such connecting branch aforesaid.

As the act requires that the company shall file a map of the modified line and connecting branch before a withdrawal was to be made, it was perhaps this fact, viz., the coupling of the two, that led the court to hold that until the filing of the map in 1867, the whole line of the road was not established.

While the court uses the term "modified line," it does not seem to have been used in the restricted sense as relating to the modified main line, but rather the entire line necessary to accomplish the full purposes of the grant.

That the portion of the road between St. John and Council Bluffs was not considered by the company as a part of the modified main line, is clearly shown from a brief filed by William T. Steiger in 1873, as attorney for the company, before the committee of public lands in the United States Senate, relative to a bill affecting the grant for the Onawa branch of said road, copy of which is found in the papers on file in your office relative to said road.

In this brief he states, on page eight, under the fourth objection to the proposed legislation, as follows:

The Onawa City branch *was built*, and the best connection—indeed for engineering reasons the only one—thereby made between the company's new line of road and the city, which branch, with that required by the law to connect with the Mississippi and Missouri road, secured to Onawa City almost a direct connection, not only with the Cedar Rapids line of road, but also with Council Bluffs, and that important point in the great through line of the Mississippi and Missouri, (now Chicago, Rock Island, and Pacific road,) as will be seen on inspection of the maps on file in the Department of the Interior.

In order that the attorney's position may be fully understood I have attached a reduced copy of a map that accompanied the report.

As to the previous position of the Department on the question I have but to refer to letter written by Commissioner Burdett to Hon. Addison Oliver, House of Representatives, dated January 19, 1876, in which it is stated:

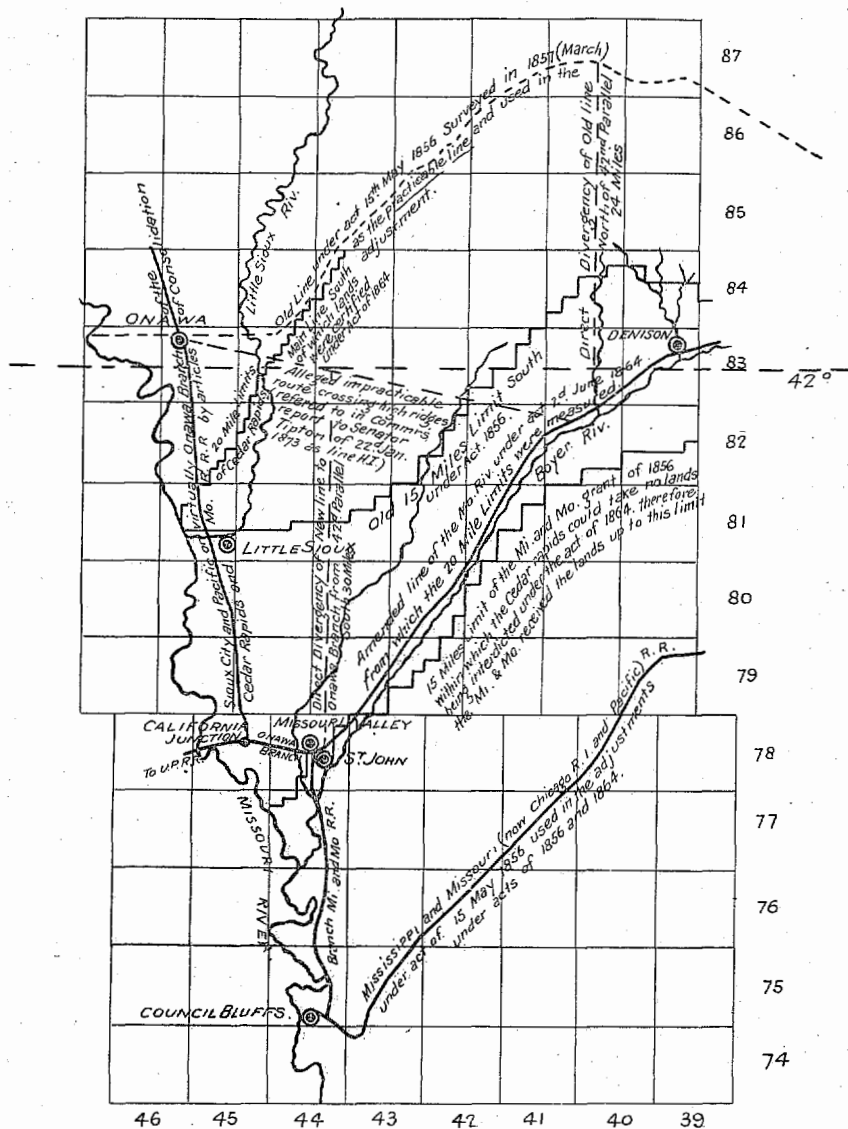
Your second question is, "Where does the 'modified line' of said company, under act of June 2d, 1864, begin, and terminate? How long is it and how much land has it received therefor?"

The modified line begins at Cedar Rapids, or near there, at the western terminus of the line built prior to 1864, and terminates at Missouri Valley, indicated on the map by the letter D.

From what has been said it is apparent that the approvals heretofore made on account of this grant for the modified main line, are in excess of that granted by the acts named, and that suit will be necessary.

I have therefore to modify the previous decision of this Department in so far as to direct that the portion of the road between Missouri Valley and Council Bluffs be not considered as a part of the modified main line, but as the "connecting branch," for which a new grant was made by the act of 1864, but which must be satisfied from the lands within twenty miles thereof.

This branch is all within the fifteen mile limits of the grant for the Mississippi and Missouri River Railroad, and the act of 1864 provides that "no land shall be conveyed to said company situate and lying within fifteen miles of the original line of the Mississippi and Missouri Railroad, as laid down on a map on file in the General Land Office."



I learn upon inquiry at your office that limits were never established upon this line and presumably for the reason above given.

This, however, is not the question before the Department, as the company does not seem to be now claiming anything on account of the "connecting branch," as such.

This disposes of the first three assignments of error.

The fourth assignment is—

The finding and holding that the 2,569.75 acres erroneously certified to the railroad company, they having been theretofore disposed of by the United States being outstanding must remain a charge to the grant unless reconveyed to the United States by said company.

It is clear that certifications made on account of this grant after patents had issued to other parties conveyed no title, and strictly speaking cannot be considered as a charge upon the grant, but as the grant was in process of adjustment, if the company claimed the lands a final adjustment would be impossible until the rights of the company, not under the certifications but under its grant, had been determined.

If the company lays no claim to these lands, a simple release or quit claim would remove the cloud from the title of the first patentees, and thereupon the company would be relieved of the charge made in part satisfaction of its grant.

The fifth and last assignment of error is—

The finding and holding that the 76,916.75 acres certified to the State and sold by the Iowa Central Air Line Railroad Company out of the grant of 1856, prior to resumption by the State of Iowa, and to the enactment of the grant of 1864, should not be deducted from the grant made for the modified line by the act of June 2, 1864.

The company's contention in support of this assignment rests upon the assumption that the act of 1864 made an entirely new grant for the unconstructed part of its road free from any charge on account of the grant of 1856, to which I am unable to accede.

As stated in the opinion under review—

These lands were certified on account of the grant made by the act of 1856, and this claim for deduction seems to rest upon the ground that the company receiving the lands did not earn the same, and that the present company never received any benefit from such certification, and therefore should not be charged with the same.

Having held that the purpose of the act of 1864 was merely to enlarge the source from which the amount of lands granted by the act of 1856 might be satisfied, it follows that indemnity can not be allowed for lands certified under the act of 1856 and prior to the passage of the act of 1864, and this claim for deduction must be denied.

After a very thorough investigation and careful consideration of the legislation upon the subject of this grant and of the decisions of the court and this Department relative thereto, I see no reason to depart from the previous decision of this Department, except in the particulars herein named, and the motion is therefore accordingly denied, and you are directed to revise the adjustment in accordance with the directions herein given.

The excess in approvals should be identified, after which formal demand should be made upon the company for reconveyance of the lands, or, in the event that they have been disposed of to *bona fide* purchasers, for their value.

HOMESTEAD ENTRY—AMENDMENT—ADVERSE CLAIM.

CALLICOTTE v. GEER.

The right to amend an entry to correspond with the settlement, may be awarded as against an intervening entryman if priority of settlement is shown by the applicant, and it does not appear that he is estopped by his own acts from setting up his right as against the adverse claimant.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (C. J. W.)

On September 27, 1893, plaintiff Callicotte made homestead entry, No. 947, for the SE. $\frac{1}{4}$ of Sec. 12, T. 27 N., R. 1 W., Perry, Oklahoma, under the mistaken apprehension, as he alleges, that this was the proper description of the quarter section on which he had made settlement on the day of the opening, September 16, 1893. On September 23, 1893, defendant Geer made homestead entry, No. 607, for the NE. $\frac{1}{4}$ of Sec. 12, T. 27 N., R. 1 W., which turned out to be the quarter section on which Callicotte made settlement on the day of the opening. After the discovery of the mistake, on November 18, 1893, Callicotte made application to amend his entry, so as to substitute the land entered by defendant, to wit, the NE. $\frac{1}{4}$ of Sec. 12, T. 27 N., R. 1 W., for that entered by himself through mistake, and on the same day he filed affidavit of contest against defendant's entry, alleging prior settlement. By direction of your office, action on the application to amend Callicotte's entry was withheld to await final disposition of his contest, and a hearing ordered for that purpose on February 23, 1895, both parties being present. The plaintiff closed his testimony on February 25, 1895, and defendant, without offering any testimony, moved to dismiss the contest. The local officers overruled the motion, and thereafter rendered a decision in favor of contestant, and recommended the cancellation of defendant's entry. From this decision Geer appealed, and on September 18, 1895, your office affirmed the decision of the local officers, and held defendant's entry for cancellation. Defendant made further appeal to the Department, and the case is now to be considered.

The following allegations of error are made:

1st. That it was error to hold that the initial acts of settlement claimed by Callicotte were followed within a reasonable time by residence and improvements.

2d. Error in not holding that contestant had exhausted his homestead rights, in making homestead entry upon the adjoining tract of land.

3d. Error in awarding to contestant preference right of entry over defendant and holding this entry for cancellation.

4th. Error in not holding that plaintiff was estopped by his acts in making out defendant's application to enter from setting up a prior claim against defendant.

It appears from the record that Callicotte's entry, No. 947, made by mistake for the wrong land, was contested by a man named Sherer, and that without pecuniary consideration Callicotte relinquished this entry.

Since your office decision was rendered, and pending the consideration of the case here, defendant Geer has filed an affidavit, under date of March 17, 1896, in which he charges that plaintiff has since the hearing abandoned the land, and asking for leave to submit proof as to the same, and that the case be re-opened for that purpose. This motion can not be entertained, and the case will be disposed of on the record as it exists.

The evidence shows that a little before one o'clock P. M., on September 16, 1893, the plaintiff reached the land in controversy, with a valise, canteen, coffee-sack of provisions, frying pan, blanket, umbrella, a spade and axe; that there was no one on the land at the time, and that he set his umbrella up as a stake and left his other things with it, and went over to a crowd of men a fourth of a mile away and introduced himself and took their names; that while talking to these men, he saw a wagon drive up about a fourth of a mile north and west of his stake; that a man got out of the wagon and came to where they were talking; that plaintiff took his name and gave his, and called attention of the men to witness that he claimed the land where his stake (umbrella) was standing, and that if the man who was on the wagon was on his tract, they knew that plaintiff was there first. The man gave his name as Geer (defendant in this case); that defendant replied that he did not come there to make trouble, and that if he was on plaintiff's claim, he would not cause him trouble. This occurred thirty to fifty minutes after plaintiff set his stake. The question of wood and water then arose, and there being no spade or axe, except plaintiff's, it was arranged to go to the creek half a mile east and dig for water and get wood. Defendant drove his team by plaintiff's stake, and got his spade and axe, and drove to the creek, where they dug for water, and got a load of wood, and went back to where Geer had first stopped with his wagon, and camped all night. Next morning plaintiff and Geer attempted to locate the lines and corners of the tracts, and came to the conclusion that plaintiff was on the SE. $\frac{1}{4}$ of Section 12, and that defendant was on the NE. $\frac{1}{4}$; plaintiff threw up a mound, three feet in diameter and a foot and a half high, on which he planted a stake, with a white flag attached, and then he and defendant started to the land office to file, arriving there Sunday night, September 17, 1893. Plaintiff formed a company (No. 181), consisting of himself (No. 1), defendant next, and then others, until the number reached ten. Plaintiff being a lawyer, made out his own and defendant's papers. Defendant left his place in company No. 181, and got a place in another company, and was thereby enabled to file on September 23, 1893, four days earlier than he could have filed if he had remained in company No. 181. About October 1, 1893, plaintiff first learned that he had made a mistake, and had filed on the SE. $\frac{1}{4}$ of Sec. 12, instead of the NE. $\frac{1}{4}$, where his stake was still standing, and when he made out defendant's papers he did not know it was for the land on which he (plaintiff) had settled. About October 1,

1893, plaintiff plowed one acre near his stake on the land, and about the 1st of November following he plowed around the whole tract, and built a sod house. On December 14, 1893, he went upon the land, with horses, wagons, plows, harrow, cooking utensils, stove, and bedding, and proceeded to build a house, in which he and his eldest son resided, until he built a six-room house, into which he moved, with his family, January 15, 1894. He has fenced the whole of the tract, dug a well, and plowed and cultivated fifty acres. The improvements are worth seven or eight hundred dollars. Upon this state of facts the defendant insists that the plaintiff is not entitled to the land, and that it was error to so hold. There can be no question under the record but that plaintiff was the prior settler on the land. His acts of settlement were sufficient to segregate the land, and were followed in due time by residence and valuable improvements.

Unless the plaintiff has done something which will operate against him as an estoppel, he is entitled to all the rights of a prior settler upon the land. Two things are insisted upon by way of estoppel: First. That plaintiff has exhausted his homestead right, notwithstanding his relinquishment, without compensation, of the entry made by mistake. Second. That having assisted defendant in preparing his entry papers, he is estopped from attacking the entry. It is perfectly apparent that this controversy grows out of the mutual mistake of the parties as to the proper description of the quarter-section on which their respective settlements were made. There is no fraud connected with the acts of either, and it is clear that the mistake in the description of the land entered by each was an honest mistake upon the part of both. It was mutual, and neither can be either benefited or injured by it, in reference to the other. The entry by plaintiff of the SE. $\frac{1}{4}$, upon which he had not settled, and upon which another party was, at the time, a settler (plaintiff's entry being the result of a mistake), did not exhaust his homestead rights, and upon relinquishment of such mistaken entry, without any benefit, it ceased to be a legal hindrance to a second entry. There is, therefore, no reason why the rights of these two parties should not be made to depend upon the priority of their origin. As defendant has introduced no testimony, and shown no actual settlement, it is a mere question of whether plaintiff's settlement antedated defendant's entry. This fact appears from the evidence, your office so found, and your office decision is affirmed.

RAILROAD GRANT—PATENT—SUCCESSOR IN INTEREST.

NORTHERN PACIFIC R. R. Co.

Under the grant to the Northern Pacific Railroad Company patents should issue to that company and not to a grantee thereof.

In the preparation of lists of lands granted to aid in the construction of railroads, the lands should be listed to the grantee company or corporation when it is in existence.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897. (J. I. P.)

From time to time there have been transmitted from your office for the consideration and approval of this Department various lists of lands selected by the Northern Pacific Railroad Company as inuring to the Northern Pacific Railway Company as the successor of the Northern Pacific Railroad Company under the grant to that company of July 2, 1864, and the joint resolution of May 31, 1870.

It has been invariably held by this Department that a right to a patent from the United States will not be traced beyond the original grantee. *Re Harrison* (2 L. D., 767); *re Tower* (2 L. D., 779; 12 L. D., 116). There are obvious reasons for this ruling of the Department. If the duty of examining into the sufficiency of transfers made from time to time by the railroad corporations, of the country, or by the settlers upon the public lands after a right of disposition shall have accrued, be assumed by this Department, a mass of *quasi* judicial work must be disposed of which will seriously embarrass the ordinary administration of its affairs.

Moreover, under the law as it now stands, if this Department erroneously certifies lands to a railroad corporation, which are not included within the grant, the certification is void; but if the list be certified in favor of a bona fide grantee the title of the grantee is good and the only recourse of the government is against the corporation. In many cases such recourse would be unavailing. I therefore conclude, for administrative reasons, that it will be unwise to certify lists in favor of the Northern Pacific Railway Company.

Upon careful consideration of the language of the grant to the Northern Pacific Railroad Company, I do not think it my duty to patent lands to a grantee of that company. The act provides in terms that patents shall be made to the Northern Pacific Railroad Company, and although the grant is to said company, its successors and assigns, yet I do not believe that the Department can be required to depart from the ordinary course of business heretofore followed in other cases.

In view of the foregoing I am of the opinion that in the preparation of lists of lands, granted to aid in the construction of railroads, the lands should always be listed to the grantee company or corporation when it is in existence. If the grantee company or corporation has

ceased to exist or has been absorbed or amalgamated or identified with another company or corporation, then it might be proper to list the lands to the latter company as successor of the grantee company or corporation. But when the lands are so listed the preamble of the list should clearly set forth the character of the evidence upon which that action is based, for the information of the Secretary of the Interior, whose approval of such lists may be asked.

You are therefore directed to be governed in the future by these instructions in preparing for my approval list of lands granted to aid in the construction of railroads.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891—PATENT.

SMITH ET AL. *v.* MURPHY'S HEIRS.

As between a purchaser from the entryman and one holding under a subsequent tax sale of the land, the benefit of the confirmatory provisions of section 7, act of March 3, 1891, must be accorded to the holder of the tax title.

Under an entry confirmed by said section, patent should issue in the name of the entryman, though his death may be disclosed by the record.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897. (I. H. L.) (P. J. C.)

The land involved in this controversy is the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 32, Tp. 20 S., R. 65 W., Pueblo, Colorado, land district.

There being but a single question involved in this stage of this controversy, it is not necessary to recapitulate all the record facts in relation to the history of this tract. It is only necessary to state such facts as will give a clear understanding of the single issue.

It appears that on November 9, 1873, James Clark made pre-emption cash entry of the tract, and on the same day, for a valuable consideration, transferred the same to Margaret Murphy; that Murphy died February 1, 1879; that Clark also departed this life during that year.

As the result of a contest against the entry of Clark, by one T. F. McAllister, which was finally dismissed by your office, and no appeal taken, the heirs of Margaret Murphy, pending the contest, applied to have the entry confirmed and passed to patent under section 7, act of March 3, 1891 (26 Stat., 1095). Daniel L. Smith and B. Sweet also made a similar application, on the ground that they were transferees of the title of Margaret Murphy, by reason of the fact that they had purchased the land from Pueblo county, which had bid it in at a tax sale, and subsequently transferred it to Smith, who deeded to Sweet an undivided half interest in the tract.

In deciding these questions presented, your office held that:

From the abstract of title covering the above land and filed in this case, and the affidavits of James Murphy and the heirs of Margaret Murphy, deceased, as far as heard from, I find that said land has not been reconveyed to said James Clark, nor

to his heirs, that the heirs of Margaret Murphy notified, ask for confirmation of said entry under the seventh section of the act of March 3, 1891. I further find that final receipt was issued to said James Clark November 9, 1878, and that he disposed of the same after final entry to a *bona fide* purchaser, for a valuable consideration, before the first day of March, 1888. Said entry will, therefore, be approved for patent by virtue of the 7th section of the act of March 3, 1891, and the same will be passed to patent for the heirs of James Clark, deceased. The contest of McAllister is dismissed.

Notify the parties of this decision, and McAllister and Smith and Sweet of their right of appeal.

Whereupon, Smith and Sweet prosecute this appeal, alleging error in holding that they were not transferees within the meaning of said section 7, and error in holding that the heirs of Murphy had any interest whatever in the land.

It is clear that the heirs of Clark have no interest in this tract. He had conveyed all his interest prior to his death, and there was therefore nothing to descend to his heirs. The decision of your office, therefore, that the entry "will be passed to patent for the heirs of James Clark," is clearly erroneous. I take it that this order was made in view of the doctrine announced in Clara Huls (9 L. D., 401), wherein it was decided that "where the death of the homesteader is disclosed by the record, patent should issue in the name of the heirs generally." But that ruling was modified subsequent to the decision of your office in Joseph Ellis (21 L. D., 377), wherein it was held that patent should issue in the name of the entryman, though his death be disclosed by the record.

The entry of Clark comes clearly within the confirmatory provisions of section 7. But the question is, whether it should be confirmed in the interest of the Murphy heirs, or the transferees of the land under the tax sale by Pueblo county. It is assumed by counsel, both in the specifications of error and the brief, that the judgment of your office was in favor of the Murphy heirs.

Section 12, Chapter XCIX, General Statutes, State of Colorado, 1883, provides:

Lands entered by pre-emption, final homestead, at public or private sale, or otherwise, shall be subject to taxation, whether patent for the same shall have been issued or not, etc.

It appears by the abstract of title to the record that the land was sold for taxes for the year 1879, on October 9, 1880, and by the treasurer or Pueblo county conveyed to the county, March 10, 1886; that by order of the county commissioners the land was sold and conveyed to Smith, December 11, 1888, who subsequently conveyed an undivided one half of it to Sweet.

The legality or regularity of this sale is not questioned by the heirs of Murphy. It therefore follows that it must be assumed that it was legal and regular.

In *Carroll v. Safford* (3 How., 441), the United States supreme court

held that land upon which final certificate was issued is taxable property, notwithstanding patent has not issued, and may be sold for taxes. This doctrine is followed with approval in *Witherspoon v. Duncan*, 4 Wall, 210; *Wisconsin Central R. R. v. Price Co.*, 133 U. S., 496; and *Northern Pacific v. Patterson*, 155 U. S., 130.

It is clear, therefore, that the heirs of Murphy have been divested of their title to and interest in the land by reason of this tax sale, and it follows that the entry can not be confirmed in their interest.

The title to the tract, having passed by a procedure and conveyance recognized as sufficient to divest the Murphy heirs of their right, would seem to be in Smith and Sweet, as contemplated by section 7; that is, they are bona fide purchasers for a valuable consideration, and the tract had been transferred by the entryman prior to March 1, 1888, after final entry.

Your office judgment is therefore modified; the entry of James Clark will be confirmed and passed to patent in his name.

RAILROAD GRANT—LANDS EXCEPTED—RELINQUISHMENT.

NORTHERN PACIFIC R. R. CO. *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

An expired pre-emption filing of record, at the date a railroad grant takes effect, excepts the land covered thereby from the operation of the grant.

The grant of March 3, 1871, was not one *in presenti*, but *in futuro*, taking effect on the delivery and filing of the relinquishment required under the terms of the grant.

Report called for from the General Land Office as to alleged excess indemnity selections in the second indemnity belt in the State of Minnesota.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897. (I. H. L.) (E. M. R.)

On June 20, 1895, your office took up for adjustment list No. 24, indemnity, of the Northern Pacific Railroad Company, filed in the local office on November 5, 1883. This list did not designate tract for tract the lost land for which indemnity selections were made, but on June 16, 1892, the company filed re-arranged lists No. 24 A, 24 B, and 24 C, describing the lost lands tract for tract.

From your said decision the St. Paul, Minneapolis and Manitoba company filed three appeals: the first involving the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 29, T. 128 N., R. 35 W., St. Cloud land district, Minnesota; the second, involving the SE. $\frac{1}{4}$ of Sec. 31, T. 128 N., R. 4 N., same land district, and the third, involving the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of Sec. 13, T. 128, R. 34, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 1, same township and range; the NE. $\frac{1}{4}$ of Sec. 5; the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 11, same township and range, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 15, same township and range.

The ground of error in the first appeal is that your office erred in holding that the tract in question was excepted from the operation of its grant by the pre-emption declaratory statement of one William Belcher. Upon this point your office decision says:

This tract is also within the primary limits of the grant for the St. Vincent Extension company and was excepted from the grant by the pre-emption filing of Wm. Belcher, made September 26, 1870, settlement alleged September 24, 1870 (19 L. D., 215), the Northern Pacific Railroad Company's application to select this tract was accordingly allowed.

It is urged in the appeal that the pre-emption filing in question could have no effect as against the grant to the Manitoba company "because it had ceased to be a subsisting claim at the date the grant to said company became operative."

It is alleged further—

In this case Belcher settled September 24, 1870, and filed his declaratory statement September 26, 1870. His pre-emption claim therefore expired and the land became subject to entry as other public land on September 24, 1871, which was prior to the time when appellant's grant became operative.

This Department recently, in considering the case of *Whitney v. Taylor* (158 U. S., 85), determined that the doctrine therein laid down applied equally to expired as to unexpired declaratory statements. The contention of the appellant is therefore not well taken.

In the second appeal it is urged that your office erred in holding that the SE. $\frac{1}{4}$ of Sec. 31, T. 128 N., R. 34 W., was excepted from the operation of the grant by the homestead entry of one Allen D. Bond. Upon this land your office decision held:

This tract was excepted from the grant to the said company by the homestead entry of Allen D. Bond, made November 1, 1865, and canceled December 14, 1871 (19 L. D., 215). The application of the Northern Pacific Railroad Company to select this land is allowed and the St. Paul, Minneapolis and Manitoba Railroad Company's list No. 8, is held for cancellation to the extent thereof.

This land is within the indemnity limits of the grant for the Northern Pacific Railroad Company. It is also within the place limits of the St. Paul, Minneapolis and Manitoba Railway Company, and the question for consideration is: Did the rights of the said last named company become operative from the date of the passage of the act of March 3, 1871, which authorized the St. Paul, Minneapolis and Manitoba Railway Company to relocate its St. Vincent extension?

Your office decision in citing the case of *Hastings and Dakota Railroad Company v. Grinnell et al.* (19 L. D., 215), which was based upon the case of *Bardon v. Northern Pacific Railroad Company* (145 U. S., 535), evidently assumed that the grant to this company was similar to that of the Northern Pacific Railroad Company and was one *in presenti* while in fact it was one *in futuro*, and became operative when the relinquishment was made as required by that act. *St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company* (139 U. S., 1-16).

On December 13, 1871, the St. Paul and Pacific Railroad Company, through its president and secretary, made, sealed, and signed the release required by the proviso of the act aforesaid and this instrument was filed in the Department on December 19, 1871, and was thereupon accepted by this Department as a compliance with the requirements of the act.

The rights of the St. Paul, Minneapolis and Manitoba Railway Company to this tract of land depend upon a determination of the question as to when that relinquishment became effective. Was it effective on the date of its being signed or on the date of its delivery and filing in this Department? If it was effective on the date of its being signed, the land is excepted from the operation of the grant on behalf of this railroad company, as on that day the homestead entry of Bond was uncanceled. If it became effective, on the other hand, only on delivery, then the grant became operative on that date, to wit, December 19, 1871, and as the map of definite location was filed in your office on December 20, 1871, it appears that at both dates the record was clear, the entry of Bond having been canceled on December 14th.

In the recent case of St. Paul, Minneapolis and Manitoba Railway Company and Northern Pacific Railroad Company *v.* Bergerud, on review (23 L. D., 408), it was held, that the relinquishment became effective only with delivery, inasmuch as the relinquishment was in effect a deed under the well-recognized rule of the law. Such being the case, it would appear that your office decision was in error in reference to this tract and that it should have been awarded to the St. Paul, Minneapolis and Manitoba Railway Company.

In reference to the third appeal taken by the appellant, consisting of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$, of Sec. 13, T. 128, R. 34 W.; the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 1; the NE. $\frac{1}{4}$ of Sec. 5; the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 11; and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 15, same township and range, it is urged that your office decision erred in holding that the land in question was subject to the selection of the Northern Pacific Railroad Company; second, in not holding that said company has selected within its forty miles second indemnity limits, a quantity in excess of the quantity it is entitled to select under the provisions of the joint resolution of May 31, 1870, and the attention of the Department is called to the fact that under the terms of the joint resolution of 1870, the Northern Pacific Railroad Company was authorized to select within such indemnity belt in any State, an amount of land equal to the amount which it had failed to secure in its granted limits within said State, subsequently to the passage of the act of July 2, 1864, and prior to the definite location of its road, and it is asserted that an adjustment of the grant for the Northern Pacific Railroad Company made by your office in 1886 or 1887, shows that the company had made within such indemnity limits in this State, selections of 40,000

acres in excess of the quantity sold or otherwise disposed of subsequently to July 2, 1864, and prior to the definite location of its road, and that this excess is in addition to the further acreage of 84,000 acres awarded to said Northern Pacific Railroad Company by the supreme court of the United States in the case of said St. Paul and Pacific Railroad Company *v.* The Northern Pacific Railroad Company (139 U. S., 1).

This raises for consideration a very serious question upon which the Department is unable to pass on the record now before it. The case is returned to your office and you will report to the Department all the facts shown by the records of your office bearing upon this question, and a decision upon the question involved is reserved pending action by the Department upon such report.

The decision appealed from is accordingly modified.

TIMBER AND STONE ACT—ADVERSE CLAIM.

BATEMAN *v.* CARROLL.

The timber and stone act does not allow the purchase of land that is inhabited by a bona fide settler.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897. (I. H. L.) (A. E.)

On June 16, 1893, John W. Carroll filed declaratory statement for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 26, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 26, T. 67 N., R. 19 W., Duluth, Minnesota, alleging settlement December 22, 1890.

On June 23, 1893, Edward J. Batemen applied to purchase the same land under the timber and stone act. On November 29, 1893, notice of Bateman's application to purchase was executed by the register of the land office, and on December 11, 1893, a copy of said notice was served upon Carroll's attorney. On January 6, 1894, publication of the same was begun in a newspaper, the last publication being on March 10, 1894.

Action on the declaratory statement of Carroll, filed by him on June 16, 1893, when the township plat was first put on record, appears to have been suspended, but on November 3, 1893, your office allowed the declaratory statement to be filed without prejudice, and on November 25, 1893, Carroll's declaratory statement went of record.

On March 14, 1894, Carroll and Bateman each submitted final proof. At this time Bateman moved to dismiss defendant's proof on the ground of illegality of pre-emption filing. This motion was denied because of your office instructions of November 3, 1893, allowing the pre-emption filing to go of record without prejudice as of the time when first filed.

A hearing was had on November 15, 1894. The register recommended in favor of the timber claimant, and the receiver that the timber filing be canceled. On appeal, your office held that:

The weight and nature of the evidence incline to the position that there are forty or fifty acres of stone, thirty to forty acres of swale, and 1,200,000 feet of pine timber

worth \$1.50 per thousand. In its present condition it is wholly unfit for agricultural purposes, and is valuable chiefly for the timber upon it.

While Carroll claims to have selected the land for a home, I am satisfied that the contrary is true, and that the meager improvements were made only in order to lend color to his claim.

Your office then held the declaratory statement of Carroll for cancellation.

From this Carroll has appealed to the Department.

On June 23, 1893, when Bateman made his sworn statement that he had personally examined the land in controversy, and that it was uninhabited, Carroll was a resident upon the land, and your office so finds. This alone is sufficient to warrant the rejection of Bateman's application to purchase the land under the timber and stone act, as the act does not allow the purchase of land which is inhabited by a settler. The residence and improvement of Carroll can not be presumed to be in bad faith simply because they were made in the wilderness. Many populous communities throughout the western country were begun by a pioneer making a settlement in what was then an almost inaccessible locality. There is no evidence to show that Carroll's settlement was made in bad faith, and you will therefore allow his final proof and reject the application of Bateman.

BLACK TOMAHAWK *v.* WALDRON.

On the report submitted under the investigation directed October 20, 1894, 19 L. D., 311, the former departmental decisions are adhered to, and judgment rendered in accordance therewith, by Secretary Francis, February 8, 1897.

RAILROAD GRANT—INDEMNITY SELECTION—ABANDONMENT.

HASTINGS AND DAKOTA RY. CO. *v.* BERG ET AL.

The failure of a railroad company to perfect an indemnity selection, within a reasonable time after notice of final decision recognizing the right of selection, must be held to work an abandonment of its prior right, where the withdrawal has been revoked, and an adverse claim intervened.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (L. H. L.) (F. W. C.)

The Hastings and Dakota Railway Company appeals from your office decision of March 2, 1893, involving the S. $\frac{1}{2}$ of Sec. 3, T. 118 N., R. 45 W., in Marshall land district, Minnesota.

This land is within the twenty mile indemnity limits of the grant made by the act of July 4, 1866 (14 Stat., 87), to aid in the construction

of the Hastings and Dakota Railway, and was free from any adverse entry or right at the time of the withdrawal (May 11, 1868), on account of said grant.

In 1884 Albert McFarlane applied to enter the SW. $\frac{1}{4}$ of said section, and William Fraser the SE. $\frac{1}{4}$; both of which applications were refused by the local officers because in conflict with said withdrawal for railroad purposes.

From this denial the applicants appealed.

July 12, 1886, said railway company applied to select both tracts, specifying a basis for the selection and tendering the required fees for said selection.

This application was also rejected by the local officers because in conflict with the pending homestead applications aforesaid, and the company appealed.

October 5, 1888, your office decided in favor of the company and that it was entitled to select said lands, and refused the said homestead applications. Fraser did not appeal. McFarlane appealed, and on March 13, 1891, this Department affirmed your office decision (12 L. D., 228), holding that the railroad company had the right of selection in said lands.

May 22, 1891, the indemnity withdrawals to said railway grant were revoked by departmental order (12 L. D., 541), as authorized by act of September 29, 1890 (26 Stat., 496).

It is not claimed, after the decision by this Department of March 13, 1891, said railway company ever made any effort to perfect its selection tendered in 1886, by making payment of selection fees or by making new selection for the land.

February 26, 1892, Elling O. Berg made homestead entry No. 12,269 for the SE. $\frac{1}{4}$ (the Fraser quarter).

May 7, 1892, Hans O. Berg applied to make homestead entry for the SW. $\frac{1}{4}$ (the McFarlane tract), which was refused by the local office because the tract applied for had been selected by said railway company July 20, 1886, as being within the twenty miles indemnity limits of said road.

Hans O. Berg appealed, alleging that the railroad company had never paid the selection fees nor completed its attempted selection of July, 1886, and that as the company had failed to complete its selection, and said land had been opened to settlement by the order of revocation of May 22, 1891, his homestead application should be accepted.

It does not seem that notice of this appeal to the General Land Office was served upon the railway company, but that defect has been waived by its appearance herein by brief both before your office and this Department.

The railway company does not seem to deny that it received notice both of the decision of your office and this Department, but urges, in effect, that it was incumbent upon your office to advise the company

what steps should be taken in order to secure the acceptance of its selection. Its resident counsel in his brief says:

When the Department found the land subject to selection on the company's appeal, it became the duty of the Secretary or Commissioner to notify the company thereof, and that the fees which it had previously tendered to the local officers would now be received, upon the payment of which the selection would be approved.

The company had exercised due diligence in the prosecution of its case by taking its appeals in apt time, and it was entitled to notice of the action of the Department as well as directions from it as to further requirements. The bounden duty of the Department was manifestly to advise the railway company that the money would now be accepted and its application to select allowed.

The records of the General Land Office show that notice of your office decision of October 5, 1888, was, on that date, given to all parties, and that an office letter dated April 7, 1891, gave resident counsel for said company notice of the promulgation of the decision of this Department in the McFarlane case.

The company was therefore duly and seasonably advised both of the action of your office and this Department in its favor, and was bound to take proper steps within a reasonable time after said decisions to perfect its right under its proffered selection of this land, and I cannot agree with counsel that it was necessary that you should advise the company as to the proper steps to be taken in order to complete its attempted selection.

Your office decision in favor of the company became final, as to the Fraser tract, in 1888, and as to the McFarlane tract, in the spring of 1891, but to the date of your office decision, March 2, 1893, the company had taken no step to secure the acceptance of its proffered selection of 1886.

In the meantime the withdrawal made of its indemnity lands had been revoked, and after the lapse of a year from the date of the last decision in its favor Elling O. Berg was permitted to make homestead entry of the Fraser tract and Hans O. Berg applied to enter the McFarlane tract.

By its failure to complete its selection within a reasonable time after decision in its favor, the indemnity withdrawal having been revoked, it must be held that its laches worked an abandonment of its rights under its list presented in 1886, in the presence of an adverse claim.

Your office decision is therefore affirmed.

SWAMP LANDS—EVERGLADES—SCHOOL LANDS.

STATE OF FLORIDA.

A patent may issue to the State of Florida under the swamp land act for the unsurveyed tract known as the "Everglades," subject to the right of the State under its grant of school lands.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (I. H. L.) (W. M. W.)

The Department is in receipt of a communication, dated December 22, 1896, from the Commissioner of Agriculture and State Land Agent

for the State of Florida, wherein he asks that patents issue for certain lands in Florida known as the "Everglades," under the act of September 28, 1850 (9 Stat., 519).

On October 10, 1894, my predecessor found that the unsurveyed body of lands lying within the State of Florida known as the "Everglades" is in fact swamp land, and that a survey thereof is not practicable, and he held that a patent may issue to the State under the swamp grant, upon an estimated area designated by metes and bounds, the State to furnish a meander survey of said "Everglades," accompanied by satisfactory proof that said meander line does not include within its limits lands not of the character granted. See 19 L. D., 251. See also State of Florida, 18 L. D., 26; State of Florida, 8 L. D., 65; Id., 369.

On the 13th day of February, 1895, the United States Senate passed a resolution, as follows:

Resolved that the Secretary of the Interior be, and he is hereby, directed to inform the Senate whether it is proposed to issue a patent to the State of Florida for that portion of the State known as the "Everglades," and if so whether the Seminole Indians of Florida will be thereby dispossessed of their occupancy of said lands or any portion thereof.

This resolution was referred to your office and also to the Commissioner of Indian Affairs for reports.

On February 23, 1895, the Commissioner of Indian Affairs reported:

That the "Everglades" as laid down upon the map of Florida comprise large portions of the counties of Monroe and Dade. From a report made by Special Agent Wilson, December 30, 1887 (see Senate Ex. Doc. No. 139, 50th Congress, 1st session), it appears that there were then fifty Indians in Monroe county, and one hundred and twenty-six Indians in Dade county. Whether these Indians are located within the "Everglades" which it is proposed to patent to the State of Florida, I am unable to determine. It also appears that there are Indians located in sections 1 and 2, township 53 south of range 41 east, in Florida, but whether these sections will fall within the "Everglades," as they may be surveyed by the governor of Florida, is a matter of doubt.

If the Indians now have the right of occupancy of the lands within the "Everglades," and the United States should convey such lands by patent to the State of Florida, I am of the opinion that the State would take title subject to the right of occupancy of the Indians (see *Beecher v. Wetherby*, 95 U. S., 517, and the authorities therein cited).

On February 16, 1895, your office reported on said Senate resolution, showing that in compliance with the departmental directions given in 19 L. D., 251, letters were sent from your office to the governor of Florida and to the United States surveyor-general for Florida, inclosing copies of said departmental decision embodying instructions how to proceed to execute the "meander survey giving the exterior metes and bounds of 'The Everglades,'" and requesting the governor of Florida

to submit satisfactory proof that said meander line does not include lands which do not come within the description of swamp and overflowed lands as defined in the act of September 28, 1850.

On February 28, 1895, the Department, in response to said Senate resolution, transmitted to the President of the Senate copies of the reports of your office and the Indian office.

On January 9, 1896, your office submitted Florida swamp land list No. 87, embracing the lands designated on the maps as "The Everglades," and containing an estimated area of 2,942,600 acres. In your office letter it is said:

The estimate includes all the lands within the meander given in the list; and what would be school sections (16) in the several townships, if surveyed, are therefore, included in the total area submitted for approval under the swamp land grant; this is on the theory that although the school grant is of earlier date than the swamp land grant, the latter being a grant *in presenti*, takes precedence in the case of unsurveyed lands. The approval of the list is respectfully recommended.

On February 3, 1896, my predecessor, referring to said list, requested your office to prepare and forward for consideration

an abstract of the evidence in your office, submitted by said State, going to show that the meander line of the survey of the "Everglades" does not include within the original limits thereof any lands which do not fall within the description of swamp lands under the act of 1850 above mentioned, as required by my decision of October 10, 1894 (19 L. D., 251).

Pursuant to said request, your office, on the 6th day of February, 1896, transmitted to the Department a résumé of the evidence submitted by the State of Florida in support of its claim, as follows:

In addition to certified copies of the field-notes of survey of certain townships bordering on the "Everglades," the State submitted the affidavits of a number of persons having knowledge of the land, two of whom, J. W. Newman and Charles F. Hopkins, were engineers in charge of expeditions crossing the "Everglades," one from Fort Shackleford to Miami, and the other from Lake Okeechobee to the mouth of Shark River. The two persons mentioned are the only ones appearing to have any real knowledge as to the character of the interior portion of the "Everglades," and I inclose their affidavits as they are too concise to bear abridgment.

Eleven persons testified as to the general character of the land near the gulf of Mexico, or the southern portion of the "Everglades." They testified that, with the exception of a few "islands" or "hammocks" of from two to twenty acres in extent, the whole country is one vast marsh, impracticable to drain, or land utterly worthless for agricultural purposes. It is not stated that the land is rendered worthless by reason of its wet condition. The State refers to the report of Mr. Frank Flynt, which report is fully set forth in 19 L. D., 251.

The field-notes of survey of the townships bordering on the "Everglades," the lines of which surveys form the principal meanders mentioned in said list No. 87, show the lines to have been run through swamps or marshes for almost its entire length. It is the opinion of this office that the public land surveys were extended into the "Everglades" as far as was practicable and, in many instances, the border townships were found to be almost entirely swamp-land.

In Newman's affidavit he states, that as engineer in charge of a party of twenty persons, he traveled across the peninsula of Florida from Fort Myers to the place marked on maps as Fort Shackleford, and thence in a southeasterly direction across the "Everglades" to Miami on Biscayne Bay; "that he does not think or believe that along the route from a point ten miles southeast of Fort Myers to a point four

miles west of Miami one single tract of forty acres of land can be found fit for cultivation without artificial drainage."

The affidavit of Charles F. Hopkins shows that in November, 1883, he was the engineer of an expedition through the "Everglades;" that the expedition entered Lake Okeechobee and proceeded due south from the southern extremity of the lake for nearly eighty miles, and then deflected to the "W. S. W." to the head of Shark River, and proceeded down that river to its mouth. The party traveled in small boats, "paddling, pushing and dragging them alternately through the shallow water and saw-grass." He further states:

I took soundings, with an iron rod, eight feet long, through the mud and muck, occasionally, for about sixty-five miles; after which the rock cropped out on the surface.

At a distance of fifteen miles we found rock at a depth of eight and one-half feet, and afterwards at varying depths of from three to five feet for a total distance from the lake of sixty miles. The muck throughout this distance appeared very rich. The rock kept rising nearer the surface, until in the vicinity of the head of Shark river it cropped out on the surface.

There are several streams with a slow current running southerly out of Okeechobee, which are about ten feet deep, and about one hundred and fifty feet wide at the mouth, gradually growing smaller, until at the end of two or three miles they spread out over the country.

These streams run through a custard apple swamp. We then encountered a plain with a stunted growth of Myrtle and "yama" grass, with water about a foot deep, at that time, which was at the end of a dry season. We continued through this for a few miles and then entered thick and tall saw-grass.

This saw-grass extended almost uninterruptedly for about forty or fifty miles, and then broke up into small saw-grass islands separated by small channels and bayous of water.

When we arrived in the vicinity of the head of Shark river, these islands changed into innumerable small hammock islands, mixed with the saw-grass islands, and strange enough all arranged in rows extending S. S. E., so one could stand and look down between the rows, as far as the eye could see.

These hammocks vary in size from one to twenty-five acres, and a few of them are above ordinary over-flow. The soil of these islands is rich.

Not over one in one hundred of these islands are susceptible of cultivation, in their present state, as they are overflowed during the rainy season, and moreover are inaccessible until the surrounding marsh is drained.

The country for about sixty miles south of Okeechobee is susceptible of drainage, being elevated at Okeechobee twenty-two feet above the sea, and gradually declining to the sea level. South of this limit the rock crops out at the surface, and, except the islands before mentioned, the land is worthless even if drained.

Drainage would be impracticable here as the gulf waters back up so as to destroy the fall.

The country in its present condition is a vast marsh covered with water at all seasons and for forty miles south of Okeechobee is devoid of all animal life, even to birds and alligators, on the line we traversed.

Our expedition passed down the median line of the State, which is the summit or water-shed line. On each side of us, four or five miles away, the water was deeper, in the saw-grass being from two to three feet deep; and for the first fifty miles after passing the custard apples there was no land in sight, the waving saw-grass extending as far as the eye could see in all directions, except on the west. A hazy outline of the land could be seen in that direction.

Shark river is about four and one-half to five feet deep and about two hundred and fifty feet wide, with rock bottom. Water very clear; depth of water at mouth twelve feet; mud bottom.

The cruise occupied twenty-eight days from Lake Okeechobee to the gulf; during which time we slept in boats every night, there being no dry land to camp on. By meridian altitude of the sun (using artificial horizon), I find the extreme south end of Lake Okeechobee to be in latitude $26^{\circ} 41' 19''$ south.

The judgment of your office, that the swamp land grant "takes precedence in the case of unsurveyed lands," is not concurred in, for reasons that will hereinafter be given.

Section 1 of the act of March 3, 1845 (5 Stat., 788), provides:

That in consideration of the concessions made by the State of Florida in respect to the public lands, there be granted to the said State eight entire sections of land for the purpose of fixing their seat of government; also, section number sixteen in every township, or other lands equivalent thereto, for the use of the inhabitants of such township, for the support of public schools.

This act was passed over five years before the swamp land act, and was based upon express concessions made by the State respecting the public lands, and in its nature rests in a solemn compact, which the government of the United States should maintain, sacredly keep and carry out on its part. It is clear that Congress intended by this act to invest the State with title to every sixteenth section of land in that State that had not been disposed of, just as soon as such sections should be identified by proper surveys of the public lands. Whenever such sections shall be identified, the title thereto will pass to the State under the granting act; no patent will be necessary. *Warren et al. v. State of Colorado*, 14 L. D., 681; *McCreery v. Haskell*, 119 U. S., 327-331.

These views find support in the decisions of the supreme court of the United States, as well as those of this Department.

In *Cooper v. Roberts*, 18 How., 173, it was said:

We agree that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title.

See also *Heydenfeldt v. Daney Gold and Silver Mining Company*, 93 U. S., 634.

In *Beecher v. Wetherby*, 95 U. S., 517, in speaking of the school grant to the State of Wisconsin, it is said, p. 523:

It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in the future, or as operating to transfer the

title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the State.

On November 20, 1855, Secretary McClelland held that the swamp grant of September 28, 1850, did not embrace lands in Illinois which were included in the railroad grant of September 20, 1850. See 1 Lester, 521-523.

Secretary Schurz declined to recall his opinion in a similar case rendered on May 2, 1878. See Copp's Public Land Laws, 1071.

In State of Mississippi, 10 L. D., 393, Secretary Noble held (syllabus):

Swamplands, included within the alternate sections reserved to the United States from the grant to the State for railroad purposes, did not pass under the subsequent act of September 28, 1850.

In State of Ohio (on review), 10 L. D., 394, Secretary Noble held (syllabus):

The swamp lands, included within the alternate sections reserved to the United States from the grant to the State for canal purposes, did not pass under the subsequent grant of swamp lands, and no indemnity can be allowed therefor.

It does not follow that because a survey of the "Everglades" is impracticable, that the State should be deprived of its rights under its school grant. The "Everglades" of Florida present conditions that are exceptional in character, inasmuch as it would seem that the body embraced therein can not now be surveyed in such a manner as to mark out and specifically define the township and section lines. It is possible, however, that such survey may hereafter be made, and under the circumstances, and for the reasons hereinbefore given, it is deemed proper that the State's rights under its school grant should be preserved to it. It is accordingly held that a patent may issue to the State of Florida for the "Everglades" under the swamp land act, subject to the right of the State under its school grant, for the land embraced in the swamp list No. 87, as approved by me. With this modification, said list is approved, and you are directed to issue a patent accordingly.

The views of the Commissioner of Indian Affairs respecting the rights of any Indians occupying the lands in question are concurred in.

PRE-EMPTION—FINAL PROOF—PAYMENT.

ODETT v. DAVIS.

The submission of pre-emption final proof, without payment of the purchase price of the land as required by law, will not protect the pre-emptor as against an intervening adverse claim.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (W. M. W.)

The case of Frank Odett v. John C. Davis has been considered on the appeal of the former from your office decision of August 24, 1895, holding for cancellation said Odett's pre-emption declaratory statement for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 33, T. 30 N., R. 11 E., Susanville, California, land district.

The record shows that on November 1, 1888, Odett filed his pre-emption declaratory statement covering the land in question. On September 11, 1891, he submitted final proof in support of his claim, but did not pay or tender the purchase money for said land.

On August 7, 1893, John C. Davis made homestead entry for said land.

On August 15, 1893, Odett appeared at the local land office, and offered to pay the government price for said land and asked that final receipt be issued to him therefor. This the register and receiver refused to do. There is nothing in the record to show upon what grounds this refusal was based.

It appears from the decision of the register and receiver in the case that upon

affidavit filed by said Odett citation was issued to said Davis to show cause why his said homestead entry should not be canceled. Hearing was set for October 12, 1893.

The case was continued until December 22, 1893, when it was submitted on an agreed statement of facts.

On April 10, 1895, the register and receiver rendered their opinion, in which they held that Odett's pre-emption filing should be held intact, and that Davis's homestead entry should be canceled without prejudice to his right to make another homestead entry.

Davis appealed.

On August 24, 1895, your office reversed the judgment of the local officers, and held Odett's filing for cancellation.

Odett appeals.

His specifications of error are as follows:

1. In holding that the record herein "fails to disclose any reason for giving him (plaintiff) a hearing, or in any way recognizing his claim to said land."

2. In holding that "failure to make proof and payment (on a pre-emption claim) as provided by law entails a forfeiture of all rights in the presence of an adverse claim."

3. In holding that the "intervention of the Davis entry while Odett was in default obliterated the latter's claim."

4. In holding the plaintiff's declaratory statement filing for cancellation.

5. In holding Davis's homestead entry intact.

The case was submitted to the register and receiver upon an agreed statement of facts, on which it was decided by them and by your office. Said agreed statement of facts recites the record showing Odett's pre-emption filing, his final proof, failure to tender or pay the purchase money at the time of proof, Davis's entry, and thereafter Odett's offer to pay for the land, as hereinbefore set out. In addition to these matters, the agreed statement shows that Odett is a laboring man, dependent upon his labor for a living; that at the time he made final proof he did not have the money to pay for the land, but it was his *bona fide* intention to secure the money to pay for the land as soon as he could; that on August 14, 1893, he borrowed the required amount of money to pay for said land, and on the 15th day of said month he offered to make payment for the land embraced in his pre-emption filing; that at the time Davis made his homestead entry of the tract Odett had on said land "a good substantial house, fence inclosing about three or four acres, and said garden." Said statement contains many other facts that can have no bearing on the questions to be determined.

Counsel for appellant calls attention to Hugh Taylor, 9 L. D., 305, and contends that it sustains his allegations of error.

That case involved the right of a pre-emptor, after the statutory life of his filing had expired, and while proceedings under his final proof were pending, to transmute his filing under section 2289 of the Revised Statutes. His application to transmute was in its nature and effect a pending application to make homestead entry of the tract in question. It follows that the case at bar does not come within the rule announced in the Hugh Taylor case.

Referring to Odett's failure to make payment for the land in question, your office held that:

While this delinquency would not necessarily defeat his right to make entry, in the absence of an adverse claim, it did, from the moment his delinquency began, render the land subject to entry by any other qualified applicant. In other words, failure to make proof and payment, as prescribed by law, entails a forfeiture of all rights in the presence of an adverse claim.

This holding is concurred in.

The judgment of your office appealed from is accordingly affirmed.

On the 17th of January, 1896, counsel for Odett filed what he calls "Petition for Rehearing," in which he recites that the claims of each of the parties have been under investigation by a special agent, who has reported against them. He also charges that Davis has abandoned the land in question, and asks that another hearing be ordered. Said petition does not allege newly discovered evidence, but simply relates

to matters of fact arising since the trial which might be the basis of a contest, if the entry were in such a condition that it would be subject to contest under the law.

If the alleged government proceedings shall be discontinued or terminated without canceling Davis's entry thereafter, I see no reason why Odett may not, if he desires to do so, contest Davis's entry on any grounds sufficient to warrant a cancellation thereof. If said proceedings result in canceling Davis's entry, the land will be subject to entry by the first legal applicant. If Odett is qualified, and desires to enter it, and makes the first application after it shall become subject to entry, there is nothing to hinder him from doing so.

The petition is dismissed.

HOMESTEAD ENTRY—ALIENATION—COMPROMISE.

MEAL v. DONAHUE.

An agreement to convey part of the land covered by a homestead entry after final proof, with possession given under such contract, calls for cancellation of the entry, although the agreement may have been made in the compromise of a prior contest against the entry in question.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (I. H. L.) (E. B., Jr.)

Alfred H. Meal appeals from your office decision of December 9, 1895, in his case against John J. Donahue, involving lots 1 and 2 and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 5, T. 17 N., R. 2 W., Guthrie, Oklahoma, land district, for which the latter made his homestead entry April 27, 1889, and final proof April 9, 1895.

On May 3, 1895, Meal filed a protest against Donahue's entry alleging that the same was fraudulent for the reason that about May, 1891, Donahue had sold to one John T. Phillips thirty-four acres of the land embraced therein, and thereafter held the land fraudulently for the purpose of acquiring title thereto in order "that he might convey title to a portion thereof to said John T. Phillips under his contract of sale"; and further, that the said John J. Donahue fraudulently attempted to convey title to said land to his sister-in-law, Mrs. Temple, immediately after making final proof thereon: wherefore Meal prays that a hearing be ordered "to determine the truth of the allegations herein"; and that the entry be canceled and he be awarded the preference right to enter the land.

These charges are supported by Meal's affidavit and the affidavit of said Phillips. The latter swears that for some time prior to about May, 1891, he had a contest pending against Donahue's entry affecting—

the E. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section 5; that about May 1891, he withdrew his said contest against said homestead entry in consideration that the said John J. Donahue should prove said land up, and acquire title thereto from the government of the United States, and thereafter should deed to this affiant thirty four acres off the east

side of said NE. $\frac{1}{4}$ of said section 5; that at said time last mentioned, the said John J. Donahue, entered into an agreement with this affiant by which said Donahue agreed to acquire title to said land, and thereafter as soon as title was so acquired by him, make a good and sufficient deed to this affiant to the thirty four acres above set forth; that said Donahue also agreed that this affiant might have the use of said thirty four acres from the time said agreement was entered into free of charge, and that this affiant might have and own all improvements of whatever kind and character affiant could place upon said thirty four acres; that in pursuance of said agreement and in consideration of the withdrawal by affiant of his contest above referred to, this affiant went into possession of said thirty four acres, and has continued in said possession up to the present time; that in pursuance of said agreement and promise so entered into by said John J. Donahue, this affiant proceeded to plant and raise upon said thirty four acres of land an orchard and vineyard consisting of about three hundred fruit trees and about two hundred grape vines, and that affiant also planted and has continuously cared for about fifty ornamental and forest trees and other shrubbery on said thirty four acres on and about a building site selected and enclosed as such by affiant and his family; . . . that said Donahue continued to re-affirm said agreement as to said thirty four acres until after he had made final proof upon his said homestead entry, which was done on April 9th, 1895, but that since about the 15th of April 1895, said Donahue has refused to comply with the said agreement and has refused to make a deed to said thirty four acres to this affiant; but that said Donahue did on the — day of April 1895, make a deed of said land together with the balance of his said homestead entry to Mrs. Trimble, a sister-in-law of said Donahue, and that his said sister-in-law has as affiant is informed and believes, mortgaged said land for the sum of \$700.00.

In said decision upon consideration of this protest your office held (1) that a conveyance of the land by Donahue after final proof would not be sufficient ground for contest; and (2) that—

The contract between Donahue and Phillips pursuant to which the contest was dismissed, was in the nature of a compromise, and was not, therefore, such an illegal agreement as would justify the cancellation of Donahue's entry.

A hearing was therefore denied and the protest dismissed. Meal thereupon prosecutes this appeal, contending that your office erred in its holdings and action adverse to him as above stated.

It is well settled that after due final proof and entry a homesteader, having then acquired the equitable title to the land entered, may contract to convey, or may at once convey the same without infracting any provision of the homestead law. A conveyance at such time is not *per se* evidence of bad faith on the part of the entryman. Your decision as to the alleged conveyance to Mrs. Trimble is therefore correct. With the alleged fraud of Donahue against Phillips in connection with that conveyance the land department is not concerned. That is a matter between themselves.

I do not concur, however, in the conclusion of your office that such a contract as is alleged to have been entered into between Donahue and Phillips is in the nature of a compromise such as to be permissible under the homestead law, and therefore not an illegal agreement. As a means of ending vexatious litigation, compromises between claimants to public land may properly be and generally are favored by the land

department, but to be favored they must, as an essential condition precedent, be within the law, and not involve and require as a necessary sequence, or as part of the contract on which they are founded, the violation of law. The government is to a certain extent a party to every valid compromise between adverse claimants to public land; or, to state the proposition in another form, no such compromise can be effected without the knowledge and consent or subsequent ratification and approval of the United States. The alleged contract, or compromise, whereby the contest between Phillips and Donahue was brought to an end, could not have received the consent, and cannot now receive the approval, of the United States speaking through this Department; for such a contract or compromise would involve a violation of law on the part of said Donahue, then an entryman, and one of the parties thereto.

It was said by the Department in the recent case of *Walker v. Clayton* (24 L. D., 79), wherein Clayton, prior to final proof, had made a contract with one May to convey to the latter his (Clayton's) homestead—

In his homestead affidavit he had sworn that the entry was made for his exclusive benefit and not directly or indirectly for the benefit or use of any other person or persons whatsoever, and he knew that in his final affidavit he would be required to make oath, subject to an exception not here in point, that he had not alienated any part of the land (Sections 2290 and 2291, Revised Statutes). It was evidently implied, if not expressed, in his contract with the United States, that he would continue to hold, reside upon and cultivate the land for his exclusive use and benefit until the time should arrive, when, after the submission of final proof as required by law, he had earned his right to receive patent therefor.

It is no adequate defence that May could not enforce specific performance of the contract. Clayton might, of his own volition, have carried it out, and it is this mischief that the statute is designed to remedy (*Molinari v. Scolari*, 15 L. D., 201).

In the case of *Tagg v. Jensen* (16 L. D., 113), it was laid down as the settled construction of the pre-emption law relative to alienation "that any agreement to convey any part of an entry or claim to another made prior to final proof will defeat the claim." While the language of the pre-emption law was more explicit than that of the homestead law as it stood at the date of this entry, the spirit and intent of each on the point at issue was the same; and section 2290 of the Revised Statutes, as amended by the act of March 3, 1891 (26 Stat., 1095), was made to conform substantially to the language of the former. See in this connection *Bashford v. Clark et al.* (22 L. D., 328).

The Department directed the cancellation of Clayton's entry because of the unlawful contract made by him, although no conveyance was ever made in pursuance thereof, nor any possession of the land, apparently, ever given. In this case not only is a similar contract alleged, but it is also charged that possession was given Phillips thereunder and continued by him up to the date of this protest.

Meal's allegations as to this contract and its partial execution by Donahue, are amply sufficient to require that a hearing be ordered in the premises. The decision of your office upon this point is reversed and you are directed to order a hearing, in accordance with the foregoing.

HOMESTEAD CONTEST—PRIORITY OF SETTLEMENT.

BEHAR *v.* SWEET.

The general rule that a settler claiming priority over one having an entry of record must establish his claim by a preponderance of the evidence, may be so far departed from, in a special case, as to reach an equitable conclusion, where, on the facts shown, justice and equity require a division of the land between the parties.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (I. H. L.) (A. E.)

On July 25, 1896, your office transmitted a motion filed by Sweet for review of departmental decision rendered in the above entitled cause on June 9, 1896. The land involved is the NW. $\frac{1}{4}$ of Sec. 23, Tp. 26 N., R. 1 W., Perry, Oklahoma.

This motion being entertained, on August 25, 1896, you were directed to notify Sweet that to insure consideration by the Department, he will be required to serve a copy of the motion upon the opposing party, and return evidence of such service within thirty days, that then each party would be allowed to file briefs in accordance with Rule 114 of Practice.

On October 10, 1896, your office retransmitted the papers, with evidence of service and briefs of counsel.

The matter is now before the Department for examination.

The facts in the case are as follows: The land is divided by a creek, running from the northwest corner southeasterly. About one-third of the land lies north of this creek, and the timber along the creek obstructs the view from either side. Behar settled on the north side of the creek, and Sweet on the south side. A conclusion drawn from the evidence is that each settled at the same time, on September 16, 1893, and neither knew the other was there, each having traveled about the same distance going to the land. Each man has built a house and improved the land. Over two years ago, when the hearing was had, Behar had twenty-one acres broken, fourteen of which were in wheat, had built two houses, kitchen, stable, chicken house, dug a well, set out fruit trees, and had forty or fifty acres fenced. One month after Behar settled on the land a child was born to him. Sweet's improvements consisted of a house, twenty-five acres fenced, hen house, hog pen, and twenty-five or thirty acres planted to crops. Each man has a family, and has been a continuous resident upon the land since his settlement, more than three years ago.

When Behar settled upon the land, his wife was sick, and there was urgent necessity for a habitation for her to dwell in. He appears therefore to have devoted himself to the improvement of the claim, and did not apply to make entry until November 7, 1893, which, however, was within time under the homestead law. Sweet, however, not having a sick wife, for whom improvements were necessary, went

to the local office and made entry on September 25, 1893, which was sixteen days before the birth of Behar's child.

It is contended by attorneys for Sweet that Sweet should have an advantage by reason of having made this entry before Behar, in that the burden of proof should be placed upon Behar to show that he was the prior settler.

The local officers found in favor of Behar, but your office and the Department agreed in finding that it was impossible to determine that either Sweet or Behar had the superior claim, or that either had settled prior to the other, and that, owing to a line of woods which divided the tract of land in controversy, each settled unknown to the other.

Each man had made valuable improvements, and had continuously resided upon the land, with his family, from date of settlement, and the Department deemed it unjust to do other than divide the land between the parties.

While the ruling that a settler claiming prior settlement over one having an entry of record must establish his claim by a preponderance of evidence, will be adhered to in most cases, the Department will, where justice and equity require it, and great hardship would result were the rule applied, depart so far from the rule as to reach an equitable decision in the case. If the rule were applied in the case under consideration, it would be depriving Behar of his land and improvements, because he remained on the land, building a habitation for his sick wife, to whom a child was born on the land twenty-five days after his settlement.

Deeming that it would be a great hardship to Behar to disturb the decision in the case under consideration, rendered June 9, 1896, the same will stand.

The motion is denied.

PRICE OF LAND—INDEMNITY LIMITS—REPAYMENT.

THOMAS FOSTER.

Lands falling within the indemnity limits of a railroad are not raised to the double minimum price.

There is no statutory authority for the return of a double minimum excess in fees and commissions erroneously required on a homestead entry of lands in fact single minimum, where such money has been covered into the United States Treasury.

Secretary Francis to the Commissioner of the General Land Office February 13, 1897.

(I. H. L.)

(J. L.)

On February 8, 1889, Thomas Foster made homestead entry No. 6479 of the SW. $\frac{1}{4}$ of section 14, T. 27 N., R. 32 E., W. M., Spokane Falls land district, Washington. He was required to pay and did pay to the receiver the sum of twenty-two dollars for fees and commissions, the land being rated at double minimum price. On November 20, 1895, Foster filed an application for the repayment of six dollars, alleging

that the land was "minimum priced land, upon which the fees and commissions payable when application for homestead entry is made" could lawfully amount to only sixteen dollars.

On December 3, 1895, your office rejected the application, saying, that the records of this (your) office show that said land is within the limits of the grant to the Northern Pacific Railroad Company, branch line. Hence the land is double minimum land (Section 2357 R. S.), and the fees and commissions collected on said homestead entry, \$22.00, was the proper amount.

From said decision Foster has appealed to this Department, respectfully traversing the fact found by your office as aforesaid.

A re-examination of the records of your office shows, that the quarter section of land aforesaid lies within the indemnity limits of the grant to the Northern Pacific Company for its main line, and does not lie within the granted limits for the branch line.

The act of July 2, 1864, incorporating the Northern Pacific Railroad Company (See section 6 on page 369 of 13 Statutes), and section 2357 of the Revised Statutes referred to in your office decision, do not extend the double minimum price to lands lying within indemnity limits. Only reserved alternate sections lying within the limits *granted* by act of Congress, are required to be sold for not less than two dollars and fifty cents per acre (19 L. D., 381).

According to the list of fees and commissions published on page 34 of the General Circular of October 30, 1895, it seems that Foster paid six dollars too much.

Therefore the reason assigned by your office for rejecting Foster's application is erroneous.

But the relief desired by Mr. Foster cannot be granted, because the six dollars which he overpaid on February 8, 1889, and demanded back on November 20, 1895, were in due course of business covered into the treasury; and there is no statute which authorizes your office or this Department to take it out. The Constitution provides that: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law."

For this reason, your office decision rejecting the application is hereby affirmed.

OKLAHOMA LANDS—SETTLEMENT—RESERVATION FOR HIGHWAY.

HARDING *v.* MOSS.

A settlement on land reserved for a public highway, along a section line, as provided under section 23, act of May 2, 1890, prior to the actual location and use of such highway, is valid and extends to the adjacent quarter section on which settlement is intended to be made.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (I. H. L.) (C. J. W.)

On September 20, 1893, Albert W. Moss made homestead entry No. 339, for SW. $\frac{1}{4}$ Sec. 10, T. 26 R. 2 E., Perry land district, Oklahoma.

On October 26, 1893, Harding filed his affidavit of contest against said entry alleging prior settlement.

The hearing was set for October 26, 1894.

On motion of Harding the case was continued to January 2, 1895. On January 2, 1895, Harding made application to take the depositions of absent witnesses and the case was continued to March 11, 1895. On March 11, 1895, Harding asked for a further continuance of thirty days on account of absent witnesses which was denied, but he was allowed another day, to wit: until 12th of March to get his witnesses.

On March 12, 1895, the hearing was had, both parties being present and represented by counsel. On March 15, 1895, the local officers rendered their decision in which they found that Moss was the prior settler, and recommended the dismissal of the contest. Harding appealed, and on October 24, 1895, your office considered the case and rendered an opinion, in which it was, in substance, found that the evidence left the fact in doubt as to which was the prior settler, and directed a division of the land between them in such way as to leave each in possession of the half upon which his improvements had been placed. From this decision both Moss and Harding have appealed, each alleging, in substance, the same errors of law, and each alleging that it was error not to have found him to have been the prior settler. Harding alleges two errors of law not covered by the allegations of Moss.

1. That it was error to deny his motion for continuance.
2. That it was error to hold that a settlement upon the four rods reserved for a public highway around the section was a valid settlement.

The land in controversy is a part of what is known as the Cherokee Outlet, and was opened to settlement on the 16th of September, 1893. Each of the parties claims to have made the race to, and settlement upon, the land on the day of the opening. The two distinct legal propositions submitted by Harding will be first considered, since, if he is correct in either, an examination of the other questions would be unnecessary.

1st. Was it error on the part of the local officers to deny the motion of Harding for further continuance? The record indicates that ample opportunity was offered Harding to prepare his case for trial, and there was no abuse of discretion on the part of the local officers in denying his last motion for continuance.

As to the insistence, that a settlement upon that part of a quarter-section reserved for a public highway along section lines, as provided by section 23, act of May 2, 1890 (26 Stat., 81), it must be held that before such highway is actually located and in use, such settlement must be regarded as valid and extends to the quarter-section contiguous, upon which such settlement was intended to be made. The highway provided for by the act is a mere easement, and does not prevent title to the entire quarter-section from passing to the patentee, subject to the easement.

Said section twenty-three is as follows:

That there shall be reserved public highways four rods wide between each section of land in said territory, the section lines being the center of said highways; but no deduction shall be made, where cash payments are provided for, in the amount to be paid for each quarter-section of land by reason of such reservation. But if the said highway shall be vacated by any competent authority, the title to the respective strips shall inure to the then owner of the tract of which it forms a part by the original survey.

Where, as in this instance, the initial act of settlement performed by a settler is upon, or partially upon, the land thus reserved, it will nevertheless be deemed settlement upon the quarter-section to which it appertains and is intended to be settled upon. Your office did not err in so holding.

The remaining questions are—1st. Was it error upon the part of your office to direct a division of the land between the two claimants; and 2d. Was it error to make no ruling as to which one of the parties was the prior settler. As to the first of these propositions it was held here, in the case of *Sumner v. Roberts* (23 L. D., 201)—

In case of a contest against an entry on the ground of a prior settlement right, the burden of proof is on the contestant to show that his settlement antedates both the entry and settlement of the contestee, and if he fails to thus show such priority, the entry must stand.

In a contest of such character, doubt as to the fact of priority, or a finding of simultaneous settlement, does not justify an arbitrary division of the land between the parties, or an award thereof to the highest bidder.

Your office decision as to this proposition is without support either in law or the evidence, and must be held to be erroneous. The question remains is the evidence of such character as to admit of a specific finding of priority of settlement upon the part of one or the other of the parties. An examination of the record is all that is necessary on this subject. The fact is not left either in doubt or uncertainty. The evidence unmistakably indicates that Moss reached the land and set his stake at least thirty minutes before Harding reached the tract. The local officers found Moss to have been the prior settler, and the record amply supports that finding. In fact, it is not seriously disputed by contestant that Moss was first on the land, and the gravamen of his contention is that, when he reached it, he performed no act of settlement for a long time thereafter; that such as he did perform was in the public highway, and that was thereafter abandoned. The record does not support this contention. Upon the contrary, it warrants the specific finding that Moss reached the land at least half an hour in advance of Harding, and staked it, setting a stake with his name over it and a handkerchief on it as a flag. This stake was still standing on the 23d of September, and presumably it remained undisturbed from the 16th until that time. It was sufficient notice that the land was taken and claimed by Moss, and as an initial act of settlement it was followed within a reasonable time by permanent improvements of value and by

residence. The finding of the local officers on these questions was proper. Your office decision is reversed, and the decision of the local officers affirmed. The contest is dismissed, and the entry of Moss held intact.

RAILROAD GRANT—LANDS EXCEPTED—SWAMP SELECTION.

DORN v. ELLINGSON.

The notation of a swamp land selection, appearing of record at the date a railroad grant becomes effective, will not operate to except the land covered thereby from the grant, where prior thereto the approval of such selection has been revoked, and the selection itself superseded by subsequent lists.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (I. H. L.) (E. M. R.)

This case involves the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 98 N., R. 10 W., Des Moines land district, Iowa.

The record shows that these tracts are within the ten mile limits of the grant to aid in the construction of the McGregor and Missouri River Railroad under the act of May 12, 1864 (13 Stat., 72), and on June 19, 1879, were listed by the Chicago, Milwaukee and St. Paul Railroad Company, successors in interest to the above mentioned road.

On June 4, 1883, your office rendered a decision rejecting said listing of these lands, holding that the tracts in controversy, having been selected as swamp land on March 17, 1852, were by virtue of the act of March 3, 1857 (11 Stat., 251), confirmed to the State of Iowa. The railroad company filed no appeal as to this decision, but thereafter, to wit, on June 4, 1884, the said company filed an application for a reconsideration and revocation of that decision.

On September 3, 1884, your office, acting upon this application denied it, and it was further declared that the decision of June 4, 1883, was final.

The company attempted to appeal, which right was denied them by your office, and thereafter an application was made for the issuance of a writ of certiorari, and on October 17, 1884, the Department refused the issuance of the writ. In the decision refusing such issuance the Department's action was based upon the laches of the petitioner and the decision did not pass upon the merits of the case before your office, it being said (L. & R. Press Copybook 109, p. 427),

But if said decision is not well founded a review here of the rule therein adopted must be reserved until such time as a case involving swamp selections comes regularly before the Department.

Your office decision of September 10, 1895, states that the question at issue in those proceedings (the decision of June 4, 1883, and those following) was the standing of what is known in your office as the

"Sargent list", being a list of certain swamp selections in the State of Iowa which at one time had been approved by this Department, but subsequently such approval, upon the recommendation of your office, had been rescinded.

It appears that the tracts in controversy remain upon your records as "selected as swamp March 17, 1852," and the decision of your office now under consideration, for the purpose of clearing the record, "directed that the selection be noted as canceled at this date."

March 24, 1895, Elling H. Ellingson, the defendant-appellant, made homestead application and the local officers allowed the entry on a waiver by the Secretary of the State of Iowa showing that the selection above referred to did not appear among the swamp selections of the county wherein these tracts are situated.

July 5, 1895, the local officers transmitted the record in the application of David Dorn to make final proof of his right to purchase the above described land under section five of the act of March 3, 1887 (24 Stat., 557).

The local officers took no action in the case, and in your office decision upon appeal you make the following finding of facts, which the record sustains:

October 31, 1874, by deed (contract to sell) the McGregor & Missouri River R. R. Company conveyed the land in controversy to David Dorn for \$400.

June 4, 1886, Dorn and wife, conveyed to Joseph M. Watts, for \$3000; Watts, April 7, 1893, mortgaged (to secure the loan of \$2500) to Charles L. Hutchinson, and subsequently:

February 15, 1894, Joseph M. Watts and wife, conveyed the land by warranty deed to said Elling H. Ellingson for \$2600, there being also an additional twenty acres of adjoining land conveyed in same deed.

In this last mentioned trade Hutchinson executed a release of his mortgage, Ellingson (February 17, 1894) executing a mortgage to E. A. Hamill to secure \$1600, of the purchase price mentioned. By stipulation of adverse parties in this case it was agreed, that Ellingson, during February 1894, executed a mortgage, and delivered same to the First National Bank of Decorah, Iowa, together with \$1000 in money, for the benefit of Joseph M. Watts. Subsequently Ellingson made homestead entry for the land, as shown, and enjoined said bank from paying or delivering said money or mortgage to Watts, and the bank still retains the same under said proceedings.

In his pleading Ellingson claims settlement on the land March 24, 1894, nine months prior to Dorn's present application to purchase. Also that he (Ellingson) previously negotiated with Watts for the purchase of the land at the rate of \$26.00 per acre.

Ellingson found during the pendency of the trade with Watts that the title still "remained in the clouds with the swamp act, the R. R. act, and the U. S. Gov. reaching for it." Ellingson claims he proposed that Watts get a perfect title (matters remaining in *statu quo* in the meantime) "or get an adverse ruling from the U. S. Commissioner, or the proper State officers." Ellingson urges that Dorn's interferences, by applying to purchase under Sec. 5, act March 3, 1887, is, under the circumstances a questionable proceeding, and alleges that Dorn in his preliminary affidavit to purchase swore that no person had settled on the land subsequent to 1882, while on cross examination he admitted he heard that Ellingson "had received a homestead filing."

As has been set out, this case is before the Department upon the

application of Dorn to purchase under the fifth section of the act of Congress of March 3, 1887 (24 Stat., 557), which is as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

Counsel for the appellant argues in his well-considered brief that in order that one may be entitled to purchase, it must appear that he acted in good faith in so purchasing from the railroad company, and that in this case it cannot be said that he acted in good faith, inasmuch as it is claimed by counsel that an examination or review of the proceeding had in reference to this tract discloses that the railroad company had, and could have had, no title in the tracts in controversy; the record showing that from 1852 up to the date of the decision appealed from this land appeared of record as selected as swamp. In this connection it is proper to state that unless the land was excepted from the grant to this railroad company, the right to purchase under the act *supra* does not exist. This brings up that question.

On October 30, 1891, by letter "K" your office decision was rendered upon the authority and effect of the "Sargent list", hereinbefore referred to. From the facts therein set forth it appears that this list was filed in your office on March 17, 1852, by George B. Sargent, surveyor general. In filing said list the surveyor general did not state that the State of Iowa had determined through its proper agents to accept his field notes as a basis of adjustment, but subsequently, on March 21, 1852, he so stated, but forwarded no agreement to this effect. And thereafter, by act of the State legislature, January 13, 1853, the swamp lands were granted to the various counties and provision was made for survey and selection by county surveyors. So it appears that if the agreement was entered into as reported by letter from Mr. Sargent, this action upon the part of the legislature was a repudiation of it.

Upon representation made to your office, on February 19, 1855, a communication was by your office addressed to the Department, asking that the former approval of the "Sargent list" made by the Depart-

ment upon the recommendation of the Commissioner of the General Land Office, be revoked, and thereafter, to wit, on March 1, 1855, said approval was revoked. Prior to this time other lists had been filed showing the swamp lands claimed by the State under the swamp act.

As a matter of history, it may be stated in this connection that about 1700 tracts were included in the "Sargent list," and the county surveyors under the authority of the act of the legislature, *supra*, selected about 1300 of these tracts, leaving 400 tracts. And in your office, for a period of nearly thirty years after the revocation of the approval of the "Sargent list", it was treated as superseded by other lists filed. And your decision of October 30, 1891, *supra*, states that this view was acquiesced in by the State, it not having ever set forward the claim that the lands specified therein were confirmed to the State by the act of 1857.

The tracts in controversy were included in the "Sargent list", but have not been enrolled in any subsequent list filed in the place of and superseding that list. It was under these facts that the then Commissioner of the General Land Office, on June 3, 1883, held that this list was confirmed under the act of March 3, 1857 (11 Stat., 251). And thereafter, as has been set out, the Department refused to disturb that decision on account of the laches of the Railroad Company.

Was the land now in controversy excepted from the operation of the grant to aid in the construction of the McGregor and Missouri River Railroad under the act of May 12, 1864 (13 Stat., 72)?

At that time there existed upon the records of your office, opposite these tracts, "selected as swamp March 17, 1852;" this record being made on account of the "Sargent list." The approval of that list had been revoked and it had been superseded by others when the grant was made. Under these facts it is clear that the land was not excepted from the operation of the grant by an invalid and repudiated selection. The clearing of the records in your office was a ministerial act, the failure to do which can in no wise affect the rights of the company.

In the case of *Anderson v. Northern Pacific Railroad Company et al.* (7 L. D., 163) it was held (syllabus):

The cancellation of an entry by the order of the Commissioner of the General Land Office takes effect as of the date when the decision is made, and the fact that such order was not noted on the records of the local office until after the definite location of the road, though made prior thereto, would not operate to defeat the operation of the grant.

So also in the case of *Sioux City and Pacific Railroad Company v. Wrich* (22 L. D., 515), in which it was held (syllabus):

A school indemnity selection made prior to statutory authority therefor does not reserve the land covered thereby from the operation of a railroad grant.

The Secretary of the Interior is charged with the adjustment of railroad grants, and should withhold from other disposition lands granted for such purposes, even though the grantee may fail to appeal from an erroneous adverse decision of the General Land Office.

And also *Knight v. United States* (142 U. S., 191).

My conclusions are that there was no existing claim at the date of the attachment of the railroad's right to these tracts that could operate to prevent the railroad company from acquiring title, and therefore that David Dorn, the defendant herein, is not entitled to purchase under the said section of the said act, but that the land involved passed to the railroad company.

The purchasers from the company are amply protected by this decision.

The decision appealed from is accordingly reversed.

TIMBER CUTTING—STATUTORY PROVISIONS.

INSTRUCTIONS.

In construing the provisions contained in the two acts of June 3, 1878, and the act of August 4, 1892, with respect to timber cutting, it must be held that the first of said acts of 1878 (20 Stat., 88), relates to all mineral lands of the United States, but to none of any other character, and permits the cutting of timber on such lands for building, agricultural, mining, and other domestic purposes, but not for the purpose of sale or commerce, and that the second of said acts (20 Stat., 89), as amended by the act of 1892, relates to all non-mineral lands of the United States, in all public land States, and prohibits the cutting of timber on such lands, except as therein otherwise provided.

Secretary Francis to the Commissioner of the General Land Office, February 23, 1897. (I. H. L.) (W. C. P.)

I am in receipt of your communication of May 25, 1896, asking to be advised as to the proper construction of the acts of Congress of June 3, 1878 (20 Stat., 88), June 3, 1878 (20 Stat., 89), and of August 4, 1892 (27 Stat., 348), all of which contain provisions relating to the cutting of timber on the public lands.

The act of June 3, 1878 (20 Stat., 88), which may be designated as act No. 1, is entitled:

An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes—

and the first section reads as follows:

That all citizens of the United States, and other persons, *bona fide* residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, the provisions of this act shall not extend to railroad corporations.

The second section provides that the register and receiver of local land offices in whose district any mineral land may be situated shall ascertain from time to time whether any timber is being cut upon any such land, except for the purposes authorized by said act, and if so, to report the fact to the General Land Office, and section three provides penalties for the violation of the provisions of the act.

The other act of June 3, 1878, which may be designated as act No. 2, is entitled:

An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

The first section of this act authorizes the sale of public lands in "the States of California, Oregon and Nevada and in Washington Territory" which are valuable chiefly for timber and stone thereon, but unfit for cultivation; the second and third sections specify the mode of procedure in such cases, and section four prohibits the cutting of timber on the public lands. It reads as follows:

That after the passage of this act, it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said States and Territory or remove, or cause to be removed, any timber from said lands, with intent to export or dispose of the same; and no owner, master or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars: *Provided*, That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until ninety days after the passage of this act.

The fifth section provides for relief from prosecutions under Sec. 2461 of the Revised Statutes, and the sixth section repeals all acts or parts of acts inconsistent with the provisions of this act.

The third act spoken of in your letter is that of August 4, 1892 (27 Stat., 348), and is entitled:

An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

The first section of this act provides for the entry of lands chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims, and the second section, which relates to the subject now under consideration, reads as follows:

That an act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory" approved June third, eighteen hundred and seventy-eight, be, and the same is hereby, amended by striking out the words "States of California, Oregon and Nevada, and Washington Territory" where the same occur in the second and third lines of said act, and insert in lieu thereof the words "public land States," the purpose of this act being to make said act of June third eighteen hundred and seventy-eight, applicable to all the public land States.

The proper construction of the two acts of June 3, 1878, was considered by the United States circuit court in the case of *United States v. Smith* (11 Fed. Rep., 487), particularly as to their operation within the State of Oregon. It was there held that act No. 2 was operative in that State to the exclusion of act No. 1. It was said in the course of that decision that the provision in act No. 2, making it unlawful to cut any timber on any public land in Oregon, except that cut by a miner or agriculturist in the ordinary working or clearing of his mining claim or farm is inconsistent with and repugnant to the license to cut contained in act No. 1; that both provisions could not be in full force in the same place. This decision was cited in the decision in *United States v. Benjamin* (21 Fed. Rep., 285), and it was held that the provisions of the act (No. 1) authorizing the cutting of timber on the public lands was not applicable to California.

These decisions were rendered on April 21, 1882, and August 18, 1884, respectively. This Department on May 25, 1882, considered a number of cases of trespass in cutting timber on mineral lands in the Territory of Dakota, and gave certain instructions in the case of *Frank P. Hardin et al.* (1 L. D., 597). Secretary Teller then said:

The act of Congress approved June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories, to fell and remove timber from the public domain for mining and domestic purposes" clearly authorizes the cutting of timber on the mineral lands of the United States for domestic use.

It has been alleged that the act of June 3, 1878, does not apply to persons cutting timber on the mineral lands for sale, and that to enable any person to have the benefit of that act, he must cut the timber for his *personal* use, and not for sale. Such a construction defeats the very intent of the act, which was to allow the settler on the mineral lands to have the benefit of the timber thereon growing for use within the Territory or State where it grew.

The purpose and scope of the act were discussed at some length, and the conclusion reached is that expressed in the foregoing quotation. These views were incorporated in a circular upon said act issued by your office June 30, 1882, and approved by this Department (1 L. D., 697), it being said:

All citizens and *bona fide* residents of the States and Territories mentioned therein are authorized to fell and remove or to purchase from others who fell and remove, any timber growing or being upon the public mineral lands in said States or Territories: *Provided*

1. That the same is not for export from the State or Territory where cut.
2. That no timber less than eight (8) inches in diameter is cut or removed.
3. That it is not wantonly wasted or destroyed.

The attention of this Department was in that same year specifically directed to the apparent conflict in the provisions of said acts of June 3, 1878, by a letter from your office requesting instructions in regard to the administration thereof. In departmental letter of August 7, 1882 (1 L. D., 600), it was held in substance that the words "all other mineral districts of the United States" appearing in act No. 1 brought within the provisions of said act not only the mineral lands in the States

and Territories named but also those in all mineral districts outside such States and Territories, it being specifically said that—

all privileges granted to inhabitants of mineral districts of the States and Territories named in the act were granted to the inhabitants of such mineral districts of California.

It was held that the two acts could apply in the same State upon the theory that act No. 1 related to mineral lands and to that class of lands only. That this was recognized as the proper construction is further evidenced by a circular of October 12, 1882 (1 L. D., 695), wherein it was said that the cutting of mesquite on the public mineral lands of the United States was allowable under the provisions of said act No. 1, while the cutting of such trees upon non-mineral lands was prohibited. This holding seems to have been modified to a certain extent by later circulars. In the circular of May 7, 1886 (4 L. D., 521), it is said in regard to act No. 1—

The act applies only to the States of Colorado and Nevada, and to the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho and Montana, and other mineral districts of the United States not specifically provided for, and does not apply to the States of California or Oregon nor to the Territory of Washington.

That is act No. 1 was held to apply to mineral lands in all States and Territories therein mentioned, also to all mineral districts outside of the States specifically named in act No. 2, but not to mineral lands in the States expressly named in act No. 2 except those in Nevada, which is named in both acts.

Further on in this circular it is said:

4th. Timber felled or removed shall be strictly limited to building, agricultural, mining and other domestic purposes.

All cutting of such timber for sale or commerce is forbidden. But for building, agricultural, mining and other domestic purposes each person authorized by the act may cut or remove for him or her own use, by himself or herself, or by his, her or their own personal agent or agents only.

The two acts of 1878 having been passed upon the same day should be treated as one act and so construed, if possible, as to give each provision of each act effect.

Act. No. 1 permits the cutting of timber for certain purposes upon mineral lands of the United States in the "States of Colorado or Nevada or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho or Montana and all other mineral districts of the United States"; and act No. 2 prohibits the cutting of timber on any lands of the United States in "the public land states", with the proviso, however, that nothing therein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim or preparing his farm for tillage, or from taking the timber necessary to support his improvements. This statement presents the apparently conflicting provisions of the two laws, the existence of which necessitates construction. If the conclusion of the circuit courts, as announced in the decisions hereinbefore cited, that the two acts cannot

operate in the same place, is to be accepted as correct, then it will be necessary to determine which of the two is to prevail.

This Department has held, however, that both acts apply in Nevada, and if this holding is to be adhered to, it would necessarily follow that both acts are to be held operative in the other public land states brought within the provisions of act No. 2 by the amendatory act. This rule, so long followed in the administration of these laws, should not be changed, unless it is clearly erroneous. It has been the policy to regard the mineral lands in a different light from other public lands of the United States, and the result has been a separate and distinct system of laws in relation to them. It was evidently this consideration that led to the conclusion by the Department that the two acts might stand, and both have effect in the same State. This theory seems to be the only reasonable one to explain the enactment of two laws upon the same day, which are apparently contradictory. This construction gives effect to both laws, allowing to each operation in its peculiar sphere, and should be adhered to if there be nothing to show a contrary intention upon the part of Congress.

The statement in instructions of August 7, 1882 (1 L. D., 600), in regard to act No. 2:

By the express provision of section 2 the mineral lands in the broadest sense of that term are excluded from the provisions of said chapter

is true because the primary object of that legislation was to provide for the sale of lands that were not mineral in character and were at the same time unfit for agricultural purposes. It may be said the insertion of the provision in said act allowing the cutting of timber upon mining claims negatives the proposition that the general prohibition against cutting was not intended to apply to mineral lands. There is some force in that statement, but the inference has not sufficient weight to overcome the other express statements.

In the instructions issued under act No. 1 June 30, 1882, it was held that timber might be cut from mineral lands for sale to citizens and *bona fide* residents of the States and Territories named in said act. In the instructions of May 7, 1886 (4 L. D., 521), the cutting of timber for sale or commerce was forbidden, but in those of August 5, 1886 (5 L. D., 129), the right to cut timber for sale was recognized. I cannot agree with this latter position. The express provision is that timber may be cut "for building, agricultural, mining or other domestic purposes." If it had been intended to make the timber on the public lands an article of trade and commerce there should have been inserted therein such a provision as "or for sale to *bona fide* residents for such purposes."

The license given under this provision is in derogation of the rights of the public and must therefore be strictly construed and limited to the cases clearly and unequivocally specified in the act. The words used do not include a license to cut timber for the purpose of sale, and such a license cannot properly be included by implication.

The proper construction of these laws would seem to be, No. 1 relates to all mineral lands of the United States, but to none of any other character, and permits the cutting of timber on such lands for building, agricultural, mining and other domestic purposes, but not for the purpose of sale or commerce, while act No. 2, as amended by the act of 1892, relates to all non-mineral lands of the United States in all public land States, and prohibits the cutting of timber upon such lands, except as therein otherwise provided.

The effect of this act No. 1 as construed by the Department having, as you state, "resulted in wholesale devastation of timber on such lands for purposes of speculation and personal gain" affords sufficient reason for reconsidering the matter for the purpose of correcting the evil if possible. Furthermore a change of the ruling as to the construction of said act could not affect any vested rights as it would simply operate as a revocation or limitation of the restricted license to cut recognized under the construction heretofore given said act. There seems therefore to be good reasons for changing the instructions under said act, and no valid reason against such action at this time.

You will at once prepare instructions in accordance with the views herein set forth to take effect upon such future date as may seem proper, and submit the same for approval.

RAILROAD GRANT—MINERAL LANDS—ACT OF MARCH 3, 1887.

WALKER v. SOUTHERN PACIFIC R. R. Co.

Prior to the approval of a railroad indemnity selection the land included therein, if mineral in character, is open to exploration and purchase under the mining laws of the United States.

The existence of a mineral location raises the presumption that the location has been made in conformity with law, and that the land covered thereby is mineral in character.

Where mineral is found, and it appears that a person of ordinary prudence would be justified in further expenditures, with a reasonable prospect of success in developing a mine, the land may be properly regarded as mineral in character.

Section 5, act of March 3, 1887, does not confer upon a purchaser from a railroad company, where the title of the company fails, the right to purchase from the government land known to be valuable for its mineral.

Secretary Francis to the Commissioner of the General Land Office, February 23, 1897. (I. H. L.) (E. B., Jr.)

This is an appeal by the Southern Pacific Railroad Company and J. T. McGrath, in the case of S. E. Walker against the said company and McGrath, from your office decision of December 21, 1895, holding so much of the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 9, T. 6 S., R. 3 W., S. B. M., Los Angeles, California, land district, as is embraced in the Green Mountain and Lucky Boy quartz mining claims "to be mineral land, and therefore excepted from the grant to said

railroad company," and the company's indemnity selection per list No. 13 for cancellation to that extent, and that McGrath had no right to purchase the land thus decided to be mineral, under the fifth section of the act of March 3, 1887 (24 Stat., 556).

It appears that said Walker duly instituted a contest December 19, 1891, against said company, alleging that the tracts above described contained veins and lodes of rock in place bearing gold and were more valuable as mineral than as agricultural land. In due course of proceedings, which are recited in said decision, but not necessary to be set out here, the case came before the Department on appeal December 5, 1894, unreported, and it appearing that the testimony was insufficient as a basis for a judgment, the case was remanded for a further hearing. Said McGrath was allowed to intervene at the second hearing as the purchaser from the company of the NE. $\frac{1}{4}$ of said section.

The second hearing which was begun April 23, 1895, and ended May 7th, following, resulted in a decision July 22, 1895, by the local office, in favor of Walker, which was affirmed by your office as already indicated, whereupon McGrath and the company prosecute here their separate appeals. Both appellants assign error (1) in not holding that the company's right to the land vested at once upon its selection thereof, and that its right could not be defeated by the subsequent discovery of mineral thereon, and (2) if the company's right did not then vest, in holding that the land was shown to be valuable for its minerals; and said McGrath assigns error (3) in holding that he was not entitled to purchase the land from the government by reason of his alleged purchase from the company, under the fifth section of the act of March 3, 1887 (*supra*).

The land in controversy is within the indemnity limits of the grant by act of March 3, 1871 (16 Stat., 579), to the said company, to aid in the construction of its branch line, the location of which was definitely fixed April 3, 1871 (*Duncanson v. Southern Pacific R. R. Co.*, 11 L. D., 538), and is embraced in the company's selection filed July 13, 1885, as per indemnity list No. 13; but this selection, as to such land, has not been approved by the Secretary of the Interior. This grant by the 23d section of the act is made—

with the same rights, grants, and privileges and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty six.

Section 3 of the act last mentioned (14 Stat., 294) expressly reserved "all mineral lands" from the operation of the act, and provided for the selection "by said company," "under the direction of the Secretary of the Interior" of indemnity lands for lands lost to the company within the primary limits by reason of any grant, sale, reservation, occupation by homestead or pre-emption settlers, or other disposition, prior to definite location.

In the case of the Wisconsin Central Railroad Company *v.* Price

County (133 U. S., 496), involving the question as to when the title to indemnity lands granted by Congress passed to the State of Wisconsin to aid in the construction of a certain line of railroad, in which the provisions of the grant as to selection of such lands were similar to those in the case under consideration, Mr. Justice Field, speaking for the Supreme Court, said:

For such lands no title could pass to the company not only until the selections were made by the agents of the State appointed by the governor, but until such selections were approved by the Secretary of the Interior. The agent of the State made the selections, and they had been properly authorized and forwarded to the Secretary of the Interior. But that officer never approved them. Nor can such approval be inferred from his not formally rejecting them. . . . The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. . . . There could be no indemnity until a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts.

The doctrine thus authoritatively declared has been recognized in other decisions of the same court and stands to-day as law upon the point under discussion. In this case no approval of the Secretary has been given to the company's selection. The land, if mineral in character, is now and heretofore has been open to exploration and purchase under the mining laws of the United States—the grant to the company having expressly excepted mineral lands from its operation.

It is practically conceded by the defendants in this case that the land contains some mineral—gold and silver. The soil is shown to be poor and thin and the land at best to be of very little value for agricultural purposes. Whether gold and silver have been shown to exist in such quantities as to render the land chiefly valuable for mining purposes is a disputed question. The testimony upon this question is somewhat conflicting. Both the local office and your office found in the affirmative, that is, that the land is chiefly valuable for its minerals; and the testimony is set out at some length in your office decision. I find, upon careful examination of the testimony, no warrant therein to dissent from the conclusion on this point reached by your office. Although the best evidence of Walker's alleged location of said mining claims—duly certified copies of the location notices—was not filed, the

testimony is ample to show that such locations existed, that of the Green Mountain having been made in 1891, and of the Lucky Boy in 1892. No objection was made to the admission of this testimony.

The presumption then was, at the date of the hearing, that these locations had been made conformably to law and that the land was mineral in character. This was a rebuttable presumption, but until overthrown by competent and sufficient evidence it fixed the burden of proof upon the defendants (*Sweeney v. Northern Pacific R. R. Co.*, 20 L. D., 394). They not only failed to carry successfully the burden of proving the non-mineral character of the land, but *per contra*, the testimony of their own witnesses, taken as a whole, is rather favorable than otherwise to the mineral claimant. Samples of ore taken from the dumps at various shafts and open cuts on the claims which are upon the same vein extending from northeast to southwest diagonally through the legal subdivisions described above, showed upon assays, as testified by a mining engineer and expert for the defendants, various values in gold and silver from a trace to nearly \$24.00 per ton. These claims are shown to be but little developed as yet. It is also shown that their mineral value increases as their development is extended.

The fact that a milling test of thirteen tons of ore taken from a development shaft on the Lucky Boy, comparatively near the surface, in 1892, ran about \$6.50 per ton in gold and silver, although scarcely enough to pay for the milling by the inadequate process employed, as testified by another of defendant's witnesses, is not wholly unfavorable to the contestant, to say the least. The contestant has expended about \$800 on the two claims, and from the testimony introduced by him the present value of the Lucky Boy, which is the better developed claim—although some of the richest ore has recently been found on the Green Mountain—is from \$4,000 to \$5,000, and the Green Mountain from \$1,000 to \$3,000. I am well satisfied that the rule laid down by the Department in the case of *Castle v. Womble* (19 L. D., 455), "that where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success, in developing a mine, the requirements of the statute have been met" applies in this case in favor of the contestant.

Section 5 of the act of March 3, 1887, *supra*, under which McGrath claims the right to purchase from the United States, reads:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That

all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

I am convinced, after careful examination and consideration of this section in the light of the laws relative to the acquisition of title to mineral lands, and the decisions of this Department and the supreme court of the United States, bearing upon the question, that this section was not intended to confer upon the purchaser therein indicated from "any said company" the right to purchase from the United States lands known to be valuable for their minerals. Such lands are subject to disposition by the United States under the mining laws only. (Sections 2318, 2319 Revised Statutes; *Deffebach v. Hawke*, 115 U. S., 392; *Davis's Administrator v. Weibbold*, 139 U. S., 507.)

The company's objection urged against the proposed cancellation of its selection as to the land embraced in said mining claims to the effect that, inasmuch as no record evidence of the locations is on file in the case, the boundaries and area of the claims are not definitely shown, segregation of these claims from the tracts in which they lie can not be made, is without force in this proceeding. Segregation is not necessary to the judgment of cancellation. The necessity for segregation will not arise until in connection with favorable action looking to the approval and patenting of these tracts, in whole or in part, under the company's selection, or in connection with other proceedings to secure title to these tracts or some portion thereof. It is shown, as already stated, that due locations of these claims have been made, and from these locations the boundaries and area of the claims can be determined whenever necessary so to do. The parol evidence which shows these locations was admitted without objection by the parties defendant and is sufficient for purposes of this decision. Objection to such evidence comes too late, therefore, on appeal.

The decision of your office is affirmed in accordance with the foregoing views. The company's selection will be canceled as to land embraced in said mining claims.

THE STATE OF FLORIDA.

Motion for review of departmental decision of August 27, 1896, 23 L. D., 237, denied by Secretary Francis, February 23, 1897.

RELINQUISHMENT—AGENT—ADVERSE CLAIM.

WOOD *v.* WOOD.

A relinquishment executed for the benefit of one holding a confidential and fiduciary relation to the entryman, can not be recognized as of any validity in the presence of a just and equitable adverse claim.

Secretary Francis to the Commissioner of the General Land Office, February 23, 1897. (I. H. L.) (J. L.)

This case involves the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 33, T. 6 N., R. 21 W., Gainesville land district, Florida. On May 29, 1888, Robert E. Wood made homestead entry No. 18,658 of said tract, claiming settlement on September 15, 1887, and improvements consisting of dwelling-house, kitchen, stable, crib, cotton-house, wagon-shelter, and twenty acres in cultivation. On March 24, 1894, Willis C. Wood filed in the local office a paper, dated February 19, 1894, purporting to be Robert E. Wood's relinquishment of said tract to the United States. Thereupon Robert E. Wood's entry was canceled, and Willis C. Wood made homestead entry No. 24,504 of said tract.

Robert E. Wood died on April 11, 1894. On June 19, 1894, his widow, Alice Wood, filed her affidavit of contest against Willis C. Wood's entry in the following words:

To the Register & Receiver of the United States Land Office, at Gainesville, Fla.

Your petitioner, Mrs. Alice Wood, being over the age of twenty one years and a native born citizen of the United States, brings this her petition of contest against Willis C. Wood and for cause says—

That one B. F. Cockcroft about the year A. D. 1874 settled upon, improved and cultivated certain public lands to-wit:—

The S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 33, T. 6 N., R. 21 W., situated in Walton county, Florida.

That about the year A. D. 1884 Robert Johnson, the petitioner's father, purchased for a good and valuable consideration the claim and improvements of the said B. F. Cockcroft in and to said land.

That your petitioner and her father, the said Robert Johnson, after the purchase aforesaid took possession of said land and continuously resided upon and cultivated the same until about the year A. D. 1887 when the said Robert Johnson died.

That the said Johnson left beside your petitioner one other heir and the said heirs amicably divided the estate, your petitioner receiving as a part of her share the claim and improvements on said land.

That about the year A. D. 1886 your petitioner was married to one Robert E. Wood who until his death resided with your petitioner on said land.

That the said Robert E. Wood about the year 1888 made application for homestead entry on said land which application was granted on the 29th day of May, A. D. 1888.

That on the 10th day of April, A. D. 1894, the said Robert E. Wood died, and shortly after his death your petitioner duly applied to Hon. Alex. Lynch, register, Gainesville, Florida, for permission to make final proof as widow of Robert E. Wood deceased.

That your petitioner was informed by the said register that the homestead entry of Robert E. Wood had been relinquished to Willis C. Wood and that the entry of

the said Robert E. Wood was canceled on March 24th, A. D. 1894 and that Willis C. Wood had entered the same.

That the said Willis C. Wood is not in possession of said land but your petitioner is in possession of, resides on, and cultivates the same and has ever since the purchase by her father from the said B. F. Cockcroft.

That your petitioner is advised, informed and believes that her husband, the said Robert E. Wood, never relinquished said entry to the said Willis C. Wood and that the said relinquishment was only gotten up to defraud your petitioner out of said land.

That your petitioner is poor and wholly dependent upon the products of said land for support.

Wherefore your petitioner asks that she be permitted to prove the foregoing allegations, and that said pretended relinquishment by Robert E. Wood be canceled, and that the entry of Robert E. Wood be reinstated, that your petitioner be allowed to make final proof as widow of Robert E. Wood deceased.

That you name a day and place where she will be permitted to prove the foregoing allegations; that the proper notice be given the said Willis C. Wood of said hearing that you grant such other or further relief as to you will seem just and right and that she pay the expenses of this contest.

After a hearing at which both parties were present in person and by counsel, the local officers, on October 19, 1894, found as matter of fact, "that the relinquishment on file was not executed by Robert E. Wood, but by Willis C. Wood." And thereupon they recommended that Willis C. Wood's entry No. 24,504 be canceled; that Robert E. Wood's entry No. 18,658 be reinstated; and that Alice Wood, the widow of Robert E. Wood be permitted to make final proof thereon.

Willis C. Wood appealed; and on March 23, 1895, your office reversed the decision of the local officers and allowed his entry No. 24,504 to stand, subject to further appeal.

Alice Wood appealed to this Department; and on April 24, 1896, the Department affirmed the decision of your office. On June 10, 1896, the Department entertained a motion for review filed by Alice Wood. On August 28, 1896, said motion was dismissed. And on September 4, 1896, Alice Wood by her attorney filed here, her petition for a re-review and re-examination of the case, and a revocation of the former departmental orders therein. Said petition was entertained on October 6, 1896, and the case is now before the Secretary for further consideration.

At the hearing, the chief controversy between the parties was, whether the signature to the relinquishment was genuine or not? Whether the relinquishment was or was not a forgery, "only gotten up to defraud the petitioner out of said land"? The local officers favored the "hypothesis of forgery", and found as hereinbefore stated "that the relinquishment on file was not executed by Robert E. Wood but by Willis C. Wood." This finding of the local officers was overruled by your office, and also twice by this Department. The present Secretary of the Interior will not disturb the finding of his predecessor as to this point.

But it is obvious that the minds of the officers who rendered the previous decisions in this case, were chiefly occupied with considera-

tion of the testimony as it related to the question of forgery. Consequently other facts and matters clearly established by the evidence, and involving questions of law and equity material to a just judgment in this case, were not fully considered.

From and after the year 1880, the time of the recognized development of the cancerous disease which terminated in Robert E. Wood's death, Willis O. Wood sustained towards his elder brother Robert, an intimate and confidential fiduciary relation. He was Robert's nurse, his protector, his adviser, his agent, his attorney-at-law, the keeper of his accounts and the manager of his finances. Robert's confidence in Willis was absolute, and Willis's influence over Robert was unbounded. This relation imposed upon Willis the duty of protecting Robert against himself; against the consequence of any act that might be prompted by a sense of helplessness and dependence, and by fraternal gratitude and affection. It matters not whether the proposition for a relinquishment of the homestead, was initiated by Willis or by Robert, Willis was not authorized to accept it. Neither law nor equity will permit advantage to be taken of such confidence and influence. (See Story's Equity Jurisprudence Sections 307, 311 and others.) In view of the testimony showing the relations between the parties as herein set out, the burden was upon Willis to prove the legality and righteousness of the relinquishment in question by clear and convincing evidence. The testimony falls far short of this requirement of law and equity.

On February 19, 1894, Robert E. Wood went as usual to his brother's mill to have his face dressed. Then and there, in the presence of Willis, and of his niece and her husband (who were also employees of Willis), the relinquishment was executed and attested. It was not filed until March 24, thirty-three days afterwards. Robert E. Wood lived until April 11, eighteen days after that. During those fifty-one days Willis made no attempt to take possession of his alleged homestead. The whole transaction was carefully concealed from Mrs. Alice Wood. When after the lapse of a decent interval, she applied at the local office to make final proof of her deceased husband's homestead entry, she was told by the register what had been done, so far as shown by the records of his office.

From the year 1882, Mrs. Wood lived upon the land with her father Robert Johnson until his death in September, 1887, a period of five years. In January, 1887, Robert E. Wood married her, and moved upon the land, and lived there with her and her father until the father's death. Being then a married woman, and so disqualified to make entry in her own right, her husband Robert E. Wood made entry in his own name on May 29, 1888, claiming settlement on September 15, 1887, the date of the wife's father's death. Mrs. Wood lived upon the land with her husband from September 15, 1887, until the day of his death, April 11, 1894; another period exceeding five years. But for the intervention of the relinquishment aforesaid, Mrs. Wood would have been

clearly entitled to make proof under her husband's entry, and thus acquire title to the whole tract.

This Department after mature consideration of all the facts and circumstances, will not permit Willis C. Wood to appropriate to his own use the whole real estate of his trustful and dependent brother, under color of a relinquishment to the United States.

For the foregoing reasons, the judgment of this Department awarding the land in controversy to Willis C. Wood is hereby revoked. The judgment of your office of March 23, 1895, is reversed; the alleged relinquishment by Robert E. Wood filed in the case, is declared null and void; Willis C. Wood's entry No. 24,504 is hereby canceled; Robert E. Wood's homestead entry No. 18,658 will be reinstated; and Mrs. Alice Wood, his widow, will be permitted to make final proof thereon.

RAILROAD GRANT—LATERAL LIMITS—UNSURVEYED LANDS.

COLLETT *v.* NORTHERN PACIFIC R. R. CO.

The maps, tract books, and official plats of survey, on file in the General Land Office, must determine the location of railroad lines, and the distances therefrom of lands in dispute between railroad companies and settlers.

The fact that lands are unsurveyed does not except them from the operation of a railroad grant on definite location.

Secretary Francis to the Commissioner of the General Land Office, February 23, 1897. (J. H. L.) (J. L. M'C.)

Your office by letter of November 19, 1895, transmitted to the Department the record in the case of Presley S. Collett *v.* Northern Pacific Railroad Company, involving lot 9 of Sec. 9, T. 16 N., R. 8 W., Olympia land district, Washington.

Counsel for said company have filed a motion to dismiss the appeal, for the reason that the same was not served upon F. M. Dudley, the general land agent of the company, and the person designated by the company as the attorney upon whom all notices should be served, but upon the local land agent of the company at Tacoma.

In the essentially similar case of Boyle *v.* The Northern Pacific Railroad Company (22 L. D., 184), it was held that service upon Thomas Cooper, the land agent of said company at Tacoma, was sufficient service.

The motion to dismiss, in so far as it is based upon insufficiency of service, must therefore be denied, and the case considered upon its merits.

The tract in controversy is opposite that portion of the road of said company extending from Portland, Oregon, to Tacoma, Washington, the grant for which was made by the joint resolution of May 31, 1870 (16 Stat., 378). It is within the withdrawal on map of general route of

August 13, 1870, and on definite location of the road, September 13, 1873, it fell within the primary limits of the grant. The records show no entry or filing covering the land at the said dates, or at the date of the grant, nor does Collett allege settlement prior to May 15, 1886.

The allegations of error are as follows, in substance:

(1) In holding that said tract was within the primary limits of the grant to said company, for the reason that it is more than forty miles from the main line of its road.

(2) In not holding that, the land being unsurveyed, the appellant had a prior right to the land under the act of May 14, 1880.

Respecting the above allegations of error it may be said:

(1) The maps, text-books, and official plats of survey on file in your office must be the guide—there can be no other or better guide—as to the locations of railroad lines, and the distances therefrom of lands in conflict between railroad companies and settlers. A careful examination of such maps and plats of survey shows that the tract in controversy is considerably less than forty miles from the line of the Northern Pacific Railroad, at its nearest point.

(2) If the third section of the act of May 14, 1880 (21 Stat., 140), gives the appellant in this case a superior right to the land, it would render it necessary to award settlers upon all surveyed lands as well, the tracts upon which they have settled—thus at once deciding all conflicting claims (where settlement has been made at any time) against the railroad company. For the language of said act is that it is intended for the relief of “any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed.”

The question, however, has been repeatedly and uniformly decided by the Department adversely to the appellant's contention in this respect. Thus in the case of *Olney v. The Hasfings & Dakota Railway Company*, it was held (10 L. D., 136, syllabus):

Definite location of the line of road excludes the subsequent acquisition of settlement rights on unsurveyed lands subject to the grant.

The decision of your office was correct, and is hereby affirmed.

HOMESTEAD—SETTLEMENT RIGHT—WIDOW—REMARRIAGE.

BELLAMY v. COX.

The settlement of a homesteader, who dies prior to the expiration of the time given for the assertion of his right, without having made application to enter, inures to the benefit of his widow; and her subsequent remarriage will not defeat her claim as the successor to the right of her deceased husband.

Secretary Francis to the Commissioner of the General Land Office, February 23, 1897. (I. H. L.) (W. A. E.)

On September 25, 1893, John H. Cox made homestead entry for lots 1 and 2 and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 3, T. 20 N., R. 4 E., Perry, Oklahoma, land district.

On November 15, 1893, Lou B. Crawford filed homestead application for the same land. With her application, she filed an affidavit alleging, substantially, that on September 16, 1893, she was the wife of William C. Crawford, since deceased; that Crawford went upon the land in controversy on that date and made settlement thereon prior to the settlement of the entryman and prior to the time of his entry. Affiant further alleged that her husband died October 20, 1893, and at the time of his settlement he was fully qualified to make entry of the land.

A hearing was ordered, and the case came up for trial on March 12, 1895. The plaintiff in the meantime had changed her name by marriage to Bellamy.

On March 18, 1895, the local officers rendered their decision in favor of the plaintiff. From this action Cox appealed, and on October 11, 1895, your office sustained the action of the register and receiver and held the entry of Cox for cancellation.

The entryman's further appeal brings the matter before the Department.

The testimony shows that William C. Crawford made the run on September 16, 1893, from the south side of the "Cherokee strip," and that he was the first person to reach the land in controversy and stick a stake. His wife followed in a wagon, arriving on the land the same afternoon. About three o'clock in the afternoon Crawford left, but his wife remained on the tract. The following Tuesday he came back, remained until Wednesday, was then taken sick, and died the following month. Before he left the land he had a well dug, a foundation laid for a house, and about a quarter of an acre broken. Mrs. Crawford returned to the land in December and spent one day and night there. The following May she was on the tract two days and nights. Her improvements at the date of the hearing consisted of nine acres broken and a box house, ten by twelve.

Cox settled on the same tract on the afternoon of September 16, 1893, subsequent to Crawford's settlement. He cut four small poles for a foundation, then left the claim about sundown and did not return until September 23, when he plowed one furrow around the land. In October, 1893, he built a small house and furnished it. The greater part of his time during the winter of 1893-4 was spent in old Oklahoma, but in the spring of 1894 he established his permanent residence on the land. At the date of the trial he had about one hundred and thirty acres enclosed with a wire fence and about fifty acres broken.

It thus appears that Crawford was the first settler and consequently had the superior right to the land. He had three months from date of settlement in which to assert his rights by making entry or by initiating a contest against an intervening entry. Before that time expired he died.

In the case of Prestina B. Howard, 8 L. D., 286, it was held that

since the passage of the act of May 14, 1880, the right given the widow, heirs, or devisee of a deceased homesteader by section 2291 of the Revised Statutes to fulfill the law, make proof, and receive patent, inures to them as well when the homestead right rests on settlement under said act as when founded on formal application to enter. See also the case of Tobias Beckner, 6 L. D., 134.

Mrs. Crawford, having thus succeeded to the rights of her deceased husband, immediately took steps to protect those rights. She filed her formal application to enter and continued the cultivation and improvement of the tract. It was not necessary for her to reside on the land. *Tauer v. The Heirs of Walter A. Mann*, 4 L. D., 433.

The principal question we have to consider, then, is what effect her remarriage had on her rights.

It was held in the case of *Prestina B. Howard*, above cited, that while a married woman is not authorized to initiate or make a homestead entry in her own right, she may, as the heir of a deceased homestead claimant, make application, submit proof, and receive patent.

The plaintiff here claims this land, not in her own right, but by virtue of her succession to the rights of her deceased husband. She did not, by her remarriage, forfeit those rights.

Your office decision is accordingly affirmed, Cox's entry will be canceled, and the plaintiff will be allowed to perfect her homestead application.

OIL LANDS-PLACER ENTRY.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 25, 1897.

REGISTERS AND RECEIVERS,
U. S. Land Offices.

SIRS: Your attention is directed to the act of Congress, approved on February 11, 1897, as follows:

[PUBLIC—No. 57.]

AN ACT to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided,* That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim or improvement were subsequent to the date of the passage hereof.

It is to be observed that though the provisions of the placer mineral land laws are by said act extended so as to allow the location and entry thereunder of public lands chiefly valuable for petroleum or other mineral oils, yet the substances named are not expressly stated to be mineral, in view of which it would appear that the prior assertion of a legal adverse claim to land valuable for petroleum or other mineral oils would preclude the acquisition of any rights thereto under the provisions of the mineral land laws.

Claims to lands of the character mentioned, heretofore initiated under the mineral land laws are by said act expressly confirmed, but this confirmation must, of course, be construed as applying only to cases where, prior to February 11, 1897, no valid adverse claim to lands involved had been acquired under other than the mineral land laws.

In proceeding under this law, you will act in accordance with the views herein set forth.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

DAVID R. FRANCIS,
Secretary.

GREER COUNTY, OKLAHOMA—ACT OF JANUARY 18, 1897.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 25, 1897.

REGISTER AND RECEIVER,
Mangum, Oklahoma Territory.

GENTLEMEN: Your attention is called to the provisions of the act of Congress, entitled "An Act To provide for the entry of lands in Greer County, Oklahoma, to give preference rights to settlers, and for other purposes", approved January 18, 1897 (Public No. 15), a copy of which is hereto attached.

Sec. 1 provides that every person qualified under the homestead laws of the United States; who on March 16, 1896, was a bona fide occupant of land within the territory established as Greer county, Oklahoma, shall be entitled to continue his occupation of such land with improvements thereon, not exceeding one hundred and sixty acres, and shall be allowed six months preference right from the passage of this act within which to initiate his claim thereto.

A party desiring to make a homestead entry under this section, must present his formal application with the usual affidavits accompanied by the fee and commissions required in an entry of minimum land, and a special affidavit showing that he was on March 16, 1896, a

bona fide occupant of the land he applies to enter. Title may be perfected at the expiration of five years from date of entry or within two years thereafter, under the provisions of the homestead law, or such person may receive credit for all time during which he or those under whom he claims have continuously occupied the land prior to March 16, 1896. Every such person shall also have the right for six months prior to all other persons to purchase at one dollar an acre, in five equal annual payments, any additional land of which he was in actual possession on March 16, 1896, not exceeding one hundred and sixty acres, which prior to said date had been cultivated, purchased or improved by him.

A party wishing to avail himself of the above privileges, must present his application to purchase (form 4-001) together with the prescribed amount of purchase money for the land desired, which need not be contiguous to his homestead entry, together with evidence showing that he had prior to March 16, 1896, cultivated, purchased, or improved the same; evidence of cultivation or improvement must consist of the affidavit of the applicant corroborated by the testimony of two or more witnesses: or in case the claim is based on purchase, an abstract of title, or other documentary evidence, showing the transfers under which the party claims as purchaser. No certificate can be issued until the entire amount of the purchase money shall have been paid: but the receiver will issue his receipt (form 4-140, a) properly modified, for the amount paid and deliver a duplicate thereof to the purchaser.

When any person entitled to a homestead or additional land as above provided, is the head of a family, and though still living, shall not take such homestead or additional land, within six months from the passage of this act, any member of such family over the age of twenty-one years, other than husband or wife, shall succeed to the right to take such homestead or additional land for three months longer, and any such member of the family shall also have the right to take, as before provided, any excess of additional land actually cultivated or improved prior to March 16, 1896, above the amount to which such head of the family is entitled, not to exceed 160 acres to any one person thus taking as a member of such family.

Application for homestead or additional entry under this provision, must be made in the same manner as heretofore prescribed.

In case of the death of any settler who actually established residence and made improvement prior to March 16, 1896, the entry may be made by the party in interest, according to section 2291 U. S. R. S.

Section 2 provides for the disposal of all land in said county not occupied, cultivated or improved, as provided in section 1, or not included within the limits of any townsite or reserve, to actual settlers only, under the provisions of the homestead law.

Any person applying to make entry under this section prior to the expiration of the preference right granted by section 1 will be allowed to

make entry, subject to any valid adverse right under said section 1, on filing his affidavit that the land applied for is not occupied, cultivated or improved by any other person.

Section 3 provides that the inhabitants of any town located in said county shall be entitled to enter the same as a townsite under the provisions of section 2387, 2388, and 2389 of the Revised Statutes. Instructions relative to entry of townsites under said sections of the Revised Statutes are found in circular of this office dated July 9, 1886 (5 L. D. 265).

Under the proviso to this section of the law, the corporate authorities of the town, or the judge of the county court, who shall enter the townsite, shall accord to all persons a preference right to the town lots upon which they have made or own improvements.

By section 4, sections numbered sixteen and thirty-six are reserved for school purposes as provided in laws relating to Oklahoma, and sections thirteen and thirty-three in each township are reserved for such purpose as the legislature of the future State of Oklahoma may prescribe. That whenever any of the lands reserved for school or other purposes under this act, or under the laws of Congress relating to Oklahoma, shall be found to have been occupied by actual settlers or for town site purposes or homesteads prior to March 16, 1896, an equal quantity of indemnity lands may be selected as provided by law.

Under section 5, the right of entry to land within said county, which on March 16, 1896, was occupied for church, cemetery, school, or other charitable or voluntary purposes, not for profit, is given to the proper authorities in charge thereof.

In each case the maximum area to be so entered is two acres. Sections numbered 16 and 36, within each township, within said county, are reserved by section 4 of this law for school purposes, and are exempted from the operations of this section.

It will not be practicable for you to locate land applied for under this section with the certainty required for an entry. You will, then, upon the presentment of such an application, forward the same to this office for appropriate action.

Section 7 provides that all laws authorizing commutations of homesteads in Oklahoma shall apply to Greer county. This makes applicable section 22 of the act of May 2, 1890 (26 Stat., 81), where the commutation of a homestead entry for townsite purposes is sought.

Instructions relative to procedure under said section 22 of the said act are found in circular of this office, dated November 30, 1894 (19 L. D., 348).

Commutation of homestead entries under section 7 of this act, except for townsite purposes, will be governed by the provisions of section 21, act of May 2, 1890 (26 Stat., 81), which requires the payment of \$1.25 per acre and proof of compliance with the homestead law for not less than twelve months from date of locating upon said homestead.

It is expected that the above instructions will be found sufficient for

your guidance, but should any case arise which is not covered thereby, you will transmit the papers in such case to this office for instructions.

Very respectfully,

E. F. BEST,
Assistant Commissioner.

Approved:

DAVID R. FRANCIS,
Secretary.

[PUBLIC—No. 15.]

AN ACT to provide for the entry of lands in Greer County, Oklahoma, to give preference rights to settlers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person qualified under the homestead laws of the United States, who, on March sixteenth, eighteen hundred and ninety-six, was a bona fide occupant of land within the territory established as Greer county, Oklahoma, shall be entitled to continue his occupation of such land with improvements thereon, not exceeding one hundred and sixty acres, and shall be allowed six months preference right from the passage of this act within which to initiate his claim thereto, and shall be entitled to perfect title thereto under the provisions of the homestead law, upon payment of land office fees only, at the expiration of five years from the date of entry, except that such person shall receive credit for all time during which he or those under whom he claims shall have continuously occupied the same prior to March sixteenth, eighteen hundred and ninety-six. Every such person shall also have the right, for six months prior to all other persons, to purchase at one dollar an acre, in five equal annual payments, any additional land of which he was in actual possession on March sixteenth, eighteen hundred and ninety-six, not exceeding one hundred and sixty acres, which, prior to said date, shall have been cultivated, purchased, or improved by him. When any person entitled to a homestead or additional land, as above provided, is the head of a family, and though still living, shall not take such homestead or additional land, within six months from the passage of this act, any member of such family over the age of twenty-one years, other than husband or wife, shall succeed to the right to take such homestead or additional land for three months longer, and any such member of the family shall also have the right to take, as before provided, any excess of additional land actually cultivated or improved prior to March sixteenth, eighteen hundred and ninety-six above the amount to which such head of the family is entitled, not to exceed one hundred and sixty acres to any one person thus taking as a member of such family.

In case of the death of any settler who actually established residence and made improvement on land in said Greer county prior to March

sixteenth, eighteen hundred and ninety-six, the entry shall be treated as having accrued at the time the residence was established, and sections twenty-two hundred and ninety-one and twenty-two hundred and ninety-two of the Revised Statutes shall be applicable thereto.

Any person entitled to such homestead or additional land shall have the right prior to January first, eighteen hundred and ninety-seven, from the passage of this act to remove all crops and improvements he may have on land not taken by him.

SEC. 2. That all land in said county not occupied, cultivated, or improved, as provided in the first section hereof, or not included within the limits of any town site or reserve, shall be subject to entry to actual settlers only, under the provisions of the homestead law.

SEC. 3. That the inhabitants of any town located in said county shall be entitled to enter the same as a town site under the provisions of sections twenty-three hundred and eighty-seven, twenty-three hundred and eighty-eight, and twenty-three hundred and eighty-nine of the Revised Statutes of the United States: *Provided*, That all persons who have made or own improvements on any town lots in said county made prior to March sixteenth, eighteen hundred and ninety-six, shall have the preference right to enter said lots under the provisions of this act and of the general town-site laws.

SEC. 4. Sections numbered sixteen and thirty-six are reserved for school purposes as provided in laws relating to Oklahoma, and sections thirteen and thirty-three in each township are reserved for such purpose as the legislature of the future State of Oklahoma may prescribe. That whenever any of the lands reserved for school or other purposes under this act, or under the laws of Congress relating to Oklahoma, shall be found to have been occupied by actual settlers or for town-site purposes or homesteads prior to March sixteenth, eighteen hundred and ninety-six, an equal quantity of indemnity lands may be selected as provided by law.

SEC. 5. That all lands which on March sixteenth, eighteen hundred and ninety-six, are occupied for church, cemetery, school, or other charitable or voluntary purposes, not for profit, not exceeding two acres in each case, shall be patented to the proper authorities in charge thereof, under such rules and regulations as the Secretary of the Interior shall establish, upon payment of the government price therefor, excepting for school purposes.

SEC. 6. That there shall be a land office established at Mangum, in said county, upon the passage of this act.

SEC. 7. That the provisions of this act shall apply only to Greer county, Oklahoma, and that all laws inconsistent with the provisions of this act, applying to said territory in said county, are hereby repealed; and all laws authorizing commutations of homesteads in Oklahoma shall apply to Greer county.

SEC. 8. That this act take effect from its passage and approval.

Approved, January 18, 1897.

HOMESTEAD CONTEST—SETTLEMENT RIGHT—BURDEN OF PROOF.

IRWIN *v.* NEWSOM (ON REVIEW).

No right can be secured under the contest of one attacking an entry on the ground of prior settlement, in the absence of some special equity shown, if the charge as made is not established by a preponderance of the evidence.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (C. W. P.)

On July 18, 1896, you transmitted the motions of John W. Irwin and Charles H. Newsom, for review of the decision of the Department of April 28, 1896, in the case of said John W. Irwin against the said Charles H. Newsom (22 L. D., 577). Upon examination of said motions, the same, under date of September 5, 1896, were entertained by the Department for argument, as provided for by rule 114 of practice.

The land involved is the NW. $\frac{1}{4}$ of Sec. 34, T. 23 N., R. 2 W., Perry land district, Oklahoma.

On September 16, 1893, the day on which the land was open to settlement, these parties made settlement on said land.

On September 25, 1893, Newsom made homestead entry of said land.

On October 25, 1893, Irwin filed affidavit of contest, alleging prior settlement.

A hearing was had; the local officers recommended the cancellation of Newsom's entry, and that Irwin be allowed to make homestead entry of the land. Newsom appealed.

Your office rendered a decision to the effect, that you were unable to determine who was the prior settler, and thought the case should be settled between the parties, and that each of them should make entry of such legal subdivisions of the land as they may agree upon, and your office reversed the judgment of the local officers, and ordered that, in case of the failure of the parties to compromise, as suggested, within sixty days, Newsom's entry be canceled as to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the section, and the right of entry for the E. $\frac{1}{2}$ be awarded to Irwin. The Department, on appeal, said:

I agree with your office that the evidence is so conflicting that it is impossible to decide which of the two claimants was the prior settler; but I can not agree with that part of your office decision which directs that, in case of failure of the parties to agree to a compromise, the land be divided between them. I think in such a case as this, if the parties can not agree, the land should be sold to the highest bidder of the two. And your office decision was modified accordingly.

In the case of Sumner *v.* Roberts, 23 L. D., 201, it was held by the Department that

in cases where entries have been made and contests thereafter instituted upon the ground of prior settlement, unless the contestant shall successfully carry the burden of showing by proof that his settlement antedates the entry and the settlement of the entryman, the rule that the entry will stand will be adhered to. The cases in which this rule would seem to have been disregarded will no longer be regarded

as precedents to be followed. The fact of prior settlement is lawful authority for the cancellation of an entry of record, but evidence which leaves the question in doubt as to which settled first, the entryman or the contestant, and is without some degree of preponderance in favor of the contestant, will leave the entry intact. Even if the evidence should show that settlement was made simultaneously by a contestant and an entryman, this will not authorize the cancellation of an entry properly of record as was held in the recent case of *Perry et al. v. Haskins* (23 L. D., 50).

In the more recent case of *Behar v. Sweet* (24 L. D., 158), it is said:

While the ruling that a settler claiming prior settlement over one having an entry of record must establish his claim by a preponderance of evidence, will be adhered to in most cases, the Department will, when justice and equity require it, and great hardship would result were the rule applied, depart so far from the rule as to reach an equitable decision in the case.

As there does not appear to be any particular equity in favor of Irwin, both parties having shown good faith in their settlement, the rule must be applied in the present case. Your office and the Department have impliedly found that Irwin failed to show by a preponderance of evidence that he was the prior settler, and I see no reason to reverse that finding.

In his brief, the attorney for Irwin calls the attention of the Department to the fact that two of Newsom's witnesses, Shaw and Barnhisel, were impeached upon the trial of this contest, and that no recognition of this fact was made by the decision of the Commissioner, and says:

This fact, no doubt, was the turning point in the minds of the register and receiver in deciding for plaintiff and against the defendant. The testimony of these witnesses, taken in connection with the testimony of the plaintiff, Irwin, wherein he swears that he saw the defendant come on to this tract of land from the west side after he, the plaintiff, was already located thereon, should certainly leave no doubt in the mind of the reviewing court that plaintiff was first to reach the land, and that the decision of the local office should be upheld and the preference right of entry awarded to the plaintiff.

Two witnesses were called to impeach the credit of the witness Shaw—one Raybourn and one Holeman. Raybourn testified that he knew nothing of Shaw's reputation for truth and veracity. Holeman testified that it was bad. But, on the other hand, two witnesses for the defendant testified that it was good. The witness Barnhisel's credit for veracity was impeached by one witness, the said Raybourn, and sustained by the testimony of the defendant and one witness.

It was by the rejection of the testimony of Shaw and Barnhisel that the local officers arrived at the conclusion that Irwin had proved his case by a preponderance of the evidence. But I can not think that much credit should be given to the impeaching witnesses.

The decision of the Department of April 28, 1896, is, therefore, revoked and Irwin's contest dismissed.

MINING CLAIM—NOTICE—PARAGRAPH 29, MINING REGULATIONS.

GOWDY ET AL. *v.* KISMET GOLD MINING CO.

The notice of an application for a mineral patent should, in stating the names of adjacent claims, include unsurveyed as well as surveyed claims.

Failure to include in the posted and published notice of a mineral application the names of the nearest or adjacent claims, in strict accordance with paragraph 29, of mining regulations, will not render new notice necessary, where the notice as given is substantially in conformity with the practice heretofore observed under said paragraph.

Paragraph 29, of mining regulations, amended, and directions given for due promulgation thereof.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (P. J. C.)

A petition for re-review of departmental decision of May 23, 1896 (22 L. D., 624), and for the exercise of the supervisory powers of the Secretary of the Interior, has been filed in this Department by the Kismet Gold Mining Company. On examination thereof the same was entertained, and under direction of the Department a copy thereof served on W. H. Gowdy *et al.* The matter now comes up regularly for consideration.

So far as material to the question now involved, it appears that during the period of publication of notice of application for patent for the Kismet Mining claim, survey No. 8868, Pueblo, Colorado, land district, the owners of the Chicago Girl Mining claim, which it is alleged conflicts with the Kismet, did not file a protest and adverse as required by section 2325 of the Revised Statutes against the Kismet. Subsequently, Gowdy *et al.* did file a protest, in which it was alleged that the notice of application was not conspicuously posted on the Kismet, and that the published notice did not contain the names of adjoining claims.

When the matter reached the Department, three questions raised by the appeal were decided. First: That Gowdy *et al.*, having failed to file their protest and adverse as provided by statute, the Department could afford them no relief if there had been a substantial compliance with the law in the matter of giving notice; that the question as to whether proper notice had been given was one in which only the government and the applicant were interested. Second: That the notice posted on the claim was conspicuously posted in contemplation of the regulations, and, Third: That the notices posted and published did not contain the names of adjoining claims, or state where the record of the claim might be found. The order was, therefore, that the entry should be suspended, and new publication be made in conformity with the rules.

A motion for review of this decision was denied September 11, 1896 (23 L. D., 319).

It is not deemed necessary to give in full the errors assigned.

The Department has no intention of receding from the position taken in this case originally as to the status of the protestants. In the case presented at that time it was not charged or shown that they did not have notice of the application for patent, and the ex parte affidavits now presented, alleging that they did not have notice, come too late for consideration, under the doctrine announced in *Peacock v. Shearer's Heirs*, 20 L. D., 213, and *Tennessee Coal, Iron and Railroad Company et al.*, 23 id., 28.

It is not conceived how it can be seriously contended that the ruling in the case at bar is in violation of the regulations. It is not understood that counsel on either side, either in their briefs or in the oral argument, insist on that position, but the complaint of the petitioner is that the construction placed on the regulations by the Department is contrary to the practice that has prevailed in your office, and that the rigid enforcement thereof at this time is a serious hardship on the petitioner, as well as the multitude of others who have followed the form of notice published and posted in this case, and if adhered to will cause doubt and uncertainty as to titles secured, as well as cause great expense in re-advertising. And, it is insisted, that if an unbending rule is to be announced and adhered to, those who have proceeded in this manner, and have made a substantial compliance with the regulations, should not be summarily required to republish and repost, and thus give those who have been inattentive to their own interests an opportunity to harass the applicants with adverse proceedings.

An informal inquiry at the mineral division in your office discloses the fact that a large proportion of the notices of the character under discussion are not strictly in conformity with the regulations, and some of the features might on strict construction be subject to the same criticism as the one at bar. It has been considered by your office that these notices are a substantial compliance with the regulations.

In view of this, your office, on the promulgation of the decision in this case, deemed it advisable to issue a circular to the local officers, in which was quoted paragraphs 29, 34, and 35 of the mining circular, and then following this:

By departmental decision of May 23, 1896, in the case of *Gowdy v. Kismet Gold Mining Company*, it was held that a strict compliance with said paragraph 35 will be insisted upon, and in that case republication was required by reason of the fact that the published notice failed to contain a reference to the names of adjoining or nearest claims.

In view of the fact that most published notices fail to comply in some particular with the above-quoted regulations, your special attention is called to said decision, and you are enjoined to comply with said regulations in the preparation of notices for publication.

After mature deliberation on this subject, I am convinced that there is much force in the proposition that if the rule announced by the Department in this case, if enforced, would effect a material change in

the practice theretofore prevailing in your office, which, by reason of its long standing, may be regarded as having become a rule of property, and that the summary enforcement of such rule as to pending applications, in which notice has been given under the former practice, is not only calculated to cause much confusion, but great expense, both of which should be avoided.

It is conceded on all hands that there should be a uniform practice, and that the fullest and most accurate notice should be given, so that the parties interested adversely may be able to fix the locus of the claim, and thereby determine whether or not there is any conflict. The language used in this case, and cited with approval in *Parsons v. Ellis* (23 L. D., 504), as to the necessity of this notice, meets my views.

It is not improbable that some confusion may have arisen by reason of the somewhat vague and indefinite wording of paragraph 29, and the different constructions that might be placed thereon. It will be observed that the language in regard to adjoining claims is:

The name or names of adjoining claimants on same or other lodes, or, if none adjoin, the names of the nearest claims, etc.

Before commenting on this language, it may be well to state that all official surveys of mining claims are made by a deputy mineral surveyor, who is regularly appointed by the surveyor-general of the district. He is, therefore, an officer of the land department, and as such is strictly under the highest obligations to perform his duties in accordance with instructions. Being such officer, his reports and acts must be accepted as *prima facie* true. It is upon his report, made from actual observation in the field, that the data are obtained from which the register must prepare the publication notice. The surveyor, therefore, must act impartially in making his report. His connection with the survey is only that of an officer of the Department, and any further acts, especially in connection with securing a patent, are in direct violation of his duties and his instructions. I may add that this discussion is suggested by reason of the fact that it is charged that the deputy surveyor exceeded his duties in this matter by preparing "the notices of application for patent."

Recurring now to the language quoted from paragraph 29, the difficulty of rigidly enforcing this requirement in all its detail is clearly apparent. To give the names of "adjoining claimants" would require a search of the records to ascertain who were the claimants of any such claim, which in itself entails a task that is burdensome and may be expensive, especially where there have been numerous transfers of fractional interests. And it is not clear how any better results so far as notice is concerned would be obtained by strictly construing this. It would seem as if simply giving the name of the claim would answer every purpose. The claimants would then have all the notice that can reasonably be required. It is a fact, as I am informed by your office,

that this requirement is very rarely fulfilled, and under the practice that has obtained has practically fallen into disuse.

The practice has been simply to name adjoining claims, and in this some confusion has arisen. The almost universal practice is that only claims of which official surveys have been made are named. It is true that these are the only claims of which the government, in any of its departments, has any official knowledge, but the fact may be, and not infrequently is, that claims of the greatest notoriety in the mining district may never have had an official survey, and may be near, or "the nearest claim," to that applied for. It seems to me that it is the duty of the deputy surveyor in all cases where it is practicable to do so, to give the names of such claims. As said in this case originally, it is primarily the duty of the applicant himself to give such information as he is possessed of in regard to adjoining, or conflicting claims, as he is presumed to know more about these matters than a stranger.

It is not improbable that my predecessor, in deciding this case as he did, and holding that a strict construction should be given to this paragraph, especially in regard to adjoining claims, had in view the necessity of naming all such claims and was not cognizant of the fact that the practice had almost uniformly been to include in the notices only such claims as had been officially surveyed.

It seems to me that paragraph 29 should be amended so as to remove any doubt of its meaning, and make as clear and adequate provision for future guidance as is possible. It will be readily understood that it is practically impossible to make any regulation that will cover all possible cases that may be presented. The most that can be done is to formulate such rule as will be best adapted to meet all contingencies that may arise, and leave the question as to whether there has been a compliance therewith to be determined as the emergency may be presented. The government has the mineral lands for sale to those who are entitled to the same by reason of compliance with the law. The Secretary of the Interior is clothed with power to make such rules and regulations in regard to the disposal thereof as are not inconsistent with law. The purpose of giving notice of the application for patent for mining claims is to notify all who may have conflicting locations that they may protect their interests as provided by law. With this end in view, and to make more definite what the practice should be in the future in such cases, I have had prepared the following as a substitute for the present paragraph 29:

29. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim; the mining district and county; whether or not the location is of record, and, if so, where the record may be found, giving the book and page thereof; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well-defined place on the claim; the names of all adjoining and conflicting claims, or, if none exist, the notice should so state.

Your office is directed to immediately send to the local officers a copy of this rule, with instructions that the same will be in full force and effect on and after the first day of June, 1897, and all publications made thereafter must be in conformity with this. All publications made or started prior to that date will be treated under the rule as it was interpreted prior to the original decision in this case.

I am constrained to believe that in the case at bar there was a substantial compliance by the applicants with the rules as then administered and construed, and that the decision should be modified to this extent. The order requiring republication and suspending the entry during that period is hereby revoked.

It is so ordered.

RAILROAD GRANT—INDEMNITY SELECTION—CONFLICTING LIMITS.

GRUNEWALD ET AL. v. NORTHERN PACIFIC R. R. CO. ET AL. AND
NORTHERN PACIFIC R. R. CO. v. ST. PAUL, MINNEAPOLIS AND
MANITOBA RY. CO.

An indemnity selection unaccompanied by a specification of loss is no bar to the attachment of other rights.

An unanceled pre-emption filing of record, at the date a railroad grant becomes effective, excepts the land covered thereby from the operation of the grant.

The establishment of indemnity limits on the definite location of the Northern Pacific, and action taken thereon, did not amount to a finding on the part of the Department that all the lands in said limits would be required to satisfy the grant to said company.

At the time of the filing and acceptance of the map of definite location of the St. Vincent extension of the Manitoba road, there was no reservation of lands for the benefit of the Northern Pacific outside the withdrawal on general route, and the primary limits adjusted to definite location, that would defeat the grant to the Manitoba company.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (F. W. C.)

This case is somewhat complicated, due to the many claimants to the tracts involved, August Grunewald, Peder J. Skaar and the Northern Pacific Railroad Company having each appealed from your office decision of February 2, 1895, making disposition of the lands involved as hereinafter stated.

The case seems to have arisen upon an application tendered by Grunewald on December 6, 1887, to make homestead entry covering the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lot 4, Sec. 3, T. 134 N., R. 43 W., St. Cloud land district, Minnesota.

This land is within the primary limits of the grant for the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Railway, made by act of March 3, 1871, the rights under which attached upon the acceptance of the map showing the line of definite location of the company's route on December 19, 1871. It is also within the thirty mile

or first indemnity belt of the grant to the Northern Pacific Railroad, as adjusted to the map of definite location of said road filed November 7, 1871. It was not within the limits withdrawn upon the map showing the line of general route of the said Northern Pacific Railroad.

The NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 3 had, prior to the tender of Grunewald's application, been applied for by Knudt Johnson, and Grunewald's application was rejected on account of the pending application by Johnson; from which he duly appealed to your office.

The case arising upon Johnson's application was duly prosecuted to this Department, final decision being rendered in Johnson's favor April 10, 1891.

Following this decision it appears that Grunewald tendered a second application, covering only the land in conflict with Johnson's entry, namely, the said NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$; but on July 13, 1891, he waived any claim as to the said forty, electing to stand upon his application presented in 1887 as to the said S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lot 4 of Sec. 3.

On April 5, 1893, one Peder J. Skaar tendered his homestead application for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 3. He did not allege prior settlement, but the local officers, having misconstrued Grunewald's action and supposing that he had withdrawn all claim under his application, instead of only eliminating the tract before referred to, held the application by Skaar for allowance and notified both railroad companies of such action; from which they duly appealed.

As to the claims made by the companies to the tracts involved, the record discloses that on December 2, 1873, the St. Paul, Minneapolis and Manitoba Railway Company listed the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 4 of said section 3, and on July 31, 1884, listed the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section. The last mentioned tract was selected by the Northern Pacific Railroad Company on October 29, 1883, without specification of bases, but the same was applied in the amendatory list filed April 26, 1892. The local officers rejected the attempted selection by the Northern Pacific Railroad Company for conflict with the prior selection by the St. Paul, Minneapolis and Manitoba Railway Company; from which said company duly appealed.

The record further shows that the said SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, involved in the claim made by both railroad companies and by both Skaar and Grunewald, was embraced in the pre-emption declaratory statement of F. J. Grunewald filed June 19, 1871, alleging settlement on the 7th of that month. This filing was never completed but was still of record, uncanceled, both at the date of the attachment of rights under the Manitoba grant and at the date of withdrawal and selection on account of the Northern Pacific grant.

The conflicting claims of all parties were considered in your office decision of February 2, 1895, before referred to, wherein the homestead applications of both Grunewald and Skaar were rejected as to the said SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$; the same being held to have been excepted from

the grant for the Manitoba company, and was awarded to the Northern Pacific Railroad Company under its selection, before referred to, of October 29, 1883. As before stated, this selection was not accompanied by a designation of losses as a basis therefor, and not being protected by the order of May 28, 1883, the same was no bar to the attachment of other rights. (*Northern Pacific R. R. Co. v. Miller*, 12 L. D., 428.)

The action of your office in awarding said tract to the said Northern Pacific Railroad Company is therefore reversed. This tract was, however, excepted from the grant to the St. Vincent Extension by the filing before referred to, and to that extent the holding of your office decision as against the grant for the Manitoba Company is affirmed.

Between Grunewald and Skaar, Grunewald was the prior claimant under his application presented December 6, 1887, which I find he has not waived, and said tract is awarded to him, the conflicting application of Skaar being rejected.

The tract remaining for consideration is the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 4 of said section 3.

As before stated, this tract is within the primary limits of the grant for the Manitoba Railway Company, the rights under which attached December 19, 1871, and is also within the indemnity limits of the grant for the Northern Pacific Railroad Company, on account of which application was made to select this land April 27, 1892; the same being rejected because of conflict with the Manitoba grant.

Your office decision sustains the rejection of the attempted selection by the Northern Pacific Railroad Company upon the ground that the lands were withdrawn, on account of the Manitoba grant, at the time of the presentation of the list of selections by the Northern Pacific Railroad Company.

It is urged by the company that the rights of these parties within this conflict are determined by the decision of the United States Supreme Court in the case between said companies reported in 139 U. S., page 1. It is admitted that the Department has ruled otherwise in its decision of December 4, 1895, between said companies, reported in 21 L. D., 462, but it is urged that this holding is clearly in conflict with the decision of the court.

Just what was intended to be held by the court in the case referred to is a matter of some doubt.

The lands involved in said case were all within the limits of the withdrawal upon the map of general route of the Northern Pacific Railroad Company, which withdrawal became effective before the attachment of rights under the Manitoba grant.

As stated by the court (page 17)—

The withdrawal made by the Secretary of the Interior of lands within the forty-mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific Railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises.

This would seem to effectually dispose of the claim of the Manitoba Railway Company as to such lands.

It is true that it was also stated in said opinion—

The act of March 3, 1865, as already stated, is expressly restrained from in any way interfering with any lands previously reserved by Congress or any competent authority to aid in any work of public improvement. Consequently, under that act no claim could be asserted that would in any way interfere with the grants to the Northern Pacific Railroad Company.

But I do not believe it was the intention of the court to enlarge upon the case in hand, nor do I think that it should be construed to include, as involved in this case, lands outside of the withdrawal on the general route of the Northern Pacific Railroad Company, and which were shown, upon the acceptance of the map of definite location of the Manitoba grant, to be within the primary limits of said grant, and so far as the records showed, free from adverse claims.

This was on December 19, 1871, and prior to this time, to wit, on November 20, 1871, the map of definite location of the Northern Pacific Railroad Company opposite this land had been filed.

Upon the lands reserved on December 19, 1871, the Manitoba grant could not operate, but these were only such as had been withdrawn upon the line of general route of the Northern Pacific Railroad Company and such as fell within the primary limits adjusted to its line of definite location.

As to the lands within the indemnity limits of the grant for the Northern Pacific Railroad, outside of the withdrawal on general route, what were the rights of the Northern Pacific Railroad Company?

Since the decision of this Department in the case of Northern Pacific Railroad Company *v.* Miller (7 L. D., 100), it has been uniformly ruled that the sixth section of the act of July 2, 1864 (13 Stat., 365), prohibited the withdrawal of indemnity lands on account of the Northern Pacific grant, so that there was no reservation thereof on account of the grant.

In the case in 139 U. S., 1, it is stated, on pages 8 and 9:

After a map of general route of the road of the plaintiff was filed, as above stated, and the line of the road in Minnesota was definitely fixed, the commissioner of the general land office designated, upon maps and records in his office, the limits of the lands granted by Congress to the plaintiff, according to the provisions of the act of 1864, and the above joint resolution, namely, the twenty, thirty and forty-mile limits on each side of the line of definite location, the first named being the limits of the lands in place; the second, the limits of the indemnity lands; and the third, or forty-mile limit, the limits of the further indemnity granted by the joint resolution of May 31, 1870. And upon such designation it was found that there was not in the State, within those limits, at the time of the final location of the road, an amount of lands intended by the grant of Congress for the plaintiff, not previously granted, sold, occupied by homestead settlers, pre-empted or otherwise disposed of.

Again on page 19—

As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found

in the lands within the place limits, it is sufficient to observe that all lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selection from them, for they were all appropriated.

This is urged as being, in effect, a reservation of all lands within the indemnity limits of the Northern Pacific grant in Minnesota, as against the grant under the act of 1871 for the Manitoba Company.

The language used by the court was perhaps influenced by the admissions of the companies, said case having been tried upon an agreed statement of facts.

The records of this Department show that upon the filing of the map of definite location of the Northern Pacific Railroad Company on November 20, 1871, the limits of the grant were established, the map being forwarded to the local office by letter from your office dated December 12, 1871, which letter was received December 21, 1871.

While this diagram showed the forty mile or second indemnity belt, yet the letter forwarding it to the local office does not show that, as stated by the court,

Upon such designation it was found that there was not in the State, within those limits, at the time of the final location of the road, the amount of lands intended by the grant of Congress for the plaintiff, not previously granted, sold, occupied by homestead settlers, pre-empted or otherwise disposed of.

The letter states as follows:

You will observe by reference to the act of 31 May 1870, that the additional indemnity lands therein granted are only for making up deficiency caused within their granted or 20 mile limits, by the disposal of lands in odd sections *since* the passage of the act of 2nd July 1864, and upon the contingency that such deficiency lands cannot be obtained within the 10 mile indemnity limits prescribed by the act of 2nd July 1864. Nor can the company make selection of any lands heretofore reserved for the Lake Superior or Mississippi railroad or reserved or granted for any other purpose and which were still reserved at the date of definite location of the road and map thereof filed in this office.

Therefore in the examination of any lists of lands selected by the company you will require that those in the 20 mile or granted limits and those in the 30 mile or first indemnity limits shall be presented in separate lists and you will eliminate or reject therefrom any lands to which the United States had not full title or which were "reserved, sold, granted, or otherwise appropriated, and" not "free from pre-emption or other claims or rights at the time the line of said road" was "definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office" which was 21st November 1871.

It will be seen that said letter clearly contemplated the exhaustion of the first indemnity belt before the second was to be resorted to, but makes no finding on that contingency, the action amounting only to the establishment of the limits within which selections might be made if necessary, which were ordered withdrawn, as was the practice then prevailing.

As to the lands involved in the case before the court, the decision therein made is of course binding, but in the administration of these grants the facts gathered from the records and files of the Department

are our guide, and in making disposition of the public grants we must be governed accordingly.

I am therefore of opinion that no such reservation was created on account of the Northern Pacific Railroad grant outside the limits of the withdrawal upon general route at the time of the filing and acceptance of the map of definite location of the St. Vincent Extension of the Manitoba Railroad, as would prevent the grant to the last mentioned company from taking effect.

Your office decision, in so far as it awards the tracts under consideration to the Manitoba Railway Company, is accordingly affirmed.

PATENT—INADVERTENT ISSUE—VACATION.

COOK v. TAYLOR.

Snit for the recovery of title will be advised where a patent, through inadvertence and mistake, is issued in contravention of departmental directions.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (J. L. McC.)

Counsel for John F. Cook has filed a motion for review of departmental decision of January 19, 1895, affirming the decision of your office, dated April 6, 1893, dismissing his protest against the delivery to William A. Taylor of patent for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, T. 6 S., R. 8 W., Las Cruces land district, New Mexico. (See 300 L. and R., 439.)

The record facts of the case are in brief as follows:

Taylor made pre-emption filing for the tract on February 16, 1884.

On August 12, 1886, Cook filed an affidavit, alleging that the land was mineral in character, and that he (the affiant) was owner of a mining claim thereon.

Taylor made final proof August 26, 1886; and on September 27, same year, was allowed to make entry of the tract in controversy.

A hearing on the affidavit was had October 30, 1886.

The matter came in due course of appeal before the Department, which, on December 24, 1891, held that the land was agricultural in character, but that the testimony failed to show that the entryman had complied with the law as to residence, improvements, and cultivation.

Your office, by letter of February 22, 1892, promulgated said decision, and stated further that Taylor would be allowed sixty days from notice "within which to submit supplemental proof showing full compliance with the pre-emption law as to residence, improvements, and cultivation, if such is the fact; otherwise his entry will be held for cancellation." No supplemental proof was ever submitted, and no motion for review was filed. The case was declared closed by your office letter of April 8, 1892.

The entry papers were filed in division "G" (the pre-emption division) of your office, with the endorsement, "Land adjudged agricultural and contest closed. Sent to R. & R. April 8, 1892." The final proof (made August 26, 1886, *supra*.) showed compliance with the pre-emption law. The testimony adduced at the hearing (had on October 30, 1886, *supra*.) was not with the entry papers. No note on the papers referred to the call made by division "N" (the mineral division) of your office, for supplemental proof. In other words, division "G" was wholly unaware of the action that had been taken by your office, the record of which was in division "N." Therefore, upon report by division "G" that decision had been rendered and the case closed, patent was issued to Taylor on May 4, 1892.

Counsel for Cook, learning of the issuance of patent, filed a protest against its delivery; but your office, by letter of April 6, 1893, held:

It is not necessary to question whether the patent in this case was issued inadvertently or not. It has been issued, signed, sealed, and recorded in this office; and this office has no further right to pass upon the validity of Taylor's entry.

From the above decision of your office Cook appealed to the Department, asking that said decision be reversed, or as an alternative, that suit be instituted, for his benefit, to set aside the patent. The Department, on January 19, 1895, held that said decision was correct, and added:

The Department has no legal authority to determine the question of a duly executed patent. It has, then, no right to consider whether the patentee ought to have or receive the patent. (*United States v. Schurz*, 102 U. S., 378.) The government is under no obligation to the petitioner respecting the relief invoked, and I am not satisfied that suit should be brought by the government to vacate the patent.

In the motion for review of the above named departmental decision, counsel for Cook earnestly contend that gross fraud and wrong were committed by the entryman, or by parties whom he allowed to make use of his name. This, however, is a matter which need not be discussed. It certainly has been shown that inadvertence and mistake were committed in issuing the patent.

In the case of *Williams v. United States* (138 U. S., 514, 517), the supreme court said:

The allegations of the bill are of fraud and wrong; but they also show inadvertence and mistake in the certification to the State; and it can not be doubted that inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to divest title acquired thereby. This is equally true in transactions between individuals and in those between the government and its patentee. . . . The facts and proceedings attending the transfer of title are fully disclosed in the bill. They point to fraud and wrong, and equally to inadvertence and mistake; and if the latter be shown the bill is sustainable, although the former charge against the defendant may not have been fully established.

The above decision of the supreme court appears to me to be clearly applicable to the case at bar.

Cook's petition asks, in substance, that the government institute suit for his benefit. But, in my opinion, he makes no showing that would justify the bringing of suit for his benefit; as the Department held in its decision of January 19, 1895, "the government is under no obligation to the petitioner respecting the relief invoked." Therefore the motion for review must be denied.

In view, however, of the inadvertence and mistake committed by your office in issuing the patent in question in contravention of the departmental decision directing that Taylor's claim should not be allowed until he had furnished proof of compliance with the pre-emption law, you are hereby directed to prepare the record in the case for submission to the Department of Justice with a view to institution of suit to set aside said patent.

PRACTICE—WAGON ROAD GRANT—SETTLEMENT CLAIM.

WATSON *v.* THE DALLES MILITARY WAGON ROAD CO.

The advancement of cases on the docket in the General Land Office, is a matter resting in the discretion of the Commissioner, and will not be interfered with by the Department unless an abuse of discretion appears.

Mere occupation or use of a body of unsurveyed public land of indefinite area, without intent to acquire title to the particular portion thereof in controversy, is not such an appropriation of that portion as to except it, or the sub-division of which it is a part, from the operation of a wagon road grant.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (E. B., Jr.)

I have considered the appeal of Samuel J. Watson from your office decision of August 31, 1896, in the case of said Watson against The Dalles Military Wagon Road Company, involving the NE. $\frac{1}{4}$ of section 25, T. 20 S., R. 46 E., Burns, Oregon, land district.

Watson claims the land under his homestead entry No. 511, therefor, made January 15, 1894; said company claims it under the grant of February 25, 1867 (14 Stat., 409), to the State of Oregon, to aid in the construction of the said wagon road. This case was previously before the Department on appeal by Watson, and a hearing was then ordered March 6, 1896, to determine whether there had been such appropriation of the land under the settlement laws as to except it from the operation of the grant. The hearing was held in May, 1896, and the case now again reaches the Department in regular course of proceeding.

The land is within the primary limits of the said grant, and unless duly reserved or otherwise lawfully appropriated, the right of the company attached thereto upon the definite location of the line of the road November 1, 1869 (*McDowell v. The Dalles Military Wagon Road Co.*, 22 L. D., 599). Your office held, in effect, that the land was not so reserved or appropriated, that the right of the company attached thereto on the date last mentioned and that Watson's entry should be canceled.

The contentions of Watson on appeal may be reduced to two, viz: first, that your office erred in deciding the case "within twelve days after the arrival of the record, in violation of Rule 73 of the Rules of Practice;" and second, in not holding that the land was so appropriated by settlement thereon of one Eli Keeny, as to except it from the operation of the grant.

It appears that the record reached your office August 19, 1896, and that the case was therefore decided by your office on the twelfth day after the arrival of the record. The Rule of Practice referred to is as follows:

After the Commissioner shall have received a record of testimony in a contested case, thirty days will be allowed to expire before any action thereon is taken, unless, in the judgment of the Commissioner, public policy or private necessity shall demand summary action, in which case he will proceed at his discretion, first notifying the attorneys of record of his proposed action.

The advancement of cases in your office is discretionary with the Commissioner and will not be interfered with by the Secretary unless the discretion is shown to have been abused; and the proceeding for the correction of any alleged abuse of discretion is by certiorari and not by appeal (*Ex parte* Frank Quinn, 9 L. D., 530, and *Taylor v. Rogers*, 12 L. D., 694). Appellant's first contention is not therefore well taken.

The testimony shows that about the fall of 1865 or spring of 1866 two men, named respectively Bruce and McFarland, enclosed a tract of land of from eighty to two hundred and twenty-five acres, according to various estimates, on the west bank of the Owyhee river, some distance below its junction with Snake river in said State, and occupied and used the same chiefly as a hay ranch. A brush fence on three sides and the river on the fourth formed the enclosure. Said township was then unsurveyed. It was not surveyed until August, 1875. The precise position of this enclosure with reference to the subdivisions of the subsequent public survey does not clearly appear. According to a diagram offered in evidence, based upon the testimony of one of appellant's witnesses, the ranch embraced nearly all of the SW. $\frac{1}{4}$ of said section, part of the NW. $\frac{1}{4}$, about thirty-five acres in the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and about forty acres in the NW. $\frac{1}{4}$ of section 36. Said Keeny succeeded Bruce and McFarland in the occupancy of the ranch about July, 1867, and continued there until about 1872. According to appellant's witnesses, some hay was cut by Keeny on one or two occasions along the north side of said enclosure, upon ground now claimed to have been within the same and part of said NE. $\frac{1}{4}$. No other use thereof by Keeny or his predecessors is alleged or shown.

From the official plat and field notes of the public survey it appears that the Owyhee River enters said section 25 a few rods east of the southwest corner thereof and flows northeastward through it, passing out of the section about the same distance south of the northeast corner, and that its position in said section is considerably northwest of the position shown on said diagram. This correction of the position

of the river in said section, taken in connection with the testimony generally, would leave only very few acres in the SE. $\frac{1}{4}$ of the said NE. $\frac{1}{4}$, if any, within the boundaries of the ranch, even upon the basis of the enlarged acreage shown in the said diagram, which basis, however, as already indicated, is not correct. The buildings used as dwellings by these ranchmen were on the extreme western portion of the ranch and only a few yards within the brush fence. It is not clear, therefore, from all the evidence, that any portion of said NE. $\frac{1}{4}$ was embraced in the said ranch as occupied by the parties named, or any of them. Subsequent to the occupation of Keeny it would appear that the ranch was considerably enlarged, embracing from six hundred to eight hundred acres, which fact is immaterial except to account to some extent for the uncertainty in the minds of the witnesses as to its boundaries at and prior to November 1, 1869, when the company's rights under its grant attached.

It is not shown that any of the parties ever claimed or intended to claim said ranch or any part thereof under the pre-emption or homestead laws or to take it for the purpose of making thereon a home for themselves. It is not shown that Bruce or McFarland had any of the qualifications of a pre-emptor or homesteader, nor that Keeny was competent to exercise either a pre-emption or a homestead right at any time during his occupancy of said ranch. He was apparently a citizen of the United States and the head of a family, but none of the witnesses knew whether he had or had not exercised homestead and pre-emption rights. He could exercise such rights but once. It is familiar doctrine that in the absence of affirmative showing that an alleged settler on the public lands had the necessary qualifications of a settler, his occupancy thereof would not except the same from the operation of any such grant as is herein relied upon.

Even if it should be conceded, however, that Keeny had all the qualifications of a settler, the fact that appellant has not shown, as already indicated, that Keeny occupied any portion of the land in controversy under any claim of homestead or pre-emption settlement, would be fatal to his second contention. Mere occupation or use of a body of unsurveyed public land of indefinite area, without intent to acquire title to the particular portion thereof in controversy, directly proven or to be reasonably presumed from acts done in the premises, is not such an appropriation of that portion as to except it, and much less the larger legal subdivision of which it is a part and which Watson claims, from the operation of such a grant. The testimony most favorable to appellant, that of his witness Harris, does not tend to show that said ranch covered more than thirty-five or forty acres, at the utmost, of the land in controversy, and that testimony—from which the diagram above referred to was made—is shown to be largely guesswork and unreliable as to the size and precise location of the ranch.

The decision of your office is affirmed in accordance with the foregoing views. Watson's entry will be canceled.

PRIVATE CLAIM—ACT OF MAY 26, 1830.

FRANCISCO FERREIRA.

Private claims decided and recommended for confirmation by the commissioners, and referred to Congress by the Secretary of the Treasury January 14, 1830, are confirmed by section 1, act of May 26, 1830.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (P. J. C.)

The Department is in receipt of your office letter ("G") of January 5, 1897, in reference to the private claim of Francisco Ferreira to certain islands—or keys—in the southern part of Florida.

The attention of your office recently has been brought to this matter, as stated in your said office letter, by one Horatio Crain, who claims "present ownership of a portion of the land embraced in the claim, and desires a patent."

This matter has been the subject of consideration by your office, from time to time, for more than three-quarters of a century and is still unsettled. The purpose of your office letter is to have the matter finally settled so that those claiming the lands may secure title thereto. The facts disclosed are as follows:

The petition of Francisco Ferreira to the governor of Florida is as follows:

[Translation.]

To his excellency the Governor:

Don Francisco Ferreyra, of this city; to your excellency respectfully sheweth: That he is desirous of dedicating himself to the cultivation of the land, and, with some slaves he owns, establish himself on some place that may be advantageous, whenever he can collect funds for the purpose of obtaining hands; and as the services he has rendered, and is still rendering, to the country with his person and property, and the great losses he has suffered during the revolution of this province, are well known to your excellency, he therefore prays that you will be pleased to grant him in absolute property a key situated among those called the Florida Keys, and is known by the name of Key Bacas, and four small islands which are situated in the vicinity thereof, that he may, when he collects sufficient funds, proceed to form his establishment thereon; which may, at the same time, be very useful for those who have the misfortune of being shipwrecked near said place—a favor he hopes to obtain from the goodness of your excellency.

Saint Augustine, January 4, 1814.

FRAN'CO FERREIRA.

On the following day, January 5, Kindelan ordered: "Let there be granted to him in absolute property the Key Bacas and the small island adjacent, without injury to a third person." (Ex. Doc. No. 58, 44th Cong., 1st Session, House of Representatives.)

Congress, on May 8, 1822, passed an act (3 Stat., 709), "for ascertaining claims and titles to land within the Territory of Florida," which provided for the appointment of three commissioners by the President, before whom every person, or their heirs, etc., "claiming title to lands

under any patent, grant, concession," etc., "dated previous to January 14, 1818," shall file his claim, "setting forth, particularly, its situation and boundaries, if to be ascertained;" that the commissioners shall examine and determine on the validity of said patents, etc., but all claims must be presented prior to May 31, 1823. Section 5 defines the powers of the commissioners, and, among others, is this:

They shall not have power to confirm any claim or part thereof where the amount claimed is undefined in quantity, or shall exceed a thousand acres; but in all such cases shall report the testimony, with their opinions, to the Secretary of the Treasury to be laid before Congress for their determination.

By act of March 3, 1823 (3 Stat., 754), Congress amended the act above quoted, by providing that the commissioners therein provided for should confine their labors exclusively to West Florida, and a new commission of three was provided for East Florida, and within that district, shall "possess all the powers given by, perform all duties required, and shall, in all respects, be subject to, the provisions and restrictions of the act of the eighth of May," *supra*, "except so far as the same is altered or changed by the provisions of this act." Section 2 of this act provides, that claims in favor of actual settlers at the time of cession are to be confirmed, where the claim does not exceed three thousand five hundred acres;

and said commissioners shall have power, any law to the contrary notwithstanding, of deciding on the validity of all claims derived from the Spanish government in favor of actual settlers, where the quantity does not exceed three thousand five hundred acres.

Section 5 provided that claims not filed on or before December 1, 1823, shall be held to be void and of no effect.

By act of February 28, 1824 (4 Stat., 6), the time was again extended till January 1, 1825, and so much of the former act as made void those claims not filed before December 1, 1823, was repealed. Section 3 of this act declares that no person shall be deemed an actual settler within the provisions of the prior act,

unless such persons, or those under whom he claims title, shall have been in the cultivation, or occupation, of the land, at and before the period of the cession.

It may be remarked, at this stage of the recital of facts, that it is fairly deducible from the petition of Ferreira that he was not at the date of the grant or cession an actual settler on the land as defined by the statute just quoted. Hence, his claim would not come within the provision of the statute authorizing the commissioners to confirm the claims of actual settlers where they did not exceed three thousand five hundred acres, but would be controlled by the provisions of the first act, which limited their confirmations to one thousand acres, provided, of course, his claim exceeded the latter amount.

In Volume 3, American State Papers—Duff Green—commencing on page 658, is found the "Minutes of the Board of Florida Land Com-

missioners." It is recited that they assemble for action, under the acts of May 8, 1822, and March 3, 1823, for "ascertaining claims and titles to lands within the district of East Florida." In these minutes, under date of November 17, 1823, is found this:

Francis Ferreira presented his memorial to this board, praying confirmation of title to an island known by the name of *Bacas*, and four small islands adjoining, situated to the south of Cape Florida, and known as one of the Florida Keys, with a concession to memorialist made by Governor Kindelan, and dated the 5th of January, 1814; which are ordered to be filed.

This, so far as my research can be extended, is the first presentation of this claim.

Pursuing this subject in its chronological order, it is found that Congress from time to time extended the period within which claims should be presented to the boards. By the act of February 8, 1827 (4 Stat., 202), it was provided that all records, etc., in the possession of the "secretary of the late board" be delivered to the register and receiver of the district of East Florida, and it was made their duty

to examine and decide all claims and titles to land in East Florida, not heretofore decided by the late board of commissioners, subject to the limitations, and in conformity with the provisions of the several acts of Congress providing for the adjustment of private land claims in Florida.

In pursuance of this law the local officers, in January, 1829, submitted their final report to the Secretary of the Treasury, which was transmitted by him to the President of the Senate, January 14, 1830 (Vol. 5 Am'n St. P'rs, etc. 327). On page 420 of the same volume, and being a part of the said report, will be found "abstract No. 15 of sixteen cases sent back from Washington to the register and receiver for their report." No. 13 is that of Francis Ferreira; "date of concession January 5, 1814;" acres blank; conceded by Kindelan, "Royal order, etc., 1790," and described as Key Bacas. In referring to this claim, they say, in a note:

No. 13—Francis Ferreira, clm't.—Key Bacas. The grant to this land was made by Governor Kindelan, in January, 1814, for services. The testimony is filed in the Land Office at Washington. It was recommended for confirmation on the 19th June, 1824.

I do not find any record in the American State Papers warranting the statement here made that this grant "was recommended for confirmation on the 19th June, 1824." This is the date of the confirmation of the Key Vacas, an entirely different grant, although to a person by the same name. Key Vacas is described as containing "14 acres without the old lines, and about one and three-fourths miles north of the City of St. Augustine," while Key Bacas is located in the Florida Keys at the extreme south of the State. It may be possible that the local officers in this report have confused the two grants.

It appears that in 1874 one E. C. Howe, claiming to be one of the heirs of Charles Howe, who held the property by mesne conveyances

from the original claimant, made inquiry of your office as to the status of the claim, and he was informed, by Mr. Commissioner Burdett,

that it had always been held by this (your) office that the sixteen claims that had been omitted from the Commissioner's report, which was submitted to Congress February 21, 1825, had never been confirmed.

Howe then applied to have the claim confirmed under act of June 22, 1860 (12 Stat., 85), as extended and amended by acts of March 2, 1867 (14 Stat., 544), and June 10, 1872 (17 Stat., 378).

Action was evidently taken under these acts, for it appears by Ex. Doc. No. 58, *supra*, that Mr. Secretary Chandler, on January 6, 1876, transmitted "a report on the private claim of Charles Howe's legal representatives" to the Speaker of the House of Representatives, in the following language:

Pursuant to the requirement of the fourth section of the act approved June 22, 1860, (12 Stat., 85,) I have the honor to transmit herewith the report of the register and receiver of the land-office at Gainesville, Fla., acting as commissioners under said act, on the private land-claim of the legal representatives of Charles Howe, deceased, together with letter of the Commissioner of the General Land-Office, of the 28th ultimo, approving said report.

So far as disclosed, nothing was ever done by Congress on this, except to print the report.

Thus the matter seems to have rested, until December 8, 1896, when Horatio Crain addressed your office relative to the same. In your said office letter to the Department as a result of this letter from Crain, it is said:

I do not agree with the views held by Commissioner Burdett, that it was doubtful as to whether Ferreira's claim has been confirmed by the act of May 28, (26,) 1830. . . . I am of the opinion that the claim of Francisco Ferreira, having been recommended for confirmation, was duly confirmed by the first section of the act of May 26, 1830 (4 Stat., 405), and that no further action is necessary on the part of Congress.

The first section of the act of May 26, 1830, reads as follows:

That all the claims and titles to land filed before the register and receiver of the land office, acting as commissioners, in the district of East Florida, under the quantity contained in one league square, which have been decided and recommended for confirmation, contained in the reports, abstracts and opinions, of said register and receiver, transmitted to the Secretary of the Treasury, according to law, and referred by him to Congress, on the fourteenth day of January, one thousand eight hundred and thirty, be, and the same are hereby confirmed, etc.

It is clear that this act refers to such claims as were filed before the register and receiver,

which have been decided and recommended for confirmation, contained in the reports, abstracts and opinions of said register and receiver,

and referred to Congress by the Secretary of the Treasury January 14, 1830. This claim was referred to Congress by the Secretary of the Treasury on said date, as appears by abstract No. 15, and it was stated by the local officers that "it was recommended for confirmation on the

19th June, 1824." The local officers evidently reported the fact only of the recommendation by the former board, and do not make any recommendation themselves. While I am unable to find in the minutes of the board, contained in American State Papers, etc., any official record of its recommendation for confirmation, yet there is in the Ex. Document No. 58, this:

B.—Decree.

FRANCIS FARREIRA } Claim to an island called Key Bacas and four small islands
 vs. } adjacent.
 THE UNITED STATES. }

In this case the claimant produced a concession made to him by Governor Kindelan for the island set out in this memorial, dated January 5, 1814, the quantity undefined:

The board not being authorized to decide finally on claims of this nature, but conceiving that the claimant has made out an equitable title for the lands which he claims, it is therefore recommended to Congress for confirmation.

JUNE 19.

I, Antonio Alvarez, keeper of the public archives of East Florida, do hereby certify the following to be a true and correct extract from the registry of claims kept by the board of land-commissioners, (book A, page 250,) now on file in my office; according to law.

Witness my hand and seal of office, at the city of Saint Augustine, Territory of Florida, the twenty-fourth day of March, A. D. one thousand eight hundred and thirty-six.

ANTONIO ALVAREZ, *K. P. A.*

If the copy of this judgment is to be accepted as authentic, and I see no reason why it may not, then the statement of the local officers would seem to be verified.

The area contained in the grant is "under the quantity contained in one league square," as determined in Teresa Rodriguez (18 L. D., 64), being, as reported by the local officers and Commissioner Burdett, 4,144.15 acres.

I therefore concur in the conclusion of your office, as announced in said letter of January 5, 1897, and suggest that appropriate action be taken by your office to issue patents to the proper party or parties.

JUDGMENT OF CANCELLATION—APPLICATION TO ENTER.

GUILLORY *v.* BULLER.

Under a decision holding an entry for cancellation, if within a specified period the entryman fails to comply with certain requirements, or appeal, the judgment becomes final at the expiration of said period, if the requirements of said decision are not complied with, and no appeal is taken, and the land involved is thereafter open to entry by the first legal applicant; but during the time so accorded to the entryman an application to enter said land should not be received.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (C. J. G.)

This controversy is in relation to the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 6, T. 4 S., R. 2 E., New Orleans land district, Louisiana.

The record shows that Arcius Vidrine made adjoining farm homestead entry for this land on December 14, 1881, claiming as his original farm the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, same section, township and range. It seems that Vidrine had lived on his original farm since 1876. He continued to reside thereon until November 1, 1884, when, as he claims, finding opportunity to sell at a good price, he sold his original farm and moved away. He remained away until March 10, 1890, when he returned and established residence on the adjoining farm.

On April 25, 1892, he submitted final proof in support of his adjoining farm entry. He claims to have believed that he would receive credit for the time he lived on his original farm after making his adjoining farm entry. Vidrine's said final proof was rejected by the local office, and he appealed to your office. In your office letter of July 27, 1893, you decided as follows:

In adjoining farm homestead entries the party must fulfil the requirements of the homestead law as to residence and cultivation, but will not be required to remove from the land which he originally owned in order to reside upon and cultivate that which he thus acquires under the homestead law, since the whole 160 acres are considered as containing one farm or body of land, residence upon and cultivation of a portion of which is equivalent to residence upon and cultivation of the whole. Mr. Vidrine having disposed of his original farm, his adjoining farm homestead entry must fall as it has no basis on which to stand. Mr. Vidrine could not be allowed credit for residence on his original farm for the three years (nearly) from December 14, 1881, to November 1, 1884, and add the same to the two years residence upon and cultivation of the land from March 10, 1890, to April 25, 1892.

By your said office decision of July 27, 1893, Vidrine was allowed to make application to have the character of his entry changed to that of one for settlement and cultivation, and when he could show five years residence upon and cultivation of this land as required by law, he would be allowed to submit final proof. He was informed through said decision that in the event of his failure to appeal therefrom or make application for change of entry, the proper steps would be taken looking to the cancellation of the same.

Vidrine never appealed from your said decision, and he claims that it was impossible for him to comply with the requirements therein as to change of entry. He thereupon began looking about for some one to whom he could sell the improvements he had placed on the land. He found a purchaser in the person of Arcade Buller to whom he disposed of his improvements for the sum of about \$450.

In the mean time, on September 1, 1893, John L. Guillory filed an application dated August 30, 1890, for entry of said land. He made the proper deposit of fees, the receipt of which was duly acknowledged on same date.

On November 6, 1893, Arcade D. Buller filed his application dated September 25, 1893, for the same tract, accompanied by the proper deposit. It is stated by Buller's counsel that his application was presented at the local office prior to that date, but that the same together

with the fees was returned. This action was attributed to the change of officers at the New Orleans Office which occurred about that time. The indorsement, however shows that Buller's application was filed on November 6, 1893.

Neither of the above applications was rejected upon presentation.

On March 3, 1894, a relinquishment by Vidrine was filed in the local office bearing the note in type-writing, "To be used in the matter of homestead application of Arcade D. Buller for the land relinquished by Vidrine, and applied for at the same moment by Buller." It seems that this relinquishment was made September 5, 1893, but was not filed until above date. In view of said relinquishment, the local office on April 7, 1894, rejected the application of Guillory, for the reason that the tract applied for was embraced in the homestead entry of Arcade D. Buller.

Guillory appealed to your office, and by letter of May 22, 1894, you affirmed the action of the local office, and in said decision you stated as follows:

Since an application to enter land which is not subject to entry at the time the application is made, confers no rights upon applicant (*Hall et al v. Stone*, 16 L. D., 199), and as the applications of Guillory and Buller should have been rejected upon presentation, they could not be recognized as pending applications at the date of Vidrine's relinquishment. Therefore, Buller, by renewing his application (as appears from the note on Vidrine's relinquishment), on March 3, 1894, appeared as the first legal applicant, and it was proper that his entry was allowed.

This decision was on the principle that Vidrine's adjoining farm homestead entry was still alive, and so remained until March 3, 1894, when cancelled for relinquishment; hence, no rights were gained by filing applications prior to that date.

Under date of June 21, 1894, resident counsel for Guillory filed in your office a motion for review of your said office decision of May 22, 1894. The principal errors assigned were substantially as follows: In holding that Buller had the prior legal application on file when the land became vacant; in not holding that the land was public and subject to entry when Vidrine's final proof on his adjoining farm homestead entry was rejected by your letter of July 27, 1893; in allowing Buller's entry upon his application of September 25, 1893, when the record shows that he did not make a new application on March 3, 1894.

Resident counsel for Guillory contends, among other things, that if the land was not public until the relinquishment was filed, then Buller's entry was illegal, the application being made prior thereto, citing *Mills v. Daly* (17 L. D., 347); that, upon the theory that a new application on the part of Buller was necessary, it is insisted in the absence of an appeal by Vidrine or an application on his part for change of entry as allowed by the action of July 27, 1893, said decision of July 27, 1893, was a final judgment and took effect from that date, citing *Perrott v. Connick* (13 L. D., 598).

By your office decision of September 6, 1894, you reiterated and reasserted your conclusions of May 22, 1894, but modified said decision to the extent of saying that in the presence of the adverse claim of Guillory, your office could not allow Buller to perfect his entry by now filing an affidavit, as it were *nunc pro tunc* showing that he was qualified on March 3, 1894, to make entry. You therefore directed the local office to call upon the respective parties and allow them thirty days in which to file new applications and new affidavits, for entry of said tract. On receipt of such applications within the time prescribed, they were to be treated as simultaneously made, and the local office was then to allow said parties to bid for the privilege of perfecting entry. The right of entry was to be awarded to the highest bidder, and the local office was to allow his entry of record.

As heretofore shown, your office held that the land in question was reserved from entry until the filing of Vidrine's relinquishment on March 3, 1894. This was error. Any rights that Vidrine may have had ceased upon his failure to appeal from your office decision of July 27, 1893, or to change his entry in accordance with the instructions contained therein. He had sixty days within which to comply with the terms of said decision. Upon his failure to do so the said decision became a final judgment, and the land thereby became subject to entry by the first legal applicant. Within that time and to that extent your office was correct in holding that the land was not subject to entry, and that applications made within that time should have been rejected.

It will be observed that Guillory's application was filed September 1, 1893, which was prior to the expiration of the time allowed Vidrine by your office decision to exercise his alternative right of appeal or to change his entry, which said decision did not of necessity become a final judgment until the expiration of sixty days from the date it was rendered. Guillory never renewed his said application. Buller's application was filed November 6, 1893, after the expiration of the sixty days, when the judgment of your office had become final and the land thereby released from any rights Vidrine may have had, and subject to entry. Hence, the application of Buller to enter the land having been made after it became subject to entry, his rights are superior to those of Guillory.

As previously set out herein, counsel for Guillory contends that, under the ruling in the case of *Perrott v. Connick* (13 L. D., 598), in the absence of an appeal by Vidrine on an application on his part for change of entry, your office decision of July 27, 1893, was a final judgment and took effect from that date. This contention is not well made, for the reason that, as heretofore shown, your said office decision could not become a final judgment until the expiration of the time allowed Vidrine to appeal or change his entry. Hence, the doctrine announced in *Perrott v. Connick*, *supra*, can not be made to apply to this case.

At the same time, no rights could be secured by filing applications to

enter during the period allowed Vidrine to appeal or change his entry, as the land was thereby reserved subject to his rights, and no such applications should have been received. The proper procedure in such cases is stated in the recent case of *Cowles v. Huff et al.* (24 L. D., 81), as follows:

That no application to make entry will be received by the local officers during the time allowed for appeal from a judgment of cancellation of an entry; but in all such cases the land involved will not be subject to entry or application to enter until the rights of the entryman have been finally determined, until which time no other rights, inchoate or otherwise, can attach.

It has been determined that your decision of July 27, 1893, was a judgment of cancellation, which became final upon Vidrine's failure to appeal within the time allowed. No application to enter could attach within that time. Buller was the first to file after the land became subject to entry; hence, he was the first legal applicant.

In support of the holding that your office decision of July 27, 1893, was a judgment of cancellation, it will be observed that by said decision Vidrine was served with notice of what he might expect from your office. He was presented with the alternative of changing his adjoining farm entry to a settlement entry, to be followed by residence and cultivation sufficient to make a five years' showing, or in the event of his failure to do this, or to appeal from your said decision, he was informed that proper steps would be taken looking to the cancellation of his entry. Vidrine took no action. The language of your said office decision is construed to be equivalent to a judgment holding Vidrine's entry for cancellation, unless within sixty days from notice he should comply with the requirements contained in said decision.

It will thus be seen that there is no middle ground for these parties as suggested in your office decision of September 6, 1894. Buller's application must either be accepted or rejected. He either has rights sufficient to entitle him to entry of this land or he has none. Any rights he may have were secured by his application filed November 6, 1893. If he secured any rights whatever by his said application, they were such as to entitle him to the land *in toto*, and not merely such as would entitle him to an equal bid for it with some other party.

Your decision of September 6, 1894, is accordingly so modified as to allow Buller's application to make entry, and the same will be made of record.

INDIAN LANDS--ALLOTMENT--TRUST PATENT--CANCELLATION.

HULL ET AL. v. INGLE.

The issuance of a trust patent on an Indian allotment terminates the jurisdiction of the Secretary of the Interior over the lands covered thereby as public lands, and he consequently has no authority, in the absence of special statutory provision, to cancel such patents for the purpose of correcting erroneous allotments.

The authority conferred upon the Secretary of the Interior by the act of January 26, 1895, to cancel a trust patent, in order to correct a mistake in the allotment, is limited to cases in which the alleged error is one of those specifically named in said act.

Assistant Attorney-General Lionberger to the Secretary of the Interior,
February 15, 1897. (W. C. P.)

On October 12, 1896, Acting Secretary Sims referred to me certain papers in the matter of Sylvester Hull *et al.* v. Jane Ingle, involving the NE. $\frac{1}{4}$ of Sec. 24, T. 37 N., R. 5 W., M. D. M., California, with a request for an opinion thereon. Afterwards on November 20, 1896, the papers in regard to hearings ordered on certain approved Indian allotments involving a similar question were also referred to me for an opinion. Still later on December 3, 1896, the papers in the matter of an allotment to Lizzie Bergen involving a similar question were also referred to me for an opinion. The Commissioner of the General Land Office has since requested that all these matters be considered together.

The question involved is as to the effect of a trust patent issued upon an Indian allotment under the provisions of the act of February 8, 1887 (24 Stat., 388), and the act amendatory thereof approved February 28, 1891 (26 Stat., 794) and the jurisdiction of this Department to cancel the same.

In the case of Hull v. Ingle the Commissioner of the General Land Office recommended that a hearing be ordered to determine the character of the land with a view to the cancellation of Ingle's trust patent, if it should be determined it was mineral in character as alleged by Hull, reference being made to the act of January 26, 1895 (28 Stat., 641), as authorizing such action. The papers being referred to this office for an opinion my predecessor on June 8, 1896, submitted his opinion holding that the case did not come within the purview of said act of 1895.

The Commissioner resubmits the matter and states his reasons for so doing as follows:

After a careful consideration of the matter I feel constrained to direct attention to the fact that the Hon. Assistant Attorney General, in rendering the opinion referred to omitted to consider what is regarded by this office, with all deference, as the determining point in the matter, viz: the particular nature of the so-called patent in question, and it is in view of this that I venture to again direct attention to the case.

This is, as the Commissioner of the General Land Office says, a very important question, but it must be borne in mind that the interest of

the Indians, who are so often described as the wards of the government, is as much entitled to consideration as is that of white claimants or of the government itself.

The allotment act contains the following provision in regard to patents:

That upon approval of the allotments provided for in this act by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever.

The Commissioner of the General Land Office takes the position that the title held by an Indian allottee under the first or trust patent is an equitable title only, that an entryman under the public land laws after the issuance of final receipt holds also an equitable title, that this Department has authority to cancel an entry illegally allowed and therefore it must have authority to cancel an allotment trust patent illegally allowed. In other words, his position is that the Indian allottee stands in the same position during the trust period of twenty-five years as does an entryman during the period between the date of final entry and the issuance of patent thereon. If this theory is to prevail the Indian allottee is placed at a great disadvantage as compared with the citizen entryman. In the one case the period within which the title remains subject to attack is the full trust period of twenty-five years while in the other it is theoretically nothing and practically but a comparatively short time. This is not the position that one whose interests the government is bound to protect in all points should be forced to occupy.

Another fact that should be taken into consideration in this matter is, that allotments are made by the agents of the government. The allotment act contains the following provision:

That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made under such rules and regulations as the Secretary of the Interior may from time to time prescribe.

While this provision refers specifically to allotments to reservation Indians, yet in the following section it is provided that allotments to non-reservation Indians shall be made "in quantities and manner as provided in this act for Indians residing upon reservations." The responsibility is at least as strong upon the government as upon the allottee to see that the allotment is proper in all respects. While these facts may not go directly to the question of the authority of this Department, yet they should be borne in mind in the discussion of

that question because they show the peculiar position of the government in its relationship to the allottee. In these matters the government is the grantor, also the trustee, and at the same time it is the guardian of all the interests of the allottee as an Indian.

The policy of inducing Indians to break up their tribal relations and to take lands in severalty was adopted as a means of advancing them towards civilization. It was recognized, however, that they would not have an adequate conception of the value of property and would not in all probability be able to preserve their holdings if left unrestrained, and hence the salutary provision that the United States would hold the land in trust for the period of twenty-five years. The provision was made solely in the interest of the Indian, and to secure him in the possession of the land until he should become able to protect himself therein.

The act of July 4, 1884 (23 Stat., 96), provided that Indians who had located or should locate upon the public lands might avail themselves of the provisions of the homestead law "as fully and to the same extent as may now be done by citizens of the United States," and provided for patents in the same words as were afterwards used in the allotment act of 1887 hereinbefore quoted. It would certainly be most unjust and inequitable to the Indians to hold that their title under the homestead law was subject to attack before this Department for twenty-five years longer than the title of a citizen might thus be attacked, yet the language in the act of 1884 conferring upon Indians rights under the homestead law is the same as that of the allotment act, and if it be held that this Department has authority to cancel patents issued under the latter act it must necessarily be held that it has authority to cancel those issued under the homestead law. The manifest injustice in this holding is of itself a strong argument against its adoption.

These allotment or trust patents have been considered by this Department as having the same effect as other patents in ousting the Department of jurisdiction in the premises. The fact that they have been thus treated is an argument in favor of the continuance of the rule. That is, no change should be made unless it be clear that this practice is radically wrong.

We have also a legislative declaration as to the extent of authority in the Secretary of the Interior in the premises in the act of January 26, 1895, *supra*, conferring upon him power to cancel such patents in those cases where a double allotment has been made or a mistake has been made in the description of the land. If it had been understood that the power to cancel a patent, wrongly issued, existed, it would have been unnecessary to enact the law of 1895. While the fact that Congress took this view of the matter should not be considered as decisive of the question, it is entitled to consideration, and should be given weight as an argument in support of the position that the Secretary had not, before that, authority to cancel such patents even though

illegally issued, and has not now authority in that direction beyond that conferred upon him by said act.

The provision that these lands should be held in trust for the Indian was made for his benefit and protection. In his opinion of July 27, 1888 (19 Op. Atty. Gen., 161), Acting Attorney General Jenks, referring to said provision, uses the following language:

But Congress has not deemed it safe, in making the Indian a freeholder, to give him at once the same control over the land as other freeholders enjoy. The legislation above mentioned deprives the Indian settler of the right of conveying or encumbering the land, in any way, for a period stated, or provides that it shall be held by the United States for a given time in trust for the sole use and benefit of the Indian, and, at the expiration of such time, be conveyed to him by patent.

Further on in said opinion he says:

It is true that the Indian who gives up his wild life has taken a great step in the direction of becoming a citizen, but his situation as a member of a civilized community exposes him to dangers which call for the fostering care and protection of the government, without which the attempt to make him a useful citizen must fail necessarily. It is only after a considerable period of probation that he can be educated to understand the dignity and responsibilities that belong to citizenship and the ownership of property, and it is to protect him, while receiving this education, that congress has placed the above mentioned restraints upon his property rights.

If it be true, and it will not be seriously disputed, that this provision was made in the interest and for the benefit of the Indian, it should not be so administered as to operate to his disadvantage. It is the duty of those charged with the administration of such a law to so construe it as to most certainly attain the end contemplated, while, at the same time doing no violence to the language used. If the duty devolving upon the trustee in this case were simply that of executing the patent at the end of the specified period, the trust would be a simple or dry one, and it might perhaps be properly held that the full legal title vested at once in the *cestui que trust*. The trustee here has, however, other and further duties in connection with the trust. This fact is clearly set forth by Attorney General Garland in his opinion of January 26, 1889 (19 Op. Atty. Gen., 232) as to the right of the allottee to sell and cut timber standing upon the lands allotted to him. After mentioning the provisions of the act of February 8, 1887, *supra*, as to the issuance of two patents he uses the following language:

Prior to the issuing of the second patent the United States is to act as trustee of the lands. This relation as to the lands is substituted for the guardianship heretofore exercised over the tribe. For twenty-five years, or longer, the obligation exists to see that the intent of the law shall be faithfully carried out, and no unlawful waste committed either by the *cestui que trust* or any one else.

For the proper execution of the trust as thus considered it is necessary that the legal title should rest in the trustee, and it follows therefore that the allottee takes under the first patent an equitable title only. It does not necessarily follow, however, that the Secretary of the Interior has authority to cancel that first or trust patent. It

would seem that a due regard for the rights of the Indians would require that they be treated as if a third party had been named as the trustee. If that had been done this Department could have no greater authority in the premises than it has with respect to other patents. This position is in entire accord with the spirit which should govern all dealings between the government and its wards, and should be assumed and adhered to, unless the law makes it the plain duty of the Secretary to do otherwise. It should be borne in mind in the decision of this question, not only that the United States in these transactions stands as grantor, as trustee and as guardian for the Indians, and that the Indian is grantee and ward, but also that the Secretary of the Interior must act in two capacities, first, as the agent and officer of the government in charge of all business pertaining to the public lands, and second as the one in charge of Indian affairs. In his first capacity he approves the allotment selections and causes a patent to issue as provided by law. When a tract of land is selected for an allotment it is thereby reserved from other disposition pending final action upon that selection, but when that final action is taken by the issuance of the first or trust patent the land is thereby finally disposed of and is no longer in any sense public land under the control of the Secretary of the Interior in his capacity of the officer in charge of business pertaining to the public lands. His work in that capacity is completed, and he is relieved of control of the land in that capacity just as effectually as if all further duties in respect to said land had been devolved upon an entirely different officer of the executive department. From the time of selection or at least from the time of approval thereof to the issuance of the first patent the duties of the Secretary in respect to said land are mixed. He still has a certain degree of control over it as public land and at the same time he is to care for it as guardian of the Indian, but from the date of the trust patent he is vested with the care and control of the land solely as agent of the trustee and as guardian of the allottee. His duty then is to protect the Indian not only in the present use and enjoyment of the property but also as to his future use and enjoyment thereof. If the dual character of the Secretary of the Interior be borne in mind, it will be easy to determine the point at which his jurisdiction over the land as public land ceases and his control of it as the property of the Indian begins. That point of time is the date of the issuance of the first patent provided for by the law, by which the present equitable estate in the land is granted to the allottee, and the ultimate fee simple is guaranteed him.

In dealings between the government and its wards, the Indians, all matters of doubt should be resolved in the interest of the Indian. Thus, if the authority of the Secretary of the Interior to cancel the patents in question were doubtful, I should be constrained to advise against its exercise. As a rule, the powers of an executive officer are

not to be enlarged by implication in the direction of encroachment upon the functions of the judiciary. While this rule obtains generally it is especially applicable here where the enlarged powers if used at all would be in derogation of the interests of the Indians.

Many mistakes have probably been made both in the way of making allotments of land not subject to disposal in that manner and by awarding allotments to persons not entitled thereto. This work is to be done by agents of the government, and such mistakes must be due, at least to a considerable extent, to the carelessness of the agents charged with that duty. I gather from the papers before me that this fact has been recognized both by the Commissioner of the General Land Office and by the Commissioner of Indian Affairs, and that steps have been taken to prevent such mistakes as far as possible in the future. In the instructions issued by Secretary Smith on June 15, 1896 (22 L. D., 709), the respective duties of those two officers are defined, that of determining as to the status of the applicant being left to the Indian Office, and that of determining the character of the allotment and the right of the allottee being left to the General Land Office. If the machinery now entirely under the control of the government be properly handled the great evils which it is claimed the Department should have the power to correct would be prevented. It would be a dangerous policy for the executive department to assume powers properly belonging to the judiciary, in the absence of express legislative authority for the purpose of correcting evils, the existence of which could have been prevented under the authority clearly belonging to the executive.

That mistakes will occur is quite certain but such cases have been in part at least, provided for in the act of January 26, 1895, and if it be absolutely necessary to the proper administration of the law that the powers of the Secretary should be still further extended, Congress should be asked to enact such laws as may be necessary to that end.

The Commissioner of the General Land Office in his letter submitting this case says:

I have not referred herein to the act of January 26, 1895 (28 Stat., 641), as authority for this proposed action as I am of the opinion that said act was passed merely to settle any possible doubts which might have existed in the minds of some persons as to the authority of the Department to cancel such so called patents. The power to do what is authorized by said act existed before its passage, and would exist were the act repealed.

In the matter of the allotment of Lizzie Bergen subsequently submitted, which he asks to be considered in connection herewith he argues that a patent issued upon an allotment covering lands chiefly valuable for the timber thereon was erroneously and wrongfully issued within the purview of said act of 1895, and therefore should be canceled under the authority vested in the Secretary by that act. I have therefore examined that question in connection with the opinion submitted by my predecessor. The provisions of said act, and the reasons set forth for

the conclusion reached in said opinion are embodied in the following quotation therefrom:

The act of January 26, 1895 (28 Stat., 641), reads as follows:

"That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been made or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian and for which a conditional patent may have been issued, to rectify and correct such mistake and cancel any patent which may have been erroneously or wrongfully issued, whenever in his opinion the same ought to be cancelled for error in the issue thereof, or for the best interests of the Indian, and if possession of the original patent cannot be obtained, such cancellation shall be effective if made upon the records of the General Land Office; and no proclamation shall be necessary to open the lands so allotted to settlement."

The patent here in question is a trust patent and therefore of the class contemplated by said act. The mistake if any, in the issuance of said patent is not one which is specifically mentioned in said act. The authority to cancel it, if it exists at all, must be under the very general expression, "and cancel any patent which may have been erroneously and wrongfully issued, wherever in his opinion the same ought to be cancelled for error in the issue thereof." If these words be read by themselves they might be held to authorize the cancellation of any patent whatever, but the context plainly shows that it must be limited to trust patents issued to Indian allottees. I am inclined to the opinion that it must be further limited and held to refer to those trust patents only which rest upon mistakes of the character mentioned in the first part of the act. If it had been intended to authorize the cancellation of any trust patent erroneously issued, then it was entirely unnecessary to specify any class of mistakes which might be corrected. It would have been sufficient to say: "The Secretary of the Interior is hereby authorized and directed to cancel any trust patent issued to an Indian allottee whenever in his opinion such patent has been erroneously and wrongfully issued."

To hold that this act is to be construed as if it read thus would be to say that the first half of the law as it reads in the books is without meaning. This would be to violate that elementary rule of construction, which requires that all parts of a statute must, if possible, be given effect. To follow that rule in this instance it is necessary to say that the Secretary was authorized to correct certain mistakes in allotments and to cancel any patent issued upon such erroneous allotment. Such construction gives effect to all parts of the act and does no violence to the language used.

This act enlarges the jurisdiction of the Secretary of the Interior and confers upon him powers theretofore exercised by the courts only, and is therefore to be construed strictly and held to authorized action in only those cases coming clearly within the meaning of the law.

In the case under consideration the party was entitled to an allotment and the land applied for was properly described in the patent. Upon the record, as then made up, the patent was properly issued. It is now alleged, however, that the proof upon which the allotment and the patent in question was issued was, as to the character of the land, false and fraudulent. If the construction of said act, as set forth above, be the correct one, this case does not present such a mistake as is contemplated by this law.

The question as to the character of this land was necessarily considered before the issuance of patent, and the conclusion was reached, and correctly so upon the record, as then made up, that it was of the character contemplated by the laws authorizing allotments. It is now asserted that this judgment was wrong and the

Department is asked to reopen the matter, make a further investigation and reverse its former judgment. I do not think the law in question demands such action.

The propositions laid down here are sound and the conclusion reached logically follows from said propositions. It will not do to assume that the Secretary of the Interior has authority to exercise the functions properly belonging to the courts simply because fraud has been committed in connection with some of these allotments. No doubt patents have been procured under other laws through fraud, but it would not be argued that the Secretary therefore has jurisdiction to investigate such cases and authority to cancel the patent if he shall determine it was wrongfully issued. The authority conferred by the act of 1895 may not be extended by implication, but must be limited to those cases clearly coming within the letter of the law. I find no good objection to the conclusion reached in my predecessor's opinion.

After a full consideration of this matter I conclude and so advise you that the Secretary has no authority to cancel the trust patent heretofore issued in this case.

Approved:

DAVID R. FRANCIS,

Secretary.

CONTEST—PREFERENCE RIGHT OF ENTRY.

HODGES ET AL. *v.* COLCORD.

The preferred right of a successful contestant is not defeated or impaired by adverse settlement claims acquired subsequent to the entry under attack.

The right of a successful contestant accorded by section 2, act of May 14, 1880, is not dependent upon the truth of the charge as laid, if the cancellation of the entry is the result of a contest prosecuted in good faith.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (R. W. H.)

I have considered the appeals of James L. Hodges and William C. Runyon from your office decision of October 3, 1896 (on review), dismissing their contests and allowing the entry of Colcord to remain intact.

This case involves lots 2, 3, 12, 13, 14, 15, and 18 of Sec. 30 T. 11 N., R. 3 W., Oklahoma district, O. T.

Most of the facts as they appear in the record have been heretofore stated in departmental decisions of December 1, 1894 and April 12, 1895, in the case of Simpson and Colcord *v.* John Gaymon, and are fully set forth in your decision of October 3, 1896, from which the present appeals are taken, so that only such portions as are material to the pending issues need be here repeated.

Upon a hearing as to the land in question between Colcord and Gaymon, upon the charge of disqualification by reason of Gaymon having entered the Territory during the prohibited period,—in which the

application of Hodges to intervene was denied—the local office decided in favor of Gaymon, and Colcord appealed.

On March 21, 1893, your office held that while Gaymon was in the Territory at the time of the opening—working for the A., T. & S. F. R. R. Co. on its right of way, he gained no advantage therefrom—and affirmed the decision below denying the application of Hodges and dismissing the contest of Colcord.

This decision came before the Department for consideration upon the appeal of Colcord, the motion for review of Hodges (which was not acted on by your office), and a third contest filed by Runyon on April 13, 1893, alleging prior settlement and the disqualification of Colcord. Hodges also filed a supplementary affidavit of contest making the same charges.

While the case was pending before the Secretary, to wit, on April 12, 1893, Gaymon filed his relinquishment of the tract, and Colcord made homestead entry No. 6850 of said land.

On December 1, 1894, the Department, having in view the rights of all parties, held that “upon the cancellation of Gaymon’s entry by his voluntary relinquishment, all contests pending against it necessarily abated. There remained nothing for the Department to do, and the case was closed,” thus denying Hodges’ motion for review “but without prejudice to any rights which Hodges may lawfully assert and maintain against the present entryman.” The papers in the case of Runyon were returned for appropriate action.

Upon this decision, your office, on January 5, 1895, directed a hearing on the charges of Hodges and Runyon against Colcord.

Before said hearing was had, however, a motion for review of the departmental decision of December 1, 1894, was filed by Colcord, insisting that the Department erred in not awarding him the preference right of entry by reason of the statement made in the relinquishment of Gaymon.

Although said motion for review was denied, the Department, in its decision thereon of April 12, 1895, said:

Gaymon’s relinquishment, written on the back of his duplicate receipt, is in these words and figures following: “I hereby relinquish all my right to and interest in, and to the government of the United States, and ask that my entry be canceled of record. This relinquishment is made for the reason that my entry is voidable, for the reason that I was in the Oklahoma country at noon of April 22, 1889, and so held by the decision of the supreme court of the United States in the case of Smith v. Townsend.

JOHN GAYMON.

Subscribed and acknowledged before me this 12th day of April, 1893.

D. D. LEACH, *Register*.

It is evident by this that the relinquishment of Gaymon was induced by the contest of Colcord, and the right of a successful contestant is superior to the right of any one who has not a right superior to that of the entryman whose entry was in contest. But as a hearing has been ordered upon the application of Hodges to contest Colcord’s entry, no judgment will be rendered in this case, in advance of such hearing.

The rights of the respective parties can then be determined.

At the hearing had in the case of Hodges and Runyon against Colcord, on September 20, 1895, Colcord moved to dismiss said contests, for the reason that neither of said plaintiffs alleged sufficient facts to show a superior right to that of Gaymon, the former entryman.

The evidence introduced by Hodges and Runyon showed that Hodges had resided on said land since July 22, 1889; Runyon since May 13, 1890, and Colcord since 1893, and that Colcord had paid Gaymon \$650 for his relinquishment, but no evidence was introduced to show the disqualification of Colcord.

Colcord introduced no evidence but elected to stand upon his said motion to dismiss, and upon "the record affecting this tract of land."

On October 25, 1895, the local office rendered a decision recommending the dismissal of said contests, basing its action upon the opinion expressed by the Department, relative to said relinquishment, and the right of a successful contestant, in its decision of April 12, 1895 (*supra*).

Upon the appeals of Hodges and Runyon your office, on April 29, reversed said local office decision and denied to Colcord the preference right to make entry of the land, holding that said departmental decision of April 12, was not *res judicata* upon this point, and that whether Colcord acquired any right to said land by virtue of his contest depended upon whether the charge of disqualification against Gaymon is true. In its decision upon Colcord's motion for review (October 3, 1896) your office used this language:

It is apparent that the decision of this office now sought to be reviewed, misinterpreted the decision of the Secretary, which clearly held that Gaymon's relinquishment was the result of Colcord's contest, and that his right was superior to the right of any one whose settlement was not made prior to the entry of Gaymon. But independently of said decision such should have been the ruling of this office. The record shows as well as the relinquishment of Gaymon, that he was in the Territory at the hour of the opening and therefore under the decision of the supreme court of the United States in the case of *Smith v. Townsend* he was clearly disqualified. It was unnecessary to introduce evidence upon this point. As Hodges and Runyon failed to show any settlement upon the tract in controversy prior to the entry of Gaymon, they could not, by a settlement made thereafter, and while the land was covered by said entry, and subject to Colcord's contest, gain any rights by their settlement. Hence the decision of the local office dismissing the contests of Runyon and Hodges was correct and should have been affirmed.

Your office, therefore, granted the motion for review, dismissed the contests, and allowed the entry of Colcord to remain intact.

The thirty-four specifications of error, in which the judgment here complained of is assailed by the attorney for Hodges, may be generalized so as to bring the material issues in the case within the scope of these two questions:

1. Did your office err in reviewing and setting aside its decision of the 29th of April, 1896?

2. Was there any circumstance connected with the relinquishment of Gaymon, which adversely affected Colcord's right to enter the land; either as the first applicant therefor after it became subject to entry, or, as a successful contestant in the exercise of his preference right?

It appears to me that the claims of Hodges and Runyon rest upon no other basis than that of settlements upon land, which, at the time, was covered by the entry of Gaymon. It had been segregated from the public domain by proper official action. No one could acquire any present right to it while in this condition. A settlement upon it, with a view to the initiation of an adverse claim—if not amounting to a trespass under the doctrine of *Atherton v. Fowler* (96 U. S., 513) is certainly without any legal status (*Maggie Laird*, 13 L. D., 502).

There is a line of cases to which attention is called in the argument of Hodges' attorney, in apparent conflict with this doctrine, which holds that a settler on land covered by the entry of another acquires a legal status as against the government the instant such entry is relinquished, and the right thus acquired is not defeated by the entry of a third party immediately following such relinquishment. (*McGowan v. McCann*, 15 L. D., 542; *Fosgate v. Bell*, 14 L. D., 459; *Poole v. Moloughney*, 11 L. D., 197).

In all of these cases—the settler being upon the land at the moment it became a part of the public domain and subject to entry—his right of priority was recognized as superior to that of a third party whose claim rested upon an entry subsequent to the settlement. The relinquishment had no other effect than to relieve the land from incumbrance and open up the other questions upon which the decisions turned. But in the case at bar the question is whether Gaymon's relinquishment was the result of Colcord's contest?

If this be the fact Colcord had a preference right of entry which nothing could defeat except his own disqualification, or a right superior to that of Gaymon, the original entryman.

It is unnecessary to pass upon the conflicting interpretations of the departmental decision of April 12, 1895, as given in your office decisions of April 29, 1896, and October 3, 1896, respectively, further than to hold that the judgment of the Department in said decision was suspended to await the issue of the hearing which had been ordered upon the application of Hodges to contest Colcord's entry. Said decision, however, did express a very decided opinion "that the relinquishment of Gaymon was induced by the contest of Colcord," and, also, that: "the right of a successful contestant is superior to the right of anyone who has not a right superior to that of the entryman whose entry was in contest."

This language—in view of the expressed purpose to render no final judgment in the case—must be regarded as *dicta* and having no other effect than a preliminary intimation to the contestants that, unless a right superior to Gaymon's was established at the hearing, the preference right of Colcord would not be affected.

As neither Hodges nor Runyon alleged *actual* settlement prior to Gaymon's entry, and as their contests were subsequent in date of filing to the contest of Colcord, there was no error in rejecting Hodges' application to intervene in the latter.

The only issue was as to Gaymon's disqualification, by reason of having entered the territory during the prohibited period.

Upon that issue—Simpson, who had filed the first contest, having abandoned it, Colcord, as next in order, had the right of way as against Hodges and Runyon. No rule is better settled than that contests are entitled to precedence in the order of their filing at the local office.

The record shows that Colcord was diligent in the prosecution of his contest, and that it was pending on appeal before the Hon. Secretary, at the time Gaymon's relinquishment was filed.

The question of Gaymon's disqualification by reason of his presence in the Territory during the prohibited period has not been passed upon by the Department, and it is unnecessary to pass upon it now for the reason that it ceased to be an issue when he relinquished his entry.

Section 2 of the act of May 14, 1880, declares that

in all cases where any person has contested, paid the land office fees and procured the cancellation of any pre-emption, homestead or timber-culture entry he shall be allowed thirty days to enter said lands.

There is nothing in the language here used which makes the preference right of the contestant dependent upon the truth of the charge of disqualification of the entryman. If the cancellation of the entry—whether by the relinquishment of the entryman, or the judgment of the Land Department—was the result of the contest, the preference right of entry inures to the contestant by operation of law.

The authorities agree that a relinquishment filed during the pendency of a contest is presumptively the result of the contest, (*Webb v. Loughrey et al.*, 9 L. D., 440, and cases therein cited) and I find nothing in the record to overcome this presumption in the case at bar.

It is contended that it was the \$650 paid by Colcord which moved Gaymon to make his relinquishment, and that Gaymon's statement (indorsed on his duplicate receipt) that:

This relinquishment is made for the reason that my entry is voidable, for the reason that I was in the Oklahoma country at noon of April 22, 1889, and so held by the decision of the supreme court of the United States, in the case of *Smith v. Townsend*, is untruthful. The facts and circumstances of the case lead me to a different conclusion.

Gaymon had resisted Colcord's contest at the hearing before the local office, and again, when it came before your office on Colcord's appeal, and still again, when it came on further appeal before the Department. In fact, Gaymon did not relax his hold upon his entry until the supreme court rendered its decision in the case of *Smith v. Townsend* (149 U. S., 490)—a decision from the court of last resort, upon a state of facts, similar in nearly every respect, to the facts in his own case.

This decision was upon the 3d of April, 1893, and Gaymon's relinquishment was ten days thereafter, to wit, on April 13th, 1893. It would be contrary to every sound principle of deduction to conclude

that Gaymon would have continued to rely upon the decisions of the local office holding him to be qualified—although affirmed by your office—in the face of a decision of the supreme court holding the contrary view.

I have, therefore, no doubt whatever that Gaymon's relinquishment was induced by the belief that the charge of disqualification as made in Colcord's contest would be sustained by the Department, on the authority of *Smith v. Townsend*. That he should desire under such circumstances to save the cost of his improvements and of the labor he had expended upon his entry, by its relinquishment, was natural, and, cannot with fairness, be assailed as fraudulent.

His offer to sell to Hodges—so far from being an indication of bad faith—is, to my mind, a proof that there was no collusion between Gaymon and Colcord.

The case of *Cullins v. Leonard* (17 L. D., 412), cannot be followed in the case at bar, for the reason that Leonard's contest was in bad faith and speculative—as he had held Pentz' relinquishment in his possession during the pendency of his contest against Pentz' entry, and frequently offered the same for sale.

The conclusions reached in your office decision (on review) of October 3, 1896, are affirmed. The contests of Hodges and Runyon will be dismissed and the entry of Colcord allowed to remain intact.

RAILROAD GRANT—FORFEITURE—ACT OF JUNE 22, 1874.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. *v.* THOMPSON.

The conditions on which the extension of time for the completion of the road was given by the act of June 22, 1874, operate as a revocation of the grant to the extent of the rights of actual settlers at the date thereof; and the protection thus given such settlers is effective, even though the lands were listed under the grant, and such list approved prior to the passage of said act.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (F. W. C.)

The record in the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Peter Thompson, involving the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 11, T. 148 N., R. 49 W., Crookston land district, Minnesota, was forwarded with your office letter of December 19, 1893, on appeal by the company from your office decision of July 20, 1883.

It appears that the appeal was duly filed in time but the same was mislaid and for that reason the record therein was not forwarded at an earlier day.

The tract involved is within the primary limits of the grant for said company upon the line known as the St. Vincent Extension of said road, as shown by the map of definite location filed and accepted

December 19, 1871. The grant made to aid in the construction of this part of the road was by the act of March 3, 1871.

The road was required to be completed by March 3, 1873, but the time was extended to December 3, 1873, by the act of March 3, 1873 (17 Stat., 631). The company failed to complete the road within the time allowed, and by the act of June 22, 1874 (18 Stat., 203), the time was again extended to March 3, 1876, upon the following conditions:

That all rights of actual settlers and their grantees who have heretofore in good faith entered upon and actually resided on any of said lands prior to the passage of this act, or who otherwise have legal rights in any of such lands, shall be saved and secured to such settlers or such other persons in all respects the same as if said lands had never been granted to aid in the construction of the said lines of railroad.

The company listed the land November 28, 1873, which list was approved by this Department April 30, 1874. Under the instructions contained in your office letter of September 3, 1874, which directed that "settlers upon the lands of the St. Vincent Extension, who were actual settlers at the date of the act of June 22, 1874, and applied to file within the legal period, are protected by the statute and their filings may be received," etc., Thompson was permitted to file pre-emption declaratory statement for this land, in which settlement was alleged May 28, 1874.

By letter of March 28, 1882, the local officers forwarded Thompson's appeal from their action rejecting his tender of proof and payment upon his filing covering this tract for the reason that the tract had been duly listed by the said company, as before stated. It was upon a tender of this proof and payment that the present controversy arose, the matter being considered in your office decision of July 20 1883, in which it was held that as Thompson's entry was made subsequent to the expiration of the grant of December 3, 1873, the same comes within the provisions of the third section of the act of April 21, 1876, and is therefore confirmed. Your office decision therefore directed that Thompson be permitted to make final entry of the land; from which action the company appealed to this Department.

As thus presented, the case is in all important particulars similar to that of *Tronnes v. St. Paul, Minneapolis and Manitoba Railway Company* (18 L. D., 101), wherein it was held (syllabus):

The act of June 22, 1874, extending the time for the completion of the road, in aid of which the previous grant had been made, and protecting the rights of actual settlers at the date of said act, required the company to file its acceptance of the terms imposed thereby, but the protective provisions therein, for the benefit of settlers, are not dependent upon the company's acceptance of the act.

The conditions on which the extension of time was given by Congress in said act operate as a revocation of the grant to the extent of the rights of actual settlers at the date thereof. It is in effect an extension of the protection intended to be given by the excepting clause in the original grant, and is applicable to all lands whether patented or otherwise.

The certification of lands prior to the passage of said act in no wise affects the right of an actual settler protected thereby, nor does it embarrass the Department in extending to such settler the protection of said act.

For the reasons given in said decision your office decision, recognizing the filing by Thompson as against the grant to said company, is affirmed, and the papers are herewith returned for your further action looking to the completion of said entry.

STATE SELECTION—CERTIFICATION—PATENT.

EDWIN F. FROST ET AL.*

The inadvertent certification of State selections at a time when the lands covered thereby are included within an existing entry, and involved in proceedings then pending before the Department, is inoperative, and constitutes no obstacle to the issuance of patent in accordance with the final judgment in said proceedings.

Secretary Francis to the Commissioner of the General Land Office, December 26, 1896. (J. L.)

This case involves lots 3 and 4 of section 35, and lots 3 and 7 of section 36, in T. 31 S., R. 39 E., Gainesville land district, Florida, containing 146.75 acres.

On June 28, 1895, list No. 14 of lands selected for the State of Florida under the provisions of the act of Congress of March 3, 1845 (5 Stat., 788), and sections 2275 and 2276 of the Revised Statutes, and embracing the four lots described, was approved by the Secretary. Whereupon, the State of Florida, by deeds dated July 10, 1895, for valuable considerations, conveyed lot 3 of section 35 and lot 3 of section 36, containing together 88 acres, to E. M. Lowe; and lot 4 of section 35 and lot 7 of section 36, containing together 58.75 acres, to G. M. Robbins, and to B. F. Hampton and H. E. Taylor as trustees for the benefit of James M. Graham, in equal shares; that is to say, one undivided half of said 58.75 acres to said Robbins, and one undivided half thereof to said trustees.

On July 31, 1895, your office informed the authorities of the State of Florida, that the lands in question had been inadvertently and through mistake certified to the State, and requested the governor to immediately execute and transmit to your office a proper deed reconveying the said land to the United States, and offered to permit the State to select an equal quantity of land elsewhere in lieu thereof. In reply your office was advised that the State had already disposed of said land, as above stated, and had thereby, divested itself of title, and was without legal authority to reconvey the land to the United States. Nevertheless, the governor, through the commissioner of agriculture, under date of May 28, 1896, transmitted to your office a quit-claim deed to the United States for the four lots of land aforesaid, bearing date August 17, 1895, and executed by the board of education of the State of Florida, under the provisions of sections 234 and 235 of the revised statutes of the State.

* Not reported in Vol. XXIII.

Your office was of opinion that said quit-claim was "without effect for the reason that the State had previously, to wit: on July 10, 1895, divested itself of title." And therefore your office by letter "G" of July 2, 1896, at the instance and request of Homer Kessler, submitted to the Secretary the following recommendation:

In order therefore that the United States may be reinvested with title, I respectfully recommend that the Honorable Attorney General be requested to cause the proper proceedings to be instituted to obtain a judicial decree declaring said list null and void so far as the same embraces lots 3 and 4 of section 35, and lots 3 and 7 of section 36, T. 31 S., R. 39 E., and that E. M. Lowe, G. M. Robbins, and B. F. Hampton and H. E. Taylor, trustees for James M. Graham, be joined as parties to such suit.

With said letter your office transmitted all the papers in the case, consisting of forty-four files. They are voluminous, and begin with May 7, 1877.

It appears that on August 25, 1883, Edwin Frost was permitted to make cash entry, No. 6090, of the four lots of land aforesaid, under the second section of the act of June 15, 1880 (21 Stat., 237). Said entry was contested and various proceedings were had in your office, during the progress of which, E. M. Lowe as owner of lot 3 of section 35 (containing 48 acres) and lot 3 of section 36 (containing 40 acres), and Homer Kessler as owner of lot 4 of section 35 (containing 18.75 acres), and lot 7 of section 36 (containing 40 acres)—both claiming under Frost's title—were made parties to the controversy.

On May 15, 1893, your office held Frost's entry for cancellation. Lowe and Kessler both appealed; and on December 8, 1894, this Department affirmed your office decision.

On April 13, 1895 (within the time prescribed by the Rules of Practice), Kessler filed a motion for a review of said departmental decision. And while said motion was pending and undecided, your office inadvertently and by mistake recommended the approval of list No. 14 of lands selected by the State of Florida, and thereupon the Secretary approved said list as aforesaid.

On July 6, 1895 (21 L. D., 38), this Department on consideration of Kessler's motion for review, revoked and annulled the departmental decision of December 8, 1894, and held Frost's entry intact.

After a careful examination of all the papers this Department is of opinion, that it is not necessary to begin judicial proceedings to set aside, as to lots 3 and 4 of section 35, and lots 3 and 7 of section 36, the approval and certification of list No. 14 described in your letter of recommendation; that the General Land Office and this Department were without authority to dispose of or to take any action in respect of the lots of land aforesaid while Kessler's motion for a review of departmental decision of December 8, 1894, was pending and undecided, as stated in your letter, and while the land was segregated by Frost's entry; and that therefore the approval and certification of said list No. 14, is null and void as to the lots of land aforesaid, and interposes no

obstacle to the issuing of patents for said lots in accordance with the departmental decision of July 6, 1895. (See case of *Weeks v. Bridgman*, 159 U. S., 541).

Your office is, therefore directed to issue to Homer Kessler a patent for lot 4 of section 35, and lot 7 of section 36, T. 31 S., R. 9 E.; and to E. M. Lowe (upon his making application therefor), a patent for lot 3 of section 35, and lot 3 of section 36, T. 31 S., R. 39 E.*

The State of Florida will be permitted to select elsewhere an equal quantity of public land in lieu of the four lots aforesaid.

PRACTICE—APPEAL—CERTIORARI.

EIMSTAD *v.* NORTHERN PACIFIC R. R. CO.

A writ of certiorari will not issue where it is apparent that the appeal, if before the Department, would be dismissed.

Secretary Bliss to the Commissioner of the General Land Office, March
(L. H. L.) 15, 1897. (J. L.)

This case involves the SE. $\frac{1}{4}$ of section 7, T. 144 N., R. 41 W., Crookston land district, Minnesota; a tract of land lying within the indemnity limits of the Northern Pacific Railroad Company, and selected by said company on June 17, 1885.

On January 8, 1895, the local officers rejected Michael Eimstad's application to make homestead entry of said tract; he alleging settlement in the year 1883, and valuable improvements on the land. On May 29, 1895, your office affirmed the action of the local officers and rejected Eimstad's application, because his declaration of intention to become a citizen of the United States was not made until March 7, 1887, and therefore he acquired no rights to the land applied for, prior to June, 1885, the date of the company's application to make selection thereof.

Service of notice of said decision was acknowledged by Eimstad's attorney on June 13, 1896. On July 28, 1896, he filed his appeal to this Department; but he failed to file any proof of service of notice of said appeal upon the Northern Pacific Railroad Company. He was notified of said defect on August 22, 1896, in accordance with Rule of Practice 82, and was requested to furnish proof of service of notice of his appeal, etc., etc., on the opposite party in accordance with the 93rd Rule of Practice. In reply he furnished proof that such service was not made until October 12, 1896—which was more than 120 days after he had received notice of the decision appealed from.

In the cases of *Rudolph Wurlitzer*, 6 L. D., 315, and *Hannon v. Northern Pacific Railroad Company*, 11 L. D., 48, this Department

* By departmental order of February 6, 1897, the directions for the issuance of patent are modified so as to accord with the decision of July 6, 1895.

held that the sufficiency of an appeal, if filed in time, is one for the appellate authority to pass upon. And that in all cases, whether appeals are defective under Rule 82 or incomplete under Rules 88 and 90, all the papers in the case, and especially the appeal itself, should be transmitted, and the letter of transmittal should specifically designate wherein the appeal is defective.

In this case, however, it is unnecessary to direct your office to certify the proceedings to the Secretary. It is manifest that notice of the appeal was not served upon the opposite party within the time prescribed by the Rules of Practice. If the appeal were before the Department it would be immediately dismissed.

Therefore the application for a certiorari is hereby denied.

SWAMP LANDS—INDEMNITY—ACTS OF 1849 AND 1850.

STATE OF LOUISIANA.

The swampy character of land forming the basis of a claim for indemnity should be shown in the same way, and by evidence of the same character, as required to entitle the State to lands under its grant.

Action on an indemnity list, in which the claim as to some of the tracts is allowed, amounts to a rejection of the claim as to the remainder.

By the act of March 2, 1849, all the swamp lands in the State of Louisiana were granted to said State, except lands bordering on streams, rivers, and bayous, which were treated by Congress as theretofore reclaimed from their swampy character, and falling within the provisions of the act of February 20, 1811, which gave to said State five per cent of the proceeds of their sale in order to provide a fund for their reclamation.

At the date of the passage of the general swamp land act of September 28, 1850, there were no lands in the State of Louisiana subject to the operation of said act, as all of the swamp land had, prior thereto, been granted to said State by the special act of 1849; and it therefore follows that the State is not included within the indemnity provisions made by the act of March 2, 1855, for said provisions were specifically limited to States included in the general act.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (W. M. W.)

On the 7th day of January, 1897, your office rejected the application of the State of Louisiana for indemnity under the acts of March 2, 1855 (10 Stat., 634), and March 3, 1857 (11 Stat., 251), for lands sold by the United States government after the date of the swamp land grants of March 2, 1849 (9 Stat., 352), and September 28, 1850 (9 Stat., 519), and prior to the said acts of March 2, 1855, and March 3, 1857. The lands in controversy are embraced in twelve lists, numbered from 14 to 25, of alleged swamp lands as a basis for the cash indemnity claimed.

These lists were filed in your office, by the agents for the State of Louisiana, on various dates from December 2, 1885, to January 16, 1891.

These lists were not submitted to the United States surveyor-general for the State of Louisiana for his action, as required by the regulations

issued under the granting act to said State. Said regulations required a personal examination to be made of alleged swamp lands under the direction of the surveyor-general by experienced and faithful deputies; the work to be done to his satisfaction; and

lists of the land falling to the State under the law will be made out by the agent for the State and certified to you by him, and, if satisfied of the correctness of the lists, you will so certify and transmit them to this office.

See instructions to the surveyor-general of Louisiana, dated April 18, 1850, Vol. 1, General Land Office Record, pp. 46 to 50, inclusive.

The lists under consideration were filed in your office, and the only evidence submitted by the State, in support of the allegation that the lands were of the character contemplated by the swamp land grant, is the certificate of the State agent, stating that on examination of the field notes of survey, the lands appear to have been swamp land. The certificate does not state that the tracts were swamp or overflowed lands at the date of the grant.

The number of tracts involved in your office decision appealed from is about eight hundred and sixty; the great bulk of them were surveyed long before the swamp grant to the State was made; some were surveyed as early as 1807, and many of them during the years 1824, 1828, and 1830. Said lists, except No. 24 and No. 25, were examined in your office, and between January 15, 1886, and May 9, 1888, the State was allowed—on the bases of the tracts found to have been swamp lands at the date of the grant—on lands embraced in said lists, cash indemnity to the amount of \$49,371.07, and land indemnity to the amount of 29,214.25 acres. (See Land Office report for 1891, p. 209.) No formal action appears to have been taken, at the time said indemnity was allowed, on the tracts found to have been non-swampy or doubtful in character.

Selections in the several townships embraced in these lists had been made and reported to your office by the surveyor-general some thirty years before the State agents filed the claim embraced in these lists.

The lands for which indemnity is asked were sold and patented, and at the dates patents issued there were no conflicting claims under the swamp-land grant of record.

Your office held that the issuance of patents, under the existing circumstances, raised a presumption against the swampy character of the land at the date of the grant; and that you

do not feel justified in allowing indemnity for said lands under the acts of 1855 and 1857, except upon the clearest proof that said lands were swamp and overflowed at the date of the grant.

The State appeals.

The appeal is based upon the claim that the showing made is sufficient to entitle the State to the indemnity claimed under the acts of March 2, 1855 (10 Stat., 634), and March 2, 1857 (11 Stat., 251). If it

be conceded that said acts apply to the State of Louisiana, the contention she makes is not tenable, in the light of the facts hereinbefore stated.

The swampy character of the lands forming the bases for indemnity should be shown in the same way and by evidence of the same character as was required to entitle the State to lands under its grant. The second section of the act of 1855 requires

due proof, by the authorized agent of the State or States, before the Commissioner of the General Land Office, that any of the lands purchased were swamp lands, within the true intent and meaning of the act aforesaid, etc.

There is absolutely no proof offered by the agent of the State in support of these claims. There is no attempt made to conform to the provisions of the act of 1849 or the regulations thereunder respecting the character of the lands claimed as swamp lands. These claims, except lists Nos. 24 and 25, have been acted on by the Department adversely to the claim of the State; and the lands included in lists Nos. 24 and 25 have been found by your office not to be swampy in character, and there is no sufficient evidence before the Department to warrant a reversal of your office decision as to lists Nos. 24 and 25. As to lands included in the other lists, they were passed upon adversely to the State when they were acted on and in part allowed. The failure to formally reject such as were not allowed can avail the State nothing now, for it necessarily followed that favorable action on a part of the lands in such list or lists included negative action on the remainder of the tracts included therein. And now, after the lapse of from five to ten years, the State can not in reason be permitted to say that said tracts have never been acted on. As to all these lists, except Nos. 24 and 25, the action heretofore had was final and the doctrine of *res judicata* applies to them.

In view of the great importance to the government, as well as the State, of the questions presented in this claim, it has been deemed proper to examine with care the several acts of Congress on the subject of granting swamp land indemnity.

This claim is based upon the act of March 2, 1855. The first question, therefore, to determine is, whether said act has any application to the State of Louisiana, *i. e.*, whether said State is now, or ever was, entitled to any indemnity in cash or in land under said act.

In order to determine this question, it is necessary to refer to the acts of Congress granting swamp lands to the State of Louisiana, the State of Arkansas, and the other States.

The act of March 2, 1849 (9 Stat., 352), was entitled: "An Act to aid the State of Louisiana in draining the swamp lands therein," and provided:

That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation, shall be, and the same are hereby, granted to that State.

SEC. 2. *And be it further enacted*, That as soon as the Secretary of the Treasury shall be advised, by the governor of Louisiana, that that State has made the necessary preparation to defray the expenses thereof, he shall cause a personal examination to be made, under the direction of the surveyor-general thereof, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation; and a list of the same to be made out, and certified by the deputies and surveyor-general, to the Secretary of the Treasury, who shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said State of Louisiana, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands shall be applied exclusively, as far as necessary, to the construction of the levees and drains aforesaid.

SEC. 3. *And be it further enacted*, That in making out a list of these swamp lands, subject to overflow and unfit for cultivation, all legal subdivisions, the greater part of which is of that character, shall be included in said list; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom: *Provided, however*, That the provisions of this act shall not apply to any lands fronting on rivers, creeks, bayous, water courses, etc., which have been surveyed into lots or tracts under the acts of third March, eighteen hundred and eleven, and twenty-fourth May, eighteen hundred and twenty-four: *And provided further*, That the United States shall in no manner be held liable for any expense incurred in selecting these lands and making out the lists thereof, or for making any surveys that may be required to carry out the provisions of this act.

The act of September 28, 1850 (9 Stat., 519), was entitled: "An Act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," and provided:

That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

SEC. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted*, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

SEC. 4. *And be it further enacted*, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as (and) designated as aforesaid, may be situated.

The act of March 2, 1855 (10 Stat., 634) was entitled: "An Act for the relief of purchasers and locators of swamp and overflowed lands," and provided:

That the President of the United States cause patents to be issued, as soon as practicable, to the purchaser or purchasers, locator or locators, who have made entries of the public lands, claimed as swamp lands, either with cash, or with land war-

rants, or with scrip, prior to the issue of patents to the State or States, as provided for by the second section of the act approved September twenty-eight, eighteen hundred and fifty, entitled, "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," any decision of the Secretary of the Interior, or other officer of the government of the United States, to the contrary notwithstanding: *Provided*, That in all cases where any State, through its constituted authorities, may have sold or disposed of any tract or tracts of said land to any individual or individuals prior to the entry, sale, or location of the same, under the pre-emption or other laws of the United States, no patent shall be issued by the President for such tract or tracts of land, until such State, through its constituted authorities, shall release its claim thereto, in such form as shall be prescribed by the Secretary of the Interior: *And provided further*, That if such State shall not, within ninety days from the passage of this act, through its constituted authorities, return to the General Land Office of the United States a list of all the lands sold as aforesaid, together with the dates of such sale, and the names of the purchasers, the patents shall be issued immediately thereafter, as directed in the foregoing section.

SEC. 2. *And be it further enacted*, That upon due proof, by the authorized agent of the State or States before the Commissioner of the General Land Office, that any of the lands purchased were swamp lands, within the true intent and meaning of the act aforesaid, the purchase money shall be paid over to the said State or States; and where the lands have been located by warrant or scrip, the said State or States shall be authorized to locate a quantity of like amount, upon any of the public lands subject to entry, at one dollar and a quarter per acre, or less, and patents shall issue therefor, upon the terms and conditions enumerated in the act aforesaid: *Provided, however*, That the said decisions of the Commissioner of the General Land Office shall be approved by the Secretary of the Interior.

The act of March 3, 1857 (11 Stat., 251), provided:

That the selection of swamp and overflowed lands granted to the several States by the act of Congress, approved September twenty-eight, eighteen hundred and fifty, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," and the act of the second of March, eighteen hundred and forty-nine, entitled "An act to aid the State of Louisiana in draining the swamp lands therein," heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law: *Provided, however*, That nothing in this act contained shall interfere with the provisions of the act of Congress entitled "An act for the relief of purchasers and locators of swamp and overflowed lands," approved March the second, eighteen hundred and fifty-five, which shall be and is hereby continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage.

To save space and repetition, these several acts will hereafter be referred to, respectively, as the Louisiana act, the Arkansas act, the indemnity act, and the confirmatory act.

In construing a statute a court may properly refer to the conditions of persons and things to be affected by such act, as well as the state of things as they appeared to the legislature at the time the enactment was considered. See *Aldridge v. Williams*, 3 How., 9; *United States v. Union Pacific R. R. Co.*, 91 U. S., 72; *District of Columbia v. Washington Market Company*, 108 U. S., 243; *Platt v. Union Pacific R. R. Co.*, 99 U. S., 48.

This has been applied by the Department. See *Townsite of Kingfisher v. Wood*, 11 L. D., 330; *Grandin Bros. et al*, 18 L. D., 459.

Applying this rule to the Louisiana act, at the time it was passed the southern portion of the State was largely, if not principally, low, flat, swampy, marshy in character; in some instances, especially towards the mouth of the Mississippi river, much the greater part of the land, a little back from the rivers, lakes and bayous, was in fact lower than the beds of such streams, or other bodies of water. From the northern boundary of the State to its center there was a strip of land from fifty to one hundred miles wide on the west side of the Mississippi river, which lands were likewise low, swampy and marshy in character. It was stated in the House of Representatives, by Mr. Bowlin, when the Louisiana act was under consideration: "that the precise amount of swamp lands in the State was 5,429,000 acres, as reported by the surveyors." See *Congressional Globe*, 30th Congress, 2d Session, p. 591. On the day the act passed the House, Mr. Harmanson, a representative from the State of Louisiana, stated during the debate, among other things:

That the State of Louisiana, and the citizens of that State, had constructed about fourteen hundred miles of *levees*, to keep out the waters of the river from the low lands. This work had been done at a cost of eight millions of dollars, as estimated by the committee on public lands; but which, in fact, had cost at least twenty millions. What had been accomplished by that work? Three millions five hundred thousand acres of land, which were before unfit for cultivation, had been reclaimed for the benefit of the general government. This vast amount of rich land, so reclaimed by Louisiana levees, had been sold, and the government had pocketed their proceeds.

The report of the Commissioner of the General Land Office stated that there were two millions two hundred thousand acres of swamp lands now in Louisiana, and he (Mr. H.) believed that one million of acres of these lands could be reclaimed. It would require five millions of dollars to accomplish this work, and the State of Louisiana was obliged to do this work, because it was required by the health of the country. . . . But the State of Louisiana was compelled by the force of circumstances to reclaim these lands; and the only question was, whether the general government would give them to the State, by way of compensation for the cost of reclaiming them. . . . Would the gentleman refuse to be just to Louisiana, for fear of receiving injustice at the hands of other States? . . .

He urged again the consideration of the claim of his State upon the general government, because she had already reclaimed three and a half millions of acres of the public lands; and he claimed the passage of the bill as a debt due from the general government.

Mr. Brodhead said he had but a word to say in explanation of the bill. In 1829 the officers of the government reported 5,429,260 acres as the whole amount of the great swamp lands in the State of Louisiana. On the 16th of April last, the Commissioner of the General Land Office reported that these swamp lands, at that time, had been reduced to 2,246,075 acres. It was apparent, therefore, that, since the year 1829, the State and people of Louisiana, by the levees which they had thrown up, had reclaimed and enabled the general government to throw into the market very large bodies of rich and valuable land. . . .

This large body of government land had been brought into market since the year 1829 at the expense of the people of Louisiana.

See *Cong. Globe* (No. 92), 30th Cong. 2d Sess. p. 592.

By an act of the legislature of Louisiana, of February 7, 1829 (see Session laws for that year, p. 76), it was provided by section 1:

That throughout all the portion of the State watered by the Mississippi and the bayous running to and from the same which are settled, where levees are necessary to confine the waters of that river, and to shelter the inhabitants against the inundations, the said levees shall be made by the riparian proprietors in the proportions and at the time hereinafter prescribed.

The second section prescribes the height and character of the levees. Other sections of the act specifically deal with the subject of levees, and define the duties of the owners of lands on the banks of the Mississippi and bayous running to and from it, respecting the making of levees, roads, etc. These provisions were carried forward and are to be found in the Revised Statutes of said State. See Revised Statutes Louisiana, 1856, p. 481 *et seq.*

With these aids, and the plain language of the act itself, there is no difficulty in arriving at the purpose and intention of Congress in passing it.

The act was clearly a grant *in presenti*, giving to the State "the whole of those swamp and overflowed lands," which were at the date of the act unfit for cultivation. The words used, "shall be, and the same are hereby, granted to that State," clearly import a present grant, and had the effect of a conveyance at the date of the act; thereafter the only thing that was required to be done was the identification of the land. The second section provided the manner that such identification should be accomplished, and when accomplished "the fee simple to said lands shall vest in said State of Louisiana;" no patent was required or necessary to complete the State's title to the lands granted. The first proviso in section 3 of the act carves out of the grant "any lands fronting on rivers, creeks, bayous, water courses," etc., for the very reason that Congress must have understood that all such lands had been reclaimed either by the riparian owners or the State under State laws; and, therefore, such lands were not in fact swamp or overflowed at the date of the act.

The Arkansas act granted to that State "the whole of those swamp and overflowed lands made unfit thereby for cultivation," which remained unsold at the date said act was passed. It was clearly a grant *in presenti*, taking effect as soon as the lands could be identified by listing and platting as specified in the act. It differed from the Louisiana act in that the Secretary of the Interior was required to cause to be issued a patent to the State for said lands; "and on that patent, the fee simple to said lands shall vest in the said State of Arkansas," and in other respects. But in this opinion it is not material to discuss the provisions of said act, except the 4th section, which extended the provisions of said act to, and conferred its benefits upon, "each of the other States of the Union in which such swamp and overflowed lands, known as (and) designated as aforesaid, may be situated." The right

of Louisiana to any swamp land indemnity depends entirely upon whether this section applies to said State, for the indemnity act of 1855, under which Louisiana makes the claim herein, specifically refers to the Arkansas act, and clearly and distinctly confines the indemnity it provides to such States only as were included in the Arkansas act. In this particular the language of the indemnity act is so plain and unequivocal that it can not be misunderstood.

The confirmatory act of 1857 referred to the Louisiana and Arkansas acts, and simply confirmed to the several States the swamp and overflowed lands theretofore selected and reported to the Commissioner of the General Land Office, so far as the lands remained vacant and unappropriated, and when such selections did not interfere with actual settlement claims under any existing law of the United States. The proviso to said act continued in force and extended the indemnity act to all entries and locations of lands claimed as swamp lands since its passage. The effect of this proviso was to simply keep in force the indemnity act of 1855 as to the subject matter as applied to the States included therein.

Adverting to the 4th section of the Arkansas act, for the purpose of determining whether or not it embraced the State of Louisiana, it seems proper to refer to the construction heretofore placed upon it by the Department.

On December 23, 1851, Secretary Stuart held that the Louisiana and Arkansas acts were not to be construed in *pari materia*, and that:

The act of March, 1849, has reference to Louisiana alone, and requires that the selections should be made under the direction of the surveyor-general, at the expense of the State of Louisiana entirely, and after the governor of that State should have informed the Secretary of the Treasury that the necessary preparations to defray those expenses had been made by the State. The provision in the act of September, 1850, is entirely different; for it makes it the duty of the Secretary of the Interior to make out lists and plats of the lands thereby granted, and to transmit the same to the governors of the States. See 1 Lester, 549, 550.

On January 14, 1856, Secretary McClelland held that:

The act of 1849 is not merged in the act of 1850, but each is to be executed according to its special tenor and provisions, the latter being merely cumulative, and embracing land which was excepted from the operation of the former. *Ib.* 554.

On February 12, 1886, your office refused to allow the State of Louisiana indemnity for swamp lands sold in said State between March 2, 1849, and September 28, 1850. On appeal to the Department doubts arose as to the proper construction of the swamp land grants of 1849 and 1850, and also the indemnity act of 1855 and the confirmatory act of 1857, and the matter was referred to the Attorney General for his opinion. On January 11, 1887, Attorney General Garland submitted his opinion, in which, after referring to the Louisiana and Arkansas acts, he said:

This last act was substantially a re-enactment of the act of the 2d of March, 1849, so far as Louisiana was concerned, with an extension of the grant in that act so as

to include the lands which had been excluded by the exception in the former enactment, as to which it was a new and substantive grant on the 28th of September, 1850. Both of these acts were grants *in presenti* by which, from their respective dates, the title to the lands therein described became vested in the several States. . . . These definitions of swamp lands in the acts of 1849 and 1850 are substantially the same. Therefore, all swamp lands granted by the act of 1849 would be within the intent and meaning of the words "swamp lands" in the act of 1850. The consideration for the grants in the acts of 1849 and 1850 was the same. The errors committed by the officers of the United States against both grantees were the same in effect. The wrongs done to both classes of purchasers were the same.

Mr. Garland also refers to an opinion rendered by Attorney General Speed (11 Opins., 472, and 3 L. D., p. 396) as supporting his views. See Attorney General Garland's opinion, 5 L. D., 464, *et seq.*

By reference to Attorney General Speed's opinion (11 Opins., 467 to 473, inclusive), it will be observed that said opinion related exclusively to the right of the State of Iowa to swamp land indemnity, and involved the construction of the acts of March 2, 1855, and March 3, 1857. There was no question but what Iowa was included in the Arkansas act of 1850. The only bearing General Speed's opinion could possibly have in determining this case is found in that portion wherein he discusses the proviso in the confirmatory act of 1857. In so far as he construed said proviso he seems to have held that it only amounted to a legislative declaration that the act of 1855 is "hereby re-enacted," having the same effect as if it had been in terms repeated and re-enacted on the third of March, 1857.

The State of Louisiana (3 L. D., 396), referred to by Attorney General Garland, was a formal affirmance by Secretary Teller of a judgment of Commissioner McFarland, in which the Commissioner held that the State of Louisiana was entitled to indemnity. The decision of the Secretary does not discuss the question as to the rights of the State. He simply stated that he saw no reason for excluding the State of Louisiana from the benefits of the acts of 1855 and 1857. The Commissioner's decision is set out at length, in which it is said, *inter alia*, that:

It is true that the act of 1849 is not specially mentioned in the act of September 28, 1850, or of March 2, 1855, but it is to be presumed from the language of these acts, in connection with that used in the act of March 3, 1857, which includes Louisiana, that it was the intention of Congress to confer the benefits contained in the acts of 1850 and 1855 to all the States over which the swamp land grant had been extended, if not, why was Louisiana included in the confirmatory act of March 3, 1857, which act places her on an equal footing with the other States.

It is claimed by the State that the act of February 20, 1811 (2 Stat., 641-643), has no bearing on the questions involved in the case. The 5th section of said act provided:

That five per centum of the net proceeds of the sales of lands of the United States, after the first day of January, shall be applied to laying out and constructing public roads and levees in the said State, as the legislature thereof may direct.

Section 1 of the act of September 4, 1841 (5 Stat., 453), provided that

the States of Ohio, Indiana, Illinois, Alabama, Missouri, Mississippi, Louisiana, Arkansas, and Michigan were to be paid ten per cent of the net proceeds of the sales of public lands therein, without in any manner diminishing the sum theretofore granted to any of said States. Section 2 of said act provided that, after deducting said amount and all expenses connected with the survey, sale, etc., of said lands, sold after the 21st day of December, 1841, the net proceeds were to be divided among the twenty-six States of the Union, the District of Columbia, and the Territories of Wisconsin, Iowa and Florida, according to their respective population, as shown by the census of 1840. By the 8th section of said act each of the States named in the first section was granted 500,000 acres of public lands, and the same amount for each new State thereafter admitted into the Union. Section 9 required the proceeds of the lands granted by section 8 to be faithfully applied to objects of internal improvements within the respective States, namely: "Roads, railways, bridges, canals, and improvement of water-courses, and draining of swamps."

While it may be true that these acts do not directly bear on the material questions involved, yet there can be no question but what they may properly be considered as aids in arriving at the purpose of Congress in passing the Louisiana act of 1849.

In the appeal great stress is laid upon the opinion of Assistant Attorney General McCammon, in *State of Ohio* (3 L. D., 571), and it is claimed by the State that it was upon the authority of said opinion that the first indemnity ever allowed the State of Louisiana was on December 28, 1885. Said opinion refers exclusively to the Arkansas act, the acts of 1855 and 1857; it makes no reference to the Louisiana act, and can not be accepted as an authority in determining the matter herein involved.

The Louisiana act was a special act in that it only applied to the State of Louisiana. It granted to said State all the swamp lands therein, except lands bordering on streams, rivers, and bayous, which it is clear, in view of the debates in Congress, and the Statutes of Louisiana, hereinbefore referred to, were not understood to be or regarded as swamp lands. The exception seems to have been made for the very purpose of protecting the United States from claims thereafter made by the State for the lands embraced in its terms. Said exception refers to lands surveyed under the act of 1811, which gave to the State five per cent of the proceeds of their sale for the very purpose of reclaiming them by draining and levees. This construction accords with sound reason, and under it every part of the act is harmonized. Said act was special and local, in that it only applied to the State of Louisiana. The United States having granted, in contemplation of law, all the swamp lands in Louisiana, there was no swamp land in that State when the Arkansas act was passed, and in the very nature of things the Arkansas act did not apply to any lands in the State of Louisiana. The Arkansas act

was a general act. In construing said acts, the maxim of *generalia specialibus non derogant* applies. Endlich on the Interpretation of Statutes, section 223, states it as follows:

It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute, to say that a general act is to be construed as not repealing a particular one, that is, one directed toward a *special object* or *special class of objects*. . . . It is usually presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special act. . . . Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language or there be something which shows that the attention of the Legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous one; or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one.

Applying this rule to the 4th section of the Arkansas act, it is perfectly clear that Congress did not intend that said section should apply to the State of Louisiana. The whole subject of swamp lands in that State had been disposed of in the prior special act, and therefore the Arkansas act should be read as silently excluding from its operation the State of Louisiana. This conclusion must necessarily result in denying the right of Louisiana to any indemnity, for, as before suggested, the indemnity act of 1855 specifically limits its provisions to such States as were included in the Arkansas act.

The confirmatory act of 1857 extended the act of 1855 and confirmed selections of swamp lands made by all the States, and in clear language included Louisiana in its confirmatory provisions, but it does not follow that in the matter of indemnity it had any reference to said State. Louisiana under the act of 1849, in common with Arkansas and other States under the Arkansas act, had made selections under the respective laws granting swamp land, and Congress by the act of 1857 confirmed said selections. Such confirmation had nothing to do with indemnity; it dealt exclusively with State selections. The fact that the State of Louisiana is referred to specifically in the matter of selections in the act of 1857, and not so referred to in the indemnity act, is an additional reason for believing that Congress did not intend to include Louisiana in the matter of indemnity.

Taking into consideration the conditions that existed in the State of Louisiana, as shown by the debates in Congress and the statutes of that State, at the time the Louisiana act was passed, and the nature and character of the act itself, there seems to be no escape from the conclusion that Congress intended by said act to convey to said State all the swamp lands in said State, and thereby finally and forever settle every question in respect to swamp lands, so far as that particular State was

concerned; that the lands excepted in said act were clearly understood not to be swamp land in character, but reclaimed, in so far as they had been swampy.

It is equally clear, in the light of reason and the authorities, that said State was not intended to be included in the Arkansas act, nor in the indemnity act of 1855; that the act of 1857 only operated in said State to confirm to her the selections theretofore made under her grant.

It follows that the State's application must be, and it is hereby, rejected and dismissed.

OKLAHOMA LANDS—SECTION 16, ACT OF MARCH 3, 1891.

BONNETT v. JONES (ON REVIEW).

The provision in section 16, act of March 3, 1891 (26 Stat., 989), that the lands specified therein shall be opened to settlement "under the provisions of the homestead and townsite laws," should be construed to mean that said lands are to be opened to settlement under the homestead and townsite laws governing the disposition of lands in Oklahoma, and not operating to repeal the provision contained in section 20, act of May 2, 1890, disqualifying as homesteaders all persons owning one hundred and sixty acres in any State or Territory, and applicable to all lands in Oklahoma.

Secretary Bliss to the Commissioner of the General Land Office, March 15, 1897.
(I. H. L.) (E. M. R.)

This case involves the SE. $\frac{1}{4}$ of Sec. 5, T. 16 N., R. 7 W., Kingfisher land district, Oklahoma Territory, and is before the Department upon motion for review, by James Jones, of departmental decision of December 23, 1896 (23 L. D., 547), in which was awarded the land in controversy to William J. Bonnett. That decision held that Jones was the owner of 160 acres of land at the time of the hearing in the case, and that under the law such ownership deprived him of the right of entry upon land situated in Oklahoma Territory.

By act of Congress of May 2, 1890 (26 Stat., 81, page 91 thereof, section 20), it is provided:

And no person who shall at the time be seized in fee simple of one hundred and sixty acres of land in any State or Territory, shall hereafter be entitled to enter land in said Territory of Oklahoma.

By act of Congress of March 3, 1891 (26 Stat., 989, page 1026 thereof, section 16), it is provided:

That whenever any of the lands acquired by either of the three foregoing agreements respecting lands in the Indian or Oklahoma Territory shall by operation of law or proclamation of the President of the United States be open to settlement they shall be disposed of to actual settlers only, under the provisions of the homestead and townsite laws (except section twenty-three hundred and one of the Revised Statutes of the United States which shall not apply).

By act of Congress of March 3, 1891 (26 Stat., 1095, page 1098 thereof, under the head of section 5), it is provided, in the amendment of sec-

tion 2289 of the Revised Statutes, after setting forth the qualifications of entry—

but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law.

In the decision sought to be reviewed it was held that the act last referred to could not under any construction of law known to the courts, be held to affect the class of lands mentioned in the act of May 2, 1890 (*supra*), because the one is general and the other special.

Counsel for the petitioner contends that the act of March 3, 1891 (26 Stat., 989), does serve to except these lands from the abridgment of the right of entry contained in the act of May 2, 1890, because it was under one of the three agreements mentioned in this act that the Cheyenne and Arapahoe lands were thrown open to settlement, and under section 16 (*supra*) said lands were thrown open to settlement under the provisions of the general homestead law.

Section 20 of the act of May 2, 1890, as has already been shown, contains an absolute and unqualified prohibition to any one who owned 160 acres of land in any State or Territory from thereafter acquiring title under the homestead law to any land in the Territory of Oklahoma. That was a general prohibition applicable to all lands within the Territory of Oklahoma. And as the Cheyenne and Arapahoe reservation is now a portion of that Territory, it is applicable to lands which were formerly in such reservation, as much as to any other lands within its territory.

Repeals by implication are not favored by the courts; and a subsequent act will not be held to repeal the provisions of a former act unless necessitated by the clear intent of Congress; in such instances as where there is a clear conflict between the meaning and scope of the acts. No such necessity is here presented. Both acts can stand.

The act of March 3, 1891, setting forth that these lands are opened to settlement "under the provisions of the homestead and townsite laws," can be and should be construed to mean that the land within the Cheyenne and Arapahoe reservation is open to settlement under the homestead and townsite laws pertaining to the Territory of Oklahoma. In this manner both acts are given force and effect without such construction being inharmonious with the true meaning of both.

The motion for review is therefore denied.

PRACTICE—CERTIORARI—APPEAL.

SEE *v.* SEE.

An application for a writ of certiorari will be denied where the applicant has not previously sought relief through appeal, as provided in the Rules of Practice.

Secretary Bliss to the Commissioner of the General Land Office, March 15, 1897. (I. H. L.) (J. L. McC.)

Clay See has filed an application for an order directing your office to transmit to the Department the record in the case of Frank V. See against said Clay See, in the matter of the simultaneous applications of the parties named to enter certain lands—the particular tract in conflict being the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 34, T. 5 N., R. 20 W., Missoula land district, Montana.

The applicant complains of the decision of your office, dated October 22, 1896, a copy of which is filed with his application.

The local officers had recommended that Clay See's homestead entry be canceled in so far as it embraced the forty acres in controversy, and that Frank V. See be permitted to file thereon.

Clay See filed an appeal to your office, alleging that it was error on the part of the local officers—

1. To recommend the homestead entry of Clay be canceled as to the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 34, T. 5 N., R. 20 W., and that Frank V. See be allowed to file upon the same;

2. Not to have recommended that said homestead entry remain intact, and that said contest of Frank V. See be dismissed.

A motion was made to dismiss said appeal, on the ground that it failed to set forth specific points of exception to the decision appealed from, as required by the Rules of Practice.

This motion was granted; and your office, proceeding to consider the case under Rule 48 of Practice, held the decision of the local officers final as to facts, concurred with them as to their conclusions of law, and directed the cancellation of Clay See's entry as to the forty acres in conflict—in case the plaintiff applied to perfect his application therefor into an entry.

It does not appear from anything in the application or the accompanying papers that Clay See has ever filed an appeal from said adverse decision of your office.

The right of proceeding by certiorari was instituted as a remedy for any injustice done by your office where the right of appeal therefrom does not exist (*Florida Navigation Co. v. Miller*, 3 L. D., 324-5; *George K. Bradford*, 4 L. D., 269; and many cases since); or where appeal has been filed but the right denied by your office (*Cedar Hill Mining Co.*, 1 L. D., 628, and many cases since). But the Department will not countenance, upon the grounds appearing by this record, a resort to the extraordinary remedy of certiorari where the applicant has not

previously sought relief through the ordinary method provided by the Rules of Practice,—to wit, by appeal (*Smith v. Noble*, 11 L. D., 558; *Spratt v. Edwards*, 15 L. D., 290; and many other cases).

The application is denied.

JUDGMENT—FINDING OF FACTS—CORRECTION OF ERROR.

FLORIDA RAILWAY AND NAVIGATION CO. *v.* HAWLEY.

On the application of a party in interest the Department may reform its finding of facts in a previous decision, so that it may be in accord with the record in the case, where such action seems requisite for the protection of the applicant, though the judgment as rendered may not be affected thereby.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (F. W. C.)

A motion has been filed on behalf of Chauncey I. Hawley to correct an alleged error in the finding of facts contained in departmental decision of March 21, 1894 (18 L. D., 236). In said decision it was held (syllabus):

A tract of land withdrawn for indemnity purposes under a railroad grant, and included in a descriptive list of lands announced for public sale under a subsequent proclamation of the President, that excepts therefrom all lands "reserved for railroad purposes" can not be regarded as "offered"; and a private cash entry of a tract occupying such status is void, and not subject to equitable confirmation.

Said decision was upon a motion filed for a review of departmental decision of May 20, 1889 (not reported), in which it was held that the private cash entry of Chauncey I. Hawley, made April 27, 1882, for certain tracts in the Gainesville land district, Florida, might be submitted to the board of equitable adjudication for confirmation.

The tracts covered by said entry are within the indemnity limits of the grant made to the State of Florida by the act of Congress approved May 17, 1856 (11 Stat., 15), to aid in the construction of a railroad from Amelia Island to Tampa Bay and Cedar Keys. The lands were in a state of reservation at the date of the allowance of Hawley's entry, and it was upon this ground that Hawley's entry was held to have been void and not capable of confirmation. The holding to this effect will be found in that portion of the opinion reported on pages 240 and 241 of the said land decisions, wherein it was held:

There being no authority to offer the tract in controversy, it must be considered as having never been offered, and, under the rulings of the court and of the Department in the cases above cited, the private cash entry of Hawley was without authority and void and can not be confirmed by the board of equitable adjudication.

This would seem to have effectually disposed of any rights under Hawley's entry; the opinion proceeds, however—

It further appears that the company applied to select this tract prior to the revocation of the withdrawal, and that the application was refused because of the entry

of Hawley. The company appealed from the action of the local officers, rejecting said list, but it was afterwards discovered that the local officers had neglected to place the selections of record, and your office was asked to correct that error, which was refused.

The finding complained of is that "the company appealed from the action of the local officers, rejecting said list."

While the decision was in no wise predicated upon this finding, and would not be affected by its elimination or change, yet as it is urged that said finding may prejudice any future rights desired to be asserted by Hawley in the courts, I have deemed it proper to inquire as to the correctness of the same, and find from the records of the land office, gathered from the report made by your office in response to a call from this Department, that, as a matter of fact, the company did not appeal from the action of the local officers in refusing to accept its list No. 2, covering this land, which list was tendered at the local office June 1, 1887. The finding made in said departmental decision, that the company appealed from the action of the local officers, rejecting its list covering the tract embraced in Hawley's purchase, is error and is set aside.

In answer to the motion it is urged on behalf of the Florida Central and Peninsular Railroad Company, the present claimant under said grant, that the finding should not be made that the company did not appeal, without a detailed statement of the several actions taken by your office and the local officers in relation to selections on account of this grant, which it is claimed will show that the selection in question was simply held in abeyance.

As before stated, the decision of the Department was not predicated upon, nor influenced by, the finding complained of, which, it is clearly shown, was an erroneous finding; and the same having been set aside, it seems to be unnecessary to further complicate the record in said case by any finding of facts not necessary to the conclusion reached in said opinion.

The motion and accompanying papers are herewith returned for the files of your office.

REPAYMENT—ASSIGNEE—MORTGAGEE.

CALIFORNIA MORTGAGE LOAN AND TRUST CO.

No right of repayment is acquired by an assignee whose interest in the land is not obtained until after the cancellation of the entry.

The right of assignees to repayment is limited to assignees of the land, and does not extend to one holding an assignment of the claim for the money paid on the entry. A mortgagee is not an assignee, within the intent and meaning of the act providing for repayment, if the mortgage is merely a lien on the land.

On application for repayment by an entryman he must show that the land is free from incumbrance.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (J. L. McC.)

The California Mortgage, Loan and Trust Company has appealed from the decision of your office, dated November 19, 1895, denying its

application for repayment of the purchase money paid by William B. Stewart for the land embraced in his pre-emption cash entry, No. 3640, for the NE. $\frac{1}{4}$ of Sec. 32, T. 4 S., R. 1 E., Los Angeles land district, California.

Said entry was canceled on March 31, 1890, because the land had been, by executive order of June 19, 1883, reserved from entry, for the benefit of the Mission Indians.

On November 27, 1893, the company above named, claiming as mortgagee, applied to have the entry reinstated. The application was denied by your office, on December 8, 1893; and on appeal the Department, on April 18, 1895, affirmed said decision. (See 307 L. and R., 150.)

Thereupon the company applied for repayment of the purchase money. With said application the company filed a certified copy of the receiver's receipt; the affidavit of the vice-president and general manager of the company, setting forth that said company, on July 28, 1889, loaned to said Stewart the sum of one thousand dollars, receiving as security for such loan a mortgage on the land; a grant deed, dated May 4, 1894, from Stewart to the company (duly recorded); a quit-claim deed from the company to the United States; an assignment by Stewart to the company of all right, title, and interest in the money paid by him to the United States for the land in controversy; and other documents.

Your office held that, inasmuch as the deed from Stewart to the company was subsequent to the cancellation of the entry, it gave the company no claim to repayment of the purchase money paid by Stewart.

It clearly appears that Stewart's entry was "erroneously allowed," within the meaning of Sec. 2 of the act of June 16, 1880 (21 Stat., 287); the only question for consideration is, whether the repayment should be made to the California Mortgage, Loan and Trust Company.

It is well settled that no right of repayment is acquired by an assignee whose interest in the land is not obtained until *after* the cancellation of the entry. (Adolph Emert, 14 L. D., 101; Albert G. Craven, id., 140; Alpha L. Sparks, 20 L. D., 75.) Also that the right of repayment is restricted to assignees of the land, and does not extend to persons holding an assignment of the claim for the money paid on the entry. (Instructions of November 2, 1895, 21 L. D., 366.)

The decision of your office correctly held that the showing made by the company relative to the existence of said mortgage was unsatisfactory. Such evidence may, however, be hereafter furnished by supplementary proof.

The question then remains for consideration, whether, in case such satisfactory evidence should be furnished, the company would be entitled to repayment?

The Department has repeatedly held that where a mortgage is merely a lien on the land, the mortgagee is not an assignee of the entryman

within the meaning and intent of the act providing for repayment. (Alonzo W. Graves, 11 L. D., 283; Emma J. Campbell, 15 L. D., 392.)

By the Civil Code of California (Sec. 2920), it is declared that a mortgage "is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." Sec. 2923:—"The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession." Sec. 2926:—"A mortgage is a lien upon everything that would pass by a grant of the property." And Sec. 2927 declares that a mortgage does not entitle a mortgagee to possession.

The California Mortgage, Loan and Trust Company not being, under departmental rulings, an assignee within the meaning of the act of June 16, 1880, repayment cannot be made to it; and your action in denying its application is therefore approved.

The title to the land was, at the date of the cancellation of the entry, in the entryman Stewart, subject only to the lien of the mortgage—if such mortgage in fact existed, as alleged; and in view thereof, repayment, if allowed at all, must be made to him. But before this can be done he will have to secure a release of the mortgage, by payment, relinquishment, or otherwise. Upon a proper application by the entryman, showing such release, I see no good reason why repayment may not be allowed.

OKLAHOMA LANDS—QUALIFICATIONS OF HOMESTEADER.

MASON v. CROMWELL.

The limitation in section 20, act of May 2, 1890, of the right to make homestead entry in Oklahoma, to persons who are not "seized in fee simple of one hundred and sixty acres of land," disqualifies one who owns a "quarter section," entered as such, though the area of the tract thus owned may fall short of one hundred and sixty acres by a small fraction, as shown by the field notes of survey.

A transfer of land owned by an intending homesteader will not operate to relieve him from the disqualification imposed by said section, if it appears to have not been made in good faith, but for the purpose of evading the statutory inhibition.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (C. J. G.)

The land involved in this controversy is the SW. $\frac{1}{4}$ of Sec. 20, T. 23 N., R. 6 W., Enid land district, Oklahoma.

Fullerton C. Cromwell made homestead entry of the above described tract on October 27, 1893.

A few days thereafter Calvin F. Mason filed an application to make homestead entry of said land, alleging settlement thereon October 13, 1893.

A hearing was duly had January 24, 1894, on the issue of prior settlement.

The register rendered decision in favor of Mason, finding that he was the prior settler and a qualified entryman. He therefore recommended that Cromwell's entry be held for cancellation.

The receiver found in favor of Cromwell, on the ground that Mason was disqualified to make entry by reason of his ownership of one hundred and sixty acres of land in the State of Kansas. He accordingly recommended that Cromwell's entry remain intact.

Both parties appealed, and your office, under date of May 22, 1895, sustained the decision of the receiver and dismissed the contest.

Mason has appealed to this Department, and in his said appeal three propositions are submitted: (1) That he was not the owner of one hundred and sixty acres of land at the time of his settlement or at the time Cromwell made settlement. (2) That before making settlement he had effectually transferred the quarter section of land that he owned in Kansas. (3) That he was not disqualified and that his entry should be allowed.

A point is raised in the plaintiff's appeal to this Department which was not discussed in the decisions below or in the briefs of the opposing counsel, namely, that as the area of the land owned by Mason in the State of Kansas (NE. $\frac{1}{4}$ of Sec. 28, T. 9 S., R. 34 W.) contains 159.35 acres, according to the field notes of your office, or less than one hundred and sixty acres, he is not therefore barred from making entry under section 20 of the act of May 2, 1890 (26 Stat., 81).

It will be necessary for the purposes of this decision to consider this proposition first, although it is the last one discussed by plaintiff in his appeal, for the reason if the point is found to be well taken it will render a consideration of the other features of the case unnecessary.

The language of the act of May 2, 1890, *supra*, having reference to this case, is as follows:

and no person who shall at the time be seized in fee simple of a hundred and sixty acres of land in any State or Territory shall hereafter be entitled to enter land in said Territory of Oklahoma.

As the plaintiff insists upon a strict and literal construction of the above statute, it will be necessary to ascertain as far as possible, in the light of previous legislation, just what meaning Congress intended to convey by the language employed. While the language of the statute is to the effect that no person who is the owner of a "hundred and sixty acres" of land shall be entitled to enter land in Oklahoma Territory, yet I am inclined to think that it would be a too strict interpretation of that language to say that simply because the plaintiff in this case happened to be the owner of a small fraction less than a hundred and sixty acres he is therefore not disqualified from making the entry applied for. The history of legislation on this subject would seem to indicate that Congress has used the terms "a hundred and sixty acres" and "quarter-section" interchangeably, and if this be true, the fact that the land owned by the plaintiff in the State of

Kansas contained a fraction less than one hundred and sixty acres or less than a quarter-section, makes no difference; he is barred equally with the owner of a full hundred and sixty acres or a technical quarter-section.

In the case of Benjamin C. Wilkins (2 L. D., 129), the Department reviewed at length the several statutes pertaining to the subject under consideration, and held that "a 'quarter-section' of public land is under the homestead laws one hundred and sixty acres." It was stated in that case as follows:

It seems clear to me from this review that Congress and the President used the terms "quarter-section" and "one hundred and sixty acres" interchangeably and as meaning the same quantity of land, and that this resulted from the fact that a quarter-section under the government system of public surveys embraces or is intended to embrace just one hundred and sixty acres, although from inaccuracies in adjusting meridians, and other exceptional reasons, it sometimes differs from that amount; and that the purpose was to give settlers under the law one hundred and sixty acres, and no more. When, therefore, by reason of the surveys, an entry for this precise amount is impracticable, it must, as nearly as possible, approximate it.

. . . . It thus appears that, substantially, the same words are used in limitation of land to be entered under both the pre-emption and homestead laws, and I cannot doubt that the terms "quarter-section" and "one hundred and sixty acres" are used synonymously in each to mean one hundred and sixty acres; and this is in harmony with the general policy of the government under other laws.

In the interpretation of Sec. 2289, Revised Statutes, which provides that every qualified person: "Shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands," the Department, in the case of William C. Elson (6 L. D., 797), said, *inter alia*

It is true that generally the quarter-section, if the survey be correct, will contain one hundred and sixty acres; but it was well known to Congress that many quarter sections were fractional in the survey, and that many, which were not fractional, did not contain exactly the one hundred and sixty acres of land. They, therefore, gave a settler the quarter-section as it should be found surveyed.

. . . . An actual area-measurement of the government survey shows, as is well known, that few subdivisions contain exactly the number of acres reported by the surveyor, generally containing more or less. The grants of the United States are not by quantity, but by description, and, it is a familiar rule, that a call of quantity in a grant must yield to description, and the act of Congress is to be regarded as a grant as to each tract, in a certain sense.

It will be observed that the question involved in the above cited cases was as to the entry of a quarter-section containing more than one hundred and sixty acres, and the entry was not rejected on account of the excess, the same being regarded as a quarter or one hundred and sixty acres "in conformity to the legal subdivisions of the public lands."

The issue has probably not heretofore been raised, under the act of May 2, 1890, as to an entry of a quarter-section containing less than one hundred and sixty acres, but, as is well known, a great many quarter sections have been entered as such when the area-measurement would not equal the one hundred and sixty acres; but as those entries

containing more have been allowed to stand, simply because the quarter-section was in conformity with legal subdivisions, it would seem that where the deficiency is shown to be small the rule should work both ways. Especially is this true since there is a provision of law to the effect that when a settler has entered less than one quarter section of land he may enter other and additional land lying contiguous to the original entry, which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres. But an application for additional land to make up the full one hundred and sixty acres in such a case as the Kansas land herein referred to, would probably not be considered, for the reason that such entry under the rules must be regarded as a quarter-section or one hundred and sixty acres, and the maxim of *de minimis non curat lex* would apply. It does not logically follow therefore, as contended by the plaintiff, that if he is barred by the ownership of 159.35 acres, he would be equally barred by the ownership of ten acres or any quantity less than one hundred and sixty acres, for the reason that when an entry is made for a much less quantity than one hundred and sixty acres, the entryman has the privilege of making an additional entry.

To all intents, therefore, the land owned by Mason in the State of Kansas was a full quarter-section according to the legal subdivisions made on the basis of one hundred and sixty acres to the quarter. Technically, the quarter section of land in Kansas did not contain one hundred and sixty acres as shown by the field notes in your office. But it was intended that it should, and the fact that the results reached by the survey show a fraction less than one hundred and sixty acres was due to the variations allowable in making the said survey. To hold otherwise would be to declare Mason a qualified entryman on a technicality, based on an interpretation of the statute by itself alone and according to the mere literal meaning of its words. The statute must be construed in connection with the whole system governing the disposition of the public lands and in the light of previous statutes upon the same subject. As heretofore shown, the terms quarter-section and one hundred and sixty acres, are used interchangeably, unless it is to be presumed that Congress, in the act of May 2, 1890, intended to reverse the former policy and introduce a fundamental change in the well established custom of the Department.

The evident intent, in all legislation relating to the public lands, has been to limit the entry of said lands to those who do not already own one hundred and sixty acres of land or a quarter-section. And the fact that the quarter-section may consist of a little more or a little less than one hundred and sixty acres, is shown by the well established practice of the Department to cut no figure either in the admission or rejection of applications to make entry. When an entry is made it is made by description, and there are numerous decisions going to show that when a quarter-section contains more than one hundred and sixty acres, the

entry therefor is not necessarily rejected on account of the excess. There seems to be no good reason for enforcing a stricter rule in cases where the actual number of acres falls in a small fractional degree short of one hundred and sixty acres. The records of your office show, with reference to the Kansas land in question, that one hundred and sixty acres in round numbers were originally entered. Presumably this represents the number of acres that passed by purchase into the possession of the plaintiff Mason.

The whole scheme for the disposition of the public domain has been to afford to landless people the opportunity of securing homes. This sentiment runs throughout the debates of Congress in passing various acts relative to such disposition of the lands. And one of the tests of a person's qualifications to secure the benefits of the law in this regard has been, whether at the time of entry he was the owner of a quarter-section of land in any State or Territory, or approximately one hundred and sixty acres. This was the evident intent of Congress as gathered from the history of legislation on that subject, regardless of the language employed in the acts. This view is certainly in harmony with sound policy and is in strict accord with justice and good faith, which constitute the essential features in a proper administration of the public land laws.

As was said in the case of *Ryan et al. v. Carter et al.* (93 U. S., 78)—

No known rule of law requires us to interpret it (act of Congress) according to its literal import, when its evident intent is different. It may be that the words, taken in their usual sense, would exclude the case of *Dodier*; but if it can be gathered, from a view of the whole law, and others *in pari materia*, that they were not used in that sense, and if they admit of another meaning in perfect harmony with the general scope of the statute, it will be adopted as the declaration of the will of Congress. Especially is this so when this construction withdraws the least number of cases from the operation of the statute.

I think it may fairly be assumed, in the light of past legislation, that it was the evident intent of Congress in the act of May 2, 1890, to convey the same meaning by the language employed therein as is indicated in its previous acts. There would seem to be no good reason for establishing a different rule from that already existing, especially as a different interpretation would have the effect of withdrawing a great number of cases from the operation of the prohibitory statute, and thereby qualify a great number of persons to make entry who have heretofore been deemed disqualified; and that too on mere technicality.

It thus being decided that the plaintiff was at one time owner of one hundred and sixty acres of land in the State of Kansas, and thereby disqualified to make entry, it becomes necessary to determine whether he was the owner thereof at 5 P. M. on October 13, 1893, the day and hour he alleges settlement on the tract in controversy. And in the consideration of this question it will be proper to attach much importance to Mason's good faith as gathered from the surrounding circumstances.

The facts relative to Mason's alleged transfer of his Kansas land are substantially as follows: Mason alleges settlement October 13, 1893. The evidence shows, however, that he was in the Territory and had examined the land several days prior to that date. He was negotiating with one Walter A. Carpenter, who had a settler's right to the land in question, for the purchase of said right. When the said purchase was consummated Mason alleges that at nine o'clock on the morning of October 13, 1893, he executed a deed transferring his land in the State of Kansas to his sister. Having acknowledged the said deed, he mailed it to his wife with instructions to send the same to the recorder's office. It appears that Mason did not know his wife's address, so he sent the deed to some one at Sabetha, Kansas, to be forwarded to his wife at St. Joseph or Marysville, Missouri. It seems also that the conveyance of the Kansas land was not in the nature of a sale, but was made as a gift, no money consideration passing between the parties to the contract. In explanation of the transaction Mason states, in affidavits accompanying a petition for rehearing, that prior to October 6, 1893, he received a letter from his sister saying that she was in need of financial aid, and that on that date he wrote her offering to give her the Kansas land and to make her a deed for the same. No evidence regarding these allegations was brought out at the hearing, and no further communication between Mason and his sister is shown. Mason claims that he has not seen the deed since he mailed it, and that he does not know whether his wife forwarded the same to the recorder's office. The affidavits referred to, however, state that the deed was finally recorded, but it was after considerable delay.

It will be unnecessary for this Department to consider at length the question as to whether or not the manner in which the said deed was delivered constituted a proper delivery in contemplation of law. In the light of the numerous authorities cited by counsel on both sides, and which it is not necessary to repeat here, I am of the opinion that Mason's act, under all the circumstances of the case, did not amount to proper delivery. There was apparently no previous agreement between the grantor and grantee as to how the delivery should be made, or that Mrs. Mason should act as the agent of both. The deed was not even sent to the grantee, nor were there any instructions that it should be delivered into the grantee's possession.

The authorities are perhaps uniform in holding that when the grantor parts with all control over the deed, that act is effectual and operates from the instant of delivery. The matter of control over the deed constitutes the essence of the case at bar. The question arises, whether from the fact that Mason mailed the deed to his wife, without any previous agreement to that effect between the parties to the deed, he thereby parted with all control over the instrument. The deed was never placed in the possession of the grantee. There were no instructions to Mason's wife that the deed should be delivered to the grantee;

in fact, the latter was at the time in Leavenworth, Kansas, a distance of three hundred miles away. So that if Mason did not really intend to transfer the Kansas land to his sister, he still had an opportunity to recall the deed, and in this view its delivery could hardly be regarded as valid.

When Mason mailed the deed he thereby constituted the government his agent to deliver the same to his wife, and then by instructions he made his wife his agent to see that it was recorded, but neither was the agent of the grantee according to any former agreement; in fact, the grantee, as subsequent events showed, knew nothing of Mason's intentions in this regard.

The principal question, however, as heretofore implied, is as to whether or not Mason has acted in entire good faith in his transactions connected with the land in controversy. One suspicious circumstance involved in the transaction is that Mason's sister, the grantee of the deed, apparently knew nothing of it. On the face of the record it looks as if she were employed as an unconscious beneficiary for the express purpose of qualifying Mason to make entry. No copy of the deed is put in evidence, nor of the letter containing the instructions to Mason's wife. The evidence concerning these things is made to depend solely upon the assertions of Mason, and he is the interested party. His testimony regarding what became of the deed after he had mailed it is entirely too vague and uncertain for a matter of so much importance. He does not know whether the said deed was acknowledged by his wife; does not recollect the description of the land he deeded away, nor is he quite sure that the said deed was ever forwarded to the recorder's office, as he has never seen it since.

Counsel for plaintiff in this case rely largely upon presumption to supply the deficiency caused by the absence of positive testimony. Given the frame-work, consisting of the bare statement of plaintiff that he properly executed and acknowledged the deed in question and placed the same in the mails, they depend upon presumption to complete the structure. They presume from Mason's statements that his intentions were honest and that the deed was properly delivered and regularly recorded. But beyond the acknowledgments of Mason himself the evidence is silent.

The Department is unable to conclude from Mason's uncorroborated statement, in view of the suspicious circumstances developed by the testimony, that being the owner of one hundred and sixty acres of land at nine o'clock in the morning of October 13, 1893, he could completely divest himself of all title thereto, without any positive agreement or negotiation with the grantee, and by the simple act of placing the deed in the mails transform himself into a properly qualified entryman by five o'clock in the afternoon of the same day. His purpose seems manifest. The history of legislation will show that the government has jealously limited the disposal of the public domain for the benefit of the

landless; so much so that where an applicant to make entry is shown to have been the owner at one time of one hundred and sixty acres of land, stronger evidence that he has become divested of title thereto will be required than is present in this case.

It is unnecessary to consider the evidence touching Mason's alleged settlement on and improvement of the land in question prior to Cromwell's entry, in view of the fact that he is found to be disqualified by reason of his ownership of one hundred and sixty acres of land in the State of Kansas at the date of said settlement.

Your office decision is hereby affirmed.

REPAYMENT—FEES AND COMMISSIONS.

LESLIE O. HUSTED.

Repayment of the fees and commissions paid on an entry will not be allowed where the entry is relinquished on account of the undesirable character of the land, and a second entry made.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (J. L. McC.)

Leslie O. Husted, on March 26, 1889, made homestead entry for the SE. $\frac{1}{4}$ of Sec. 15, T. 7 N., R. 49 W., Denver land district, Colorado.

Finding it was impossible to obtain water fit for use, he was, upon his own request, permitted to relinquish the land and make a second entry. Afterward he applied for repayment of the fees and commissions paid upon his former entry. This application your office refused, by letter of March 4, 1896. He now appeals to the Department. He quotes from the General Circular of October 30, 1895, which states that, where an entry is canceled as invalid for some reason other than abandonment, and not the wilful act of the party, he . . . may have the fee and commissions paid on the canceled entry refunded on proper application, under the act of June 16, 1880.

The paragraph quoted from the General Circular expressly refers to an entry "canceled as invalid;" the entry in the case at bar was not canceled because invalid. The act of June 16, 1880, provides for repayment where entries have "been erroneously allowed and can not be confirmed;" the entry here in question could have been confirmed, but the entryman did not wish that it should be; he preferred to relinquish it and select other land.

The decision of your office was correct, and is hereby affirmed.

REPAYMENT—PATENTEE—SURRENDER OF PATENT.

HENRY H. HARRISON.

On application for the return of purchase money by a patentee who was required to purchase under section 5, act of March 3, 1887, when in fact the land passed by the railroad grant under which he held, the applicant should surrender the patent, but should not be required to execute a deed of relinquishment.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (J. L.)

This case involves the repayment of the sum of two hundred dollars, the purchase money paid to the United States by Henry H. Harrison for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 9, T. 47 N., R. 4 W., Ashland land district, Wisconsin, containing eighty acres of land.

Said tract was granted by the acts of June 3, 1856 (11 Statutes 20), and May 5, 1864 (13 Statutes 66), to the State of Wisconsin to aid in the construction of railroads. Decisions of the supreme court rendered on June 3, 1895, and reported in 159 U. S. reports—*Wisconsin Central Railroad Co. v. Forsythe*, p. 46, and *Spencer v. McDougal*, p. 62—finally adjudged that the Wisconsin Central Railroad Company acquired from the State of Wisconsin a good title to said tract of land under said grants. And it appears that Harrison by sundry intermediate conveyances had acquired and was owner of the title of the company.

Previous to the publication of said decisions, your office and this Department had held that the tract in contest (and other lands in *con-simili casu*), did not pass under the grants aforesaid, and was subject to entry under the general land laws. Your office thereupon advised Mr. Harrison, that it would be necessary for him to purchase said tract from the government under the fifth section of the act of March 3, 1887 (24 Statutes, 556). Consequently Harrison, on June 8, 1893, paid the government two hundred dollars for the tract, as appears by certificate No. 5728 of that date issued at Ashland, Wisconsin. And on August 31, 1894, a patent for the land was issued to him.

After the promulgation of said decisions, to wit: on July 3, 1895, Harrison filed his application for repayment of the two hundred dollars aforesaid in accordance with section 2362 of the Revised Statutes of the United States. On December 6, 1895, (by letter "F"), your office required Harrison (1) to surrender the patent issued to him, (2) to furnish a duly executed deed relinquishing to the United States all right and claim to the land under said patent, (3) to have said deed duly recorded, and (4) to furnish a supplemental abstract of title continued from June 27, 1895—the date of the abstract now on file—down to and including the date of recording said deed.

On January 15, 1896, Harrison filed a motion for a review of said decision. On July 2, 1896 (letter "F"), your office denied said motion, and declined to modify the former decision.

Whereupon Harrison appealed to this Department.

By section 2362 of the Revised Statutes it is enacted that:

The Secretary of the Interior is authorized, upon proof being made to his satisfaction that any tract of land has been erroneously sold by the United States so that from any cause the sale can not be confirmed, to repay to the purchaser or to his legal representatives or assigns, the sum of money which was paid therefor, out of any money in the Treasury not otherwise appropriated.

It is conceded, that before he applied to purchase under the act of March 3, 1887, Harrison had acquired the valid title already conveyed by the United States to the State of Wisconsin; that the patent issued to him conveyed no title, because the land therein described did not belong to the United States; and that his right to be repaid the purchase money is unquestionable. The only question involved is merely a matter of administration to be determined by reference to the regulations.

The General Land Office circular of February 6, 1892, on page 86, and the circular of October 30, 1895, on page 98, both prescribe as follows:

If however, the applicant has acquired the valid title already conveyed by the United States, it will not be necessary for him to reconvey the land, but he may make a full statement, with corroborative evidence of the facts, waiving all claim under the invalid entry, and thereupon receive repayment of the amount erroneously paid.

Harrison filed a full statement, which is corroborated by the records of your office. He is willing and offers to surrender his patent, and waive all claims under it, and the invalid entry on which it was issued. Your office erred in requiring him to execute a deed of relinquishment, and have the same recorded, and to furnish a supplemental abstract of title continued from the date of the abstract on file down to the date of such recordation.

The patent is null and void to all intents and purposes. It conveyed no right, title, interest or estate which Harrison can consistently undertake to relinquish. He should be repaid the money upon the return and surrender of the patent with his receipt for the money duly attested endorsed thereon, in full payment and satisfaction of all his claims thereunder, in such form as your office may prescribe.

Your office decision is hereby modified as above indicated.

ADJOINING FARM ENTRY—TOWNSITE—MINERAL LAND.

CALDWELL v. GOLD BAR MINING COMPANY.

An adjoining farm entry is invalid, and will not be allowed to stand, if the entryman was not in fact the owner of the alleged original farm at the time of entry.

An application to make townsite entry under section 2389 R. S., will not be allowed, where the number of bona fide occupants is not given, and it is not manifest that the occupants in fact desire in good faith to make such entry, and also where the application covers land apparently mineral in character, and in close proximity to another town.

In case of an attack on a mineral location of land that has once been adjudged mineral in character, the abandonment or forfeiture of the claim must be shown by clear and unmistakable evidence.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (P. J. C.)

The record shows that the Gold Bar Quartz Mining Company made application for patent for the Gold Bar mining claim, lot No. 206, Sacramento, California, land district, on November 24, 1893. Notice by publication was duly given of this application, which ran from November 26, 1893, to February 3, 1894.

John Caldwell, a superior judge of Nevada county, California, filed in the local office an application to enter, for townsite purposes, "in accordance with the provisions of sections 2388-9 inclusive (R. S.)," lot 3 in Sec. 33, lot 6 in Sec. 28, lot 12 in Sec. 27, and fractional NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ (also described as lot 20) in Sec. 34, T. 16 N., R. 8 E., M. D. M., in trust for the uses and purposes of the occupants and dwellers thereon. He represented that the land was then used and occupied for townsite purposes and had been since 1860. This application is not dated, but the local officers say it was presented January 23, 1894. It appears that they declined to accept the application because of conflict with the mineral application "and with the homestead entry of Richard Ryan." It is also stated by the local officers that on the same day Judge Caldwell filed a protest against the mineral entry. It seems that this protest was against the "mineral applicants the Gold Bar Quartz Mining Company, Richard Ryan, homestead claimant, and Central Pacific Railroad Company." It is dated January 15, 1894, and alleges that he desires to make entry of the land for the use and benefit of the inhabitants thereof; that the land is entirely enclosed and occupied by persons residing thereon; that there are more than fifteen dwellings and families thereon, the total number of inhabitants being one hundred and fifty; that the land has been used for townsite purposes for more than thirty years; "that the majority of the occupants of said premises have requested me to make application in trust for them under the United States Revised Statutes;" that he files "this adverse claim and protest against the said application by said Gold Bar Quartz Mining Company for said Gold Bar Quartz Mine," because

"the land embraced therein is agricultural land, and that no part of it is mineral and that no mineral or quartz of any kind has ever been discovered thereon;" that the land is settled upon and occupied as a townsite; and that "that portion in section 27 is excepted from the railroad grant by reason of the pre-emption claim of J. J. Collins."

This protest is not sworn to by the judge, but he states "that the facts upon which said adverse claim and protest are based being (are) fully set forth in the affidavits hereto annexed."

The affidavits referred to were made by Richard Ryan, one of the defendants in the protest, and John Thomas, in which they swear that there are nine dwellings etc. on the land; that there is no lode existing within the limits of the Gold Bar claim; that no gold nor quartz has been extracted from the premises; that the ground embraced is non-mineral in character, and that there are no indications of mineral upon the same; and that Collins settled upon lot 12 in Sec. 27 prior to 1862 and filed his declaratory statement therefor in 1868. This affidavit was sworn to on January 12, 1894.

On January 24, following, the local officers issued notice calling for a hearing on this protest.

On February 3, 1894, the mining company made application to purchase the land applied for, which was denied because of the pending contest. Subsequently, in the same month, the mining company applied for a re-hearing on its application to purchase and to reconsider the respective orders issued, and that the notice might be dismissed and quashed. The local officers thereupon modified their former decision to the extent of quashing the notice which had been issued; and thereupon transmitted the record to your office with the recommendation that a hearing be ordered. The mineral claimants appealed from their action.

Your office, by letter of January 20, 1894, considered this appeal, and in doing so recited the prior history of lot 3, included in the tract, as follows:

In deciding this question it becomes necessary to consider briefly the facts of record relative to said lot 3, of section 33.

This office by decision dated November 27, 1885, (letter F), in the case of S. J. Alderman v. C. P. R. R. Co., involving said lot 3, decided: "The residence of Irish antedating the railroad grant, and extending beyond the date of definite location, excepted the land from the operation of the grant, the same is therefore subject to disposal under the general laws of the United States."

Said office decision was affirmed by the departmental decision of September 28, 1887.

It appears from the record in quasi contest No. 601, W. H. Weldon claiming the Gold Bar Quartz mine v. C. P. R. R. Co. that Weldon on October 8, 1890, filed a petition alleging that the land in said lot 3, is mineral in character.

Upon said petition a hearing, which was ordered by this office, was held March 27, 1891.

Said hearing resulted in a final decision by this office, dated February 26, 1892, from which I quote: "You decided that the land was mineral in character and recommended that it be excluded from the grant to the said respondent.

"The parties in interest were duly notified of your decision and no appeal has been taken therefrom.

"Your decision is accordingly affirmed and the Central Pacific R. R. Co.'s selection as per list No. 12, is hereby canceled as to the extent of said lot No. 3 of Sec. 33, T. 16 N., R. 8 E., M. D. M.

"It further appears that while the case was pending in this office you allowed in violation of Rule 53 of Practice, homestead entry No. 5945 to be made by Richard Ryan"

"This entry covers the tract involved in the above contest and was wholly irregular but will be allowed to stand subject to any prior attached rights."

In view of the foregoing, the proper townsite authorities and Richard Ryan will be allowed thirty days in which to apply for notice of a hearing, to be by them served in accordance with the rules of practice, at which evidence must be submitted to show whether the land embraced in said mining claim is valuable mineral land, and whether that part thereof embraced in said lot 3 is more valuable for mineral than agricultural purposes.

Lot 12, of section 27, T. 16 N., R. 8 E., embraced in said declaratory statement is also within the grant to the Central Pacific Railroad Company. Before the townsite declaratory statement can be received and filed, it will be necessary to have said lot 12, regularly excepted from the grant.

In order to show that lot 12, ought to be excepted from the grant, said railroad company should be made a party defendant in this case by due service.

A motion for review of this decision was denied by your office letter of October 4, 1894.

A hearing was had before the local officers in pursuance of this order, at which the townsite claimants and Richard Ryan were represented by an attorney, and there was also present an attorney for the mining company. The railroad company appeared and filed a protest in reference to lot 12 in section 27. It may be said in this connection that this lot is not included in nor does it conflict with the Gold Bar Quartz mine in any way.

As a result of the hearing before the local officers they decided that the land involved is non-mineral in character and that lot 12 of section 27 was covered by a valid pre-emption claim at the date of the grant to the Central Pacific Railroad Company, and decided that the mineral application of the Gold Bar Mining Company should be canceled; that lot 12 was excepted from the terms of the grant; that Richard Ryan's homestead entry of an additional farm homestead should be allowed to stand intact; and that Judge Caldwell or his successor in office be allowed to enter the land applied for by him and not embraced in Richard Ryan's claim.

On appeal your office affirmed the decision below, except as to Ryan's additional farm homestead, which was held for cancellation. A motion for review of said decision was denied, and the case now comes before the Department on the separate appeals of the mineral claimants and Ryan. The specifications of error filed by the mining company are quite voluminous and will not be set forth, but such errors as are suggested that are pertinent to the issues involved will be considered. The error alleged by Ryan is in holding his additional farm homestead entry for cancellation.

As to the appeal of Ryan: The judgment of your office that his additional farm homestead entry should be canceled is concurred in. In the first place, it was erroneously allowed by the local officers, inasmuch as the land was then under contest and of course not subject to entry until that contest was disposed of. Again, this entry should not be allowed to stand under the circumstances. In his affidavit he stated

that I now own and reside upon an original farm containing about three acres and no more; that the same comprises a portion of mineral lot No. 198, in the NE. $\frac{1}{4}$ of Sec. 33, T. 16 N., R. 8 E., and is contiguous to the tract this day applied for.

The testimony in the case shows that Ryan was only a settler or "squatter" on the mineral land at the time he made his additional farm entry and that he had no title to the land until about two months prior to the hearing which was held December 17, 1894. If it be conceded, for the sake of argument, that he had the right to make additional farm entry simply by reason of purchase of this tract, yet it is clear that he had no such title to the three acres as would warrant the allowance of the entry at the time it was made (*Boord v. Girtman*, 14 L. D., 516; *Rush v. Bailey*, 16 L. D., 565).

Apparently a little more than one half of the ground included in the Gold Bar is in lot 3 of Sec. 33. It is triangularly shaped, the base of the triangle extending almost the entire length of the southerly side line of the mining claim and the apex being just outside the northerly side line.

This particular piece of land has been the subject of litigation in the Department and the local courts since 1885. This is probably owing to the fact that the land has been inhabited to some extent ever since 1860, by a few persons; its close proximity to the city of Grass Valley, and that it is surrounded by mines and mining claims, many of which have been patented by the government, and which are now, or have been in the past, extensively worked.

So far as disclosed there has never before been any attempt made to secure title to the land for townsite purposes, neither was the tract under municipal control or laid off in lots and blocks. It is shown by the testimony of one witness, however, that since this proceeding was commenced it has been included within the corporate limits of Grass Valley.

It will be observed that the application for townsite entry is not made under the act of March 3, 1877 (19 Stat., 392), as an additional entry for townsite purposes, but is for an original townsite entry under "sections 2388-9 inclusive."

It is gathered from the record that the application of the superior judge was brought about by a petition from the residents. There is in the record a petition signed by ten persons representing themselves to be "of the number represented by your honor, officially, in a certain petition and application for townsite patent," etc., requesting him to

withdraw the application made for entry. In compliance therewith, as stated by him, the superior judge filed a formal withdrawal of his said application, which was dated December 10, 1894. Subsequently, however, on the day the hearing began, the judge withdrew this abandonment. In his letter of withdrawal he states that he had supposed the request to abandon the application presented to him had been made by "all the townsite residents within the limits of said Gold Bar quartz claim," but he is "now informed that five of the townsite residents" did not join in the petition. So it appears that the superior judge is now representing the wishes of but five persons in prosecuting his application for patent. At the hearing the attorney who appeared for the townsite applicants also acted for Ryan, to the extent of offering the testimony taken in behalf of the townsite applicants as evidence for Ryan. It will be remembered that the protest of the superior judge was made both against Ryan and the mineral claimant, and his application to enter included the land Ryan had entered as an additional farm homestead. It is therefore clearly apparent, if these parties—the superior judge and Ryan—are acting in good faith, that their interests are necessarily antagonistic.

It is shown by the testimony on the part of the defendant, that at the time of the hearing there was residing on the mining claim the individuals who petitioned the superior judge to abandon the application for townsite. This petition was shown to one of the witnesses for the defense and he was asked if it included all the settlers within the Gold Bar mining claim. His reply was, that it did not; that those not signing were Richard Ryan, John Thomas, John Thompson, Mrs. Wallace and Peter Keelly. It is shown, however, that Ryan did not live on the land, but had a part of it included in his enclosure. It is also shown that Peter Keelly did not then reside on the tract, his house having been burned previously. The townsite claimants' testimony shows "ten or eleven dwellings" and gives the names of eleven persons living there with their families, including Weldon, who it appears is largely interested in the Gold Bar Company. It also shows that there have been people living on the land since 1860.

It also appears that all the settlers, except five, have entered into an agreement with the mining company by which they are to get title to the surface of the ground they occupy.

It further appears that there have been mines worked in this immediate vicinity since its first settlement; that in all directions immediately surrounding the Gold Bar are mining claims and on the two sides and one end have been patented as mineral land. It is shown that in 1888 Ryan and Keelly and two others located lot 3 as a placer claim. The ground included in the Gold Bar claim was originally located in 1877, under the name of the Silver Star, and relocated under its present name in 1888.

It seems to me, in view of all these circumstances, that there is not presented such a case here as will warrant the Department in permitting an entry of this land under the townsite law, at least under the

application that is now pending. The actual number of *bona fide* occupants of the tract is not given, neither is it shown that any emergency exists that would demand the granting of another and independent townsite entry such as this application contemplates, in such close proximity to another town. In the protest filed by the superior judge it is alleged that there are "more than 9 dwellings occupied by 8 families," but the testimony does not show "more than 9 dwellings."

It is contended that the former decision of your office in the case of *Weldon v. Central Pacific R. R. Co.*, affirming that of the local officers adjudging the land included in the Gold Bar to be mineral in character, is *res judicata* of that question. It appears to me that there is much force in this proposition. If its mineral character was such as to except it from the operation of the grant to the railroad company, it would seem to be ample for the purpose of at least throwing the burden of proof upon those attacking it on the ground that it is agricultural, which is one of the charges made in the affidavit of contest. This question as to the burden of proof in cases where there has been a former adjudication on this subject, is fully discussed in all its features in *Stinchfield v. Pierce*, 19 L. D., 12; *Dargin et al. v. Koch*, 20 L. D., 384, and *McCharles v. Roberts*, Id., 564, and it is not deemed necessary to go over the ground again. It is enough to say that in the last-named case it was decided that where parties attack a mineral location on land that has once been adjudged to be mineral in character it is necessary to allege and prove abandonment or forfeiture of the mining claim and that the testimony should be clear and unmistakable;

that after final judgment declaring land to be mineral in character the simple allegation that the land is as a present fact more valuable for agriculture is not sufficient upon which to order a hearing, and again compel the mineral claimant to adjudicate the question.

The clear preponderance of the testimony in the case at bar is with the mineral claimants. It is shown that there is some mineral in sight on the claim. It is true, as said in your office decision, that no ore has been produced by the claimants, but this may be accounted for by the fact that there has been continuous litigation over the land. But be this as it may, the fact is that there is not sufficient evidence in the case to warrant a reversal of the former judgment as to the character of the land.

Your office judgment that the land is not mineral in character is therefore reversed, and the application by the superior judge denied.

INDIAN LANDS—ALLOTMENT—CONTEST.

OPINION.

The Secretary of the Interior has authority to investigate the validity of an Indian allotment at any time prior to the issue of the first patent provided for under the allotment law, and on sufficient cause shown, to rescind the approval of an allotment and reject it.

*Assistant Attorney-General Lionberger to the Secretary of the Interior,
February 15, 1897. (W. C. P.)*

A letter from the Commissioner of the General Land Office in regard to hearings on charges against the legality of certain Indian allotments was referred to me by First Assistant Secretary Sims, with request for an opinion upon the questions involved.

Other papers relating to similar matters were transmitted by the Commissioner before and after said letter was received, and were referred to me for an opinion. Subsequently the Commissioner addressed a letter to you requesting that all these matters be considered together.

It seems in this particular instance allegations were made that the lands covered by certain Indian allotments were covered by a heavy growth of timber, which constituted their chief value, and that the allotments were made for the benefit of timber speculators, whereupon the Commissioner of the General Land Office ordered a hearing to determine the facts. This action was taken under departmental letter of December 6, 1895, to the Commissioner of the General Land Office, wherein it was said:

In accordance with your recommendations you are hereby authorized to suspend action on all Indian allotments in said States under section 4 of said act pending investigation of the charges preferred against the same.

In the letter which called forth these instructions the Commissioner of the General Land Office made the following statement and suggestion:

I have temporarily suspended action on a number of allotment applications in said States now in this office, and on a number of allotments which have been before the Department and approved for patent, pending instructions from the Department in the matter.

I respectfully suggest that this office be authorized and directed to suspend all action on Indian allotments under section 4 of the general allotment act of February 8, 1887, in the States of Minnesota and Wisconsin, pending investigation thereof by a special agent of this office as to the charges preferred against the same in the letters transmitted herewith.

The instructions given by the Department when read in connection with this letter from the Commissioner of the General Land Office which called them forth are broad enough to justify his conclusion that the order of suspension covered approved allotments as well as those where applications were under consideration.

I take it, however, that my opinion was desired upon the general question as to the authority of the Secretary to investigate the legality of an allotment after approval, rather than upon the question as to whether the action of the Commissioner of the General Land Office in ordering hearings on charges against approved allotments was within the scope of his instructions.

The Commissioner of Indian Affairs requested the Commissioner of the General Land Office to rescind his order for these hearings, contending that the approval of any Indian allotment is a final determination of the right of the Indian thereto, and that thereafter there is no authority to investigate the legality of the allotment. In support of this contention he cites the decision in the case of *Falconer v. Price* (19 L. D., 167), and a decision of December 3, 1888, in respect to selling timber by the allottee after approval. He also argues that the ruling of the supreme court that where a right to a patent has once been vested in a purchaser of public lands, it is equivalent to a patent issued, is by analogy applicable to an Indian allotment.

The decisions of the supreme court (*Stark v. Starrs*, 6 Wall., 402, and *Simmons v. Wagner*, 11 Otto, 260), cited by the Commissioner of Indian Affairs, do not touch upon the question of the authority of this Department to investigate the legality of an entry of public lands at any time prior to the issuance of patent, but announce the rule that a right once vested, that is, by legal entry or purchase, is equivalent to a patent against subsequent claimants of the land. These cases are not in point here. The authority of this Department to investigate entries of the public lands, and to cancel any entry shown to be illegal at any time prior to the issuance of patent, is too well established to require the citation of authorities in support of the proposition. By analogy this same rule may be well applied to Indian allotments.

The departmental letter of December 3, 1888, does not announce any rule that should be recognized as controlling the question now under consideration. That letter simply instructed the Commissioner of Indian Affairs that certain Chippewa Indians who had been given allotments under a treaty with that tribe might be allowed to sell the timber upon their allotments after approval by the President and prior to the issue of patent thereon. This action does not by any means go to the extent of saying that this Department would have no authority to investigate as to the legality of any allotment at any time prior to the issue of patent. It is true that the right under an approved allotment upon which patent subsequently issues relates back to the date of approval, but that has no influence upon the question now under consideration.

The decision in the case of *Falconer v. Price* (19 L. D., 167,) seems to sustain the contention of the Commissioner of Indian Affairs. It seems that Falconer applied to contest Price's allotment, and in the decision thereof, after reciting that the allotment was approved by the Commissioner of Indian Affairs, and by the Department, and was sent to the

General Land Office, with directions to issue patent thereon, but that no patent had been issued, it is said:

Your office held that the allotment having been approved by the Department, the question as to the right of Price was settled, and your office declined to order a hearing in the case. Your action is approved. The decision of your office is affirmed.

There is no discussion of the question, no citation of authority, nor anything to indicate the line of reasoning by which the conclusion was reached. I can not agree with that conclusion. The duty of making these allotments devolves upon the Secretary of the Interior, and while the interests of the Indians should be carefully guarded, there is also an obligation upon him to watch the interests of the government and to prevent the making of illegal allotments. A mistake may be corrected or a fraud prevented at any time before the Secretary of the Interior, as the officer having charge of the public lands and their disposal, completes his duties so far as to issue the patent provided for in said law. Having been given charge of this work he is necessarily thereby vested with authority to do whatever may be necessary to its proper performance.

As said before, this question may be determined by applying the rules which obtain as to the sale or other disposition of the public lands under other laws. A homestead or other entry is subject to cancellation at any time prior to the issuance of patent, for fraud or illegality. That the same rule should be applied in Indian allotments as in the case of final entries will not be seriously disputed.

After a careful consideration of this matter, I am of the opinion, and so advise you, that the Secretary of the Interior has authority to investigate the validity of an Indian allotment at any time prior to the issue of the first patent provided for in the allotment act, and upon sufficient cause shown, to rescind the approval of the allotment and reject it.

Approved:

DAVID R. FRANCIS,

Secretary.

MINING CLAIM—NOTICE—POSTING.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 11, 1897.

REGISTERS AND RECEIVERS,

United States Land Offices.

GENTLEMEN: Your attention is directed to the fact that by decision rendered by the Department on February 27, 1897, in the case of W. H. Gowdy *et al.*, v. The Kismet Gold Mining Company, the decision rendered in said case on May 23, 1896, and reported in 22 L. D., 624,

was modified, and paragraph 29 of the Mining Regulations amended so as to read as follows:

29. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim; the mining district and county; whether or not the location is of record, and, if so, where the record may be found, giving the book and page thereof; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well defined place on the claim; the names of all adjoining and conflicting claims, or, if none exist, the notice should so state.

According to the last decision of the Department, the amendment of said paragraph will take effect on the first day of June, 1897, and all publications thereafter made must contain the information therein prescribed. All publications made or started prior to that date are to be treated in accordance with the practice of the Department existing prior to the original decision in the case of *W. H. Gowdy, et al., v. The Kismet Gold Mining Company*.

Said decision of February 27, 1897, will be found published in Vol. 24 of Land Decisions, page 191.

Very respectfully,

E. F. BEST,
Acting Commissioner.

Approved:

WM. H. SIMS,
Acting Secretary.

MISSISSIPPI LANDS—ACT OF FEBRUARY 17, 1897.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 22, 1897.

The REGISTER and the RECEIVER,
United States Land Office, Jackson, Mississippi.

SIRS: The act of Congress, approved February 17, 1897, provides as follows:

AN ACT to enable certain persons in the State of Mississippi to procure title to public lands.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all persons who, prior to January nineteenth, eighteen hundred and ninety-five, purchased in good faith from the State of Mississippi any lands within the six miles or granted limits of the Mobile and Ohio Railroad, and which lands were included in approved swamp-land list numbered seven, Augusta series, their heirs or assigns, shall have the preference right for one year from the passage of this act to enter under the homestead laws of the United States not exceeding one hundred and sixty acres of the lands so purchased by them from the State of Mississippi and to purchase not exceeding one hundred and sixty acres additional of such lands at one dollar and twenty-five cents per acre, or, if they

elect not to avail themselves of the homestead law, to purchase three hundred and twenty acres of such land: *Provided, however*, That this act shall not affect the rights of homestead claimants who, between the sixteenth day of February, eighteen hundred and ninety-five, and the twenty-seventh day of May, eighteen hundred and ninety-six, made settlements and entries or filed with the local land officers applications to enter in good faith, under the homestead laws, any of the lands included in the provisions of this act not occupied or actually and substantially improved by such purchasers from the State.

SEC. 2. That all persons who have legally purchased any of the lands aforesaid at tax sales shall be considered assigns within the meaning of this act.

Approved, February 17, 1897.

The act provides that persons who, prior to January 19, 1895, purchased in good faith from the State of Mississippi any of the lands in question, their heirs or assigns, shall have one year from the passage of the act within which to enter, under the homestead laws, not to exceed one hundred and sixty acres of land so purchased by them, and to purchase from the United States, one hundred and sixty acres additional at \$1.25 per acre; or, if they do not desire to make entry under the homestead laws, to purchase three hundred and twenty acres of said land. It also provides that such act shall not affect the rights of homestead claimants who, between February 16, 1895, and May 27, 1896, made settlements and entries or filed applications to enter in good faith, under the homestead laws, any of the lands included in the provisions of the act not occupied or actually and substantially improved by such purchasers from the State.

Section two provides that persons who have legally purchased any of said lands at tax sales shall be considered assigns within the meaning of this act.

All persons applying to enter either under the homestead law or to purchase any of such lands by virtue of their rights as purchasers from the State, must present to you satisfactory evidence that they were purchasers from the State prior to January 19, 1895, or are heirs or assigns of such purchasers.

All persons who have made homestead entries of any of said lands between the dates mentioned in the proviso to the first section of the act, or had filed applications in the local office to make such entries, are entitled to perfect their entries even as against the purchasers from the State unless the land entered or embraced in their application was occupied or actually and substantially improved by such purchasers from the State, but they must submit satisfactory evidence that no portion of the land embraced in their entry or application to enter was so occupied or actually and substantially improved by any purchaser from the State at the date of their entry or application.

If the purchaser from the State of any of the lands embraced within the provisions of this act do not apply to make entry under the homestead law, or to purchase said lands within one year from the passage of this act, such lands will be subject to settlement and entry under the homestead law as other portions of the public domain, and nothing

in this act will be so construed as to impair or affect the rights of any homestead settler upon said lands, but such subsequent right will be subject to the preference right of purchasers from the State for the period of one year.

Respectfully,

E. F. BEST,
Acting Commissioner.

Approved:

C. N. BLISS,
Secretary.

ABANDONED MILITARY RESERVATION—FORT CAMERON.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 22, 1897.

REGISTER AND RECEIVER,
Salt Lake City, Utah.

GENTLEMEN: The appraisers have appraised the lands in the Fort Cameron, post and wood and timber, abandoned military reservation at from ten cents to two dollars and fifty cents per acre.

The Secretary of the Interior has approved the appraisal of the lands appraised at or above \$1.25 per acre, and for lands appraised at less than \$1.25 per acre he has, under the law, fixed the minimum price of such lands at \$1.25 per acre. Therefore, no tract of land in this reservation can be disposed of at less than \$1.25 per acre, although you will be governed by the appraisal in disposing of those lands appraised at more than \$1.25 per acre.

All of said lands, except the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 14, the NE. $\frac{1}{4}$ Sec. 23 and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 24, T. 29 S., R 7 W., which contain buildings purchased by Mr. John R. Murdock from the government, and all school sections, reserved by law from settlement and entry, are subject to settlement under the provisions of the act of August 23, 1894 (28 Stat., 491), which, among other things, provides:

That persons who enter under the homestead law shall pay for such lands at not less than the value heretofore or hereafter determined by appraisement, *nor less than the price of the land at the time of the entry*, and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior.

On April 9, 1895 (20 L. D., 303), the Secretary of the Interior directed this office to issue instructions under said act of August 23, 1894, as follows:

That the homesteader be given the option in making payment upon his entry of these lands, of making his payments in five equal payments to date from the time of the acceptance of his proof tendered on his entry, and that the rate of the interest upon deferred payments be charged at the rate of 4 per cent per annum.

In allowing entries for lands in this reservation, under said law, you will in each case endorse on the application "Fort Cameron Reservation, act August 23, 1894," and make the same notation on your abstract of homestead entries.

Under the provisions of the homestead law, an entryman has the right either to commute his entry after fourteen months from date of settlement, or offer final proof under Sec. 2291 R. S. In entries under said act of August 23, 1894, he may, at his option, commute after fourteen months with full payment in cash, or, after submitting ordinary five year final proof and after its acceptance, he may pay for the land the full amount of the appraised value thereof or at not less than \$1.25 per acre, without interest, or he may make payment in five equal installments, the first payment to be made one year after the acceptance of his final proof, and the subsequent payments to be made annually thereafter, interest to be charged at the rate of four per cent per annum from the date of the acceptance of final proof until all payments are made.

In case the full amount is paid after fourteen months from date of settlement you will, if the proof is satisfactory, issue cash certificate and receipt; and in the event that regular final proof is made, and the full amount then paid, you will issue final certificate and receipt; but when partial payments are made the receiver will issue a receipt only for the amount of the principal and interest paid, reporting the same in a special column of the abstract of homestead receipts, and at the time last payment is made, you will issue the final papers as in ordinary homestead entries.

In issuing final papers you will make the proper annotations thereon, as well as on the applications and abstracts, as before directed, to show that the entry covers lands in Fort Cameron reservation.

You are further advised that the same rule, as to the allowance of credit for residence prior to entry and for military service, applies to entries under said act of August 23, 1894, as to other homestead entries.

Where, upon submitting final proofs the entrymen elect to make payment for the lands entered in five annual installments, you are authorized to make the usual charges for reducing the testimony to writing, but as the final certificate and receipt cannot be issued until the last payment is made you cannot charge the final commissions until said final certificate and receipt are issued.

Where the entrymen submit final proofs and elect to pay for the lands in installments, you will not give said proofs current numbers and dates but will, if they are acceptable to you, make proper notes on your records showing that satisfactory proof has been made and the dates upon which the partial payments must be made, and then transmit said proofs to this office, in special letters, and not in your monthly returns, for filing with the original entries.

There are no guarantees to be taken in order to secure payment of

the installments, but if, when each installment is due, any entryman fails to pay the same you will report the matter to this office when proper action will be taken in the case.

The said act of August 23, 1894, did not repeal the act of July 5, 1884 (23 Stat., 103), hence, parties qualified to make entry under the second section of the latter act may do so without making other payment than the legal fee and commissions.

Sections 2, 16, 32 and 36 of this reservation are reserved for school purposes.

On May 4, and August 5, 1895, you transmitted the applications of John R. Murdock to be permitted to purchase, under the third section of the said act of July 5, 1884, the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 13, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 24, S. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 14 and the NE. $\frac{1}{4}$ Sec. 23, T. 29 S., R. 7 W., subdivisions containing buildings purchased by him from the government.

Subsequently Mr. Murdock relinquished all claims to the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 13, and the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 14, T. 29 S., R. 7 W. It therefore appears that the subdivisions containing buildings and which Mr. Murdock is entitled to purchase are the following, viz: SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 14, the NE. $\frac{1}{4}$ Sec. 23, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 24, T. 29 S., R. 7 W.

You will advise Mr. Murdock that he will be allowed sixty days from notice hereof, within which to make application to purchase the last mentioned subdivisions, upon which the buildings are situated, and to pay therefor the appraised value where that is fixed at or more than \$1.25 per acre, and at the rate of \$1.25 per acre for the subdivisions appraised at less than \$1.25 per acre, and inform him that if he fails to make said purchase within the time specified the lands will become subject to homestead entry by the first legal applicant.

In case the application is made and the purchase money tendered you will issue cash certificate and receipt, modified to suit the case, making the following notation on the margins thereof: "Purchased under Sec. 3, act of July 5, 1884."

Issue notice to Mr. Murdock and in due time make report in accordance with circular of October 28, 1886 (5 L. D., 204).

You will acknowledge receipt of this letter.

Very respectfully,

E. F. BEST,
Acting Commissioner.

Approved March 22, 1897:

C. N. BLISS,

Secretary.

SETTLEMENT RIGHT—STATE SELECTION.

BENSON v. STATE OF IDAHO.

No rights are secured by a settlement made for the purpose of securing the timber on the land and not for the establishment of a home.

A State selection made prior to the official filing of the township plat is premature and invalid.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (R. W. H.)

On July 16, 1894, Elmer E. Benson made application to enter, under the homestead law, the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 8, and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ Sec. 9, Tp. 39 N., R. 2 E., Lewiston land district, Idaho. His application was rejected, on the ground that the State of Idaho had selected the land under its grant for the support and maintenance of an insane asylum, as provided by section 11 of the act of July 3, 1890, for the admission of the State of Idaho into the Union. (26 Stat., 215.)

On appeal to your office a hearing was ordered, which resulted in a recommendation by the local office that Benson's homestead application be allowed and the State selection canceled.

Upon the State's appeal from this decision of the local office, your office declined to allow said homestead application, for the reason that you were not satisfied from the testimony that—

Benson went upon the land honestly and in good faith for the purpose of actual settlement, and of honestly endeavoring to comply with all the requirements as to settlement, residence and cultivation necessary to acquire title under the homestead law, [being] of the opinion rather that his purpose from the first was speculative only, in that he intended to obtain the valuable timber upon the land by means of a homestead entry, without complying with the conditions of the homestead law.

This conclusion is supported by the facts as they appear in the record. Benson was an unmarried man. He first went upon the land, which was covered with valuable timber, about April 24, 1894, cleared about a quarter of an acre and laid eight small unhewn logs in square form as a foundation of a cabin. In the latter part of May, or early part of June following, he finished the cabin with logs of the same sort, and after that did nothing more upon the land up to the time of the hearing.

There is no disinterested testimony as to Benson's good faith, his only witnesses being his brother Orin L. Benson, and Mace E. Kent, both of whom had contests pending against the State's selection of neighboring tracts, and who depended, each upon the other, for evidence to support their claims.

Against this testimony the State produces two witnesses, Florence and Jordan, the former a public officer and the latter his assistant, who were employed by the State to make the selections under its grant

from Congress; and, inasmuch as the law (act of March 3, 1893,) provided that the preference right of selection for the period of sixty days, given therein to the States, "shall not accrue against bona fide homestead and pre-emption settlers on any of said lands at the date of filing of the plat of survey of any township in any local office of said States," it must be presumed, in the absence of evidence to the contrary, that the State's selecting agents used due diligence to discover evidences of settlement, and were careful to avoid the selection of occupied tracts.

Both Florence and Jordan, on behalf of the State, swear that they went over this land in May, 1894, and saw no indications of settlement or improvements alleged to have been made on the ground in April.

Upon weighing the testimony, I find that whatever settlement there was on the land was only a colorable one, and made to anticipate the filing of the map and the selection of the State, with a view to securing the valuable timber thereon, and not for a home.

In *Dobie v. Jameson* (19 L. D., 91), *Little v. Durant* (3 L. D., 74), *McWeeney v. Greene* (9 L. D., 38), and many other cases, it is held that "the acts of settlement upon unsurveyed land must be of such a character, and so open and notorious, that the public generally may have notice of the settlers' claims." The rule as laid down in *Wright v. Laïson* (7 L. D., 555), applies as well to this case as to entries under the act of June 3, 1878. It is that "a settlement for the purpose of securing the timber on the land, or for any other purpose than establishing a home, is not a *bona fide* settlement within the meaning of said act."

Your decision declining to allow Benson's homestead application is therefore affirmed.

Among the specifications of error in the claimant's appeal is the following:

The Hon. Commissioner erred in not holding and deciding that the selection by the State of Idaho, embracing the land in controversy, was prematurely made, and, as such, was and is absolutely void.

It appears from the record that the plat of township 39, range 2 E., B. M., was received at the local office at Lewiston, on May 4, 1894, and that George B. Florence, State selecting agent for Idaho, selected the land in controversy on June 30, 1894, for the insane asylum (List No. 3), under the grant contained in section 11 of the act of July 3, 1890 (26 U. S. Stat., 215), providing for the admission of Idaho as a State into the Union. The plat, however, was not officially filed in the local office until July 2, 1894. Prior to this date, under rules established by the Department, the land embraced in said approved plat was not subject to entry or selection (4 L. D., 202).

In *Campbell v. Jackson* (17 L. D., 417), it is held—

That an application to enter land, which is not subject to entry at the time the application is made, confers no rights upon the applicant. This was held in *Goodale*

v. Olney (13 L. D., 498), and in *Maggie Laird*, on page 502 of the same volume. . . . The same rule would prevail in the case of a selection by a State, and it must be made to appear, that at the time the State applied to select the land, it was subject to such selection. Otherwise, no rights would be secured by the application.

In *Lansdale v. Daniels* (100 U. S., 113), Mr. Justice Clifford said:

Beyond doubt the declaratory statement was a nullity, as it was filed at a time when the act of Congress gave it no effect. The fact that it remained in the local office will not remove the difficulty, as it was made and filed without authority of law.

The Department makes no distinction between entries by individuals and selections by States or corporations under Congressional grants, as to the time when their rights, respectively, attach, unless the language of the grant itself makes an exception to the general rule, as stated above, which is not claimed in the present case.

The State selection of the land in question, made June 30, 1894, prior to the official filing of the township plat on July 2, 1894, was therefore premature and invalid. (*William Herth*, 22 L. D., 385.)

No right, however, accrues to Benson, because his settlement was not bona fide and his application was speculative.

The land in question is still a part of "the surveyed, unreserved and unappropriated public lands of the United States within the limits of the State," and subject to selection by the State under the direction of the Secretary of the Interior, as provided in section 14 of the act of July 3, 1890, provided that, at the time of exercising its right, the land is not occupied by a bona fide homestead settler or reserved under any other law for the disposal of the public lands.

PRACTICE—ORDER FOR HEARING—RAILROAD GRANT.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RY. CO. *v.* McCLAINE.

An order for a hearing issued by the General Land Office, on the appeal of an applicant from the rejection of his application to enter, operates as a disposition of said appeal, and its want of regularity is thereafter not material.

Land not protected by withdrawal and embraced within a bona fide settlement claim is not subject to indemnity selection.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (W. M. W.)

The case of the St. Louis, Iron Mountain and Southern Railway Company *v.* John H. McClaine has been considered, on the appeal of the former from your office decision of November 9, 1895, holding for cancellation its list of selection as to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 17, T. 22 N., R. 3 E., Ironton, Missouri, land district.

The land in question is within the indemnity limits of the grant to the Cairo and Fulton Railroad Company, now the St. Louis, Iron Mountain and Southern Railway Company by the act of July 22, 1866 (14 Stat., 338), and was selected by the company July 12, 1894, per list No. 1.

The withdrawal made in favor of said road was revoked August 15, 1887. See circular, 6 L. D., 131, 133.

The records of your office show that, on June 6, 1869, one Gish made homestead entry for the NW. $\frac{1}{4}$ of Sec. 17, T. 22 N., R. 3 E., which was canceled October 7, 1876; that on October 14, 1878, Austin Fuller made homestead entry for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section, which was canceled on May 5, 1886; that on December 26, 1885, Andrew Inman made homestead entry for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, which was canceled May 26, 1893.

On August 3, 1894, John H. McClaine filed in the local office his application to make homestead entry of the tract in controversy, which application was rejected for conflict with the selection made by the railroad company.

McClaine appealed to your office.

On June 20, 1895, your office considered McClaine's appeal, and found that he based it on the ground that he made *bona fide* settlement upon this land May 28, 1894, with the intention of entering it under the homestead laws; that on the same date

he applied at the local office of the clerk of the court of Ripley county, for the purpose of making application to homestead this tract, but owing to his not being familiar with the description of the land, he made out his application papers in blank, and left them with the clerk until the proper description could be furnished, and feeling secure in his position as possessor in fact, he deferred perfecting his application until August 1, 1894; that his improvements consisted of a dwelling house, 19 by 25 feet, and about twenty acres cleared and in cultivation,

and that his improvements were made before the company's selection and were worth about \$1,050.

On this showing your office directed a hearing, after due notice to the parties in interest, to establish the exact condition of the land at the date of its selection by the railroad company.

On September 6, 1895, the hearing was had, after due notice to each of the parties. Both parties appeared by attorneys at the hearing.

The evidence submitted at the hearing on the part of McClaine shows, without conflict, that about October 1, 1893, McClaine and his wife moved on this land; that at that time there were improvements on the land, consisting of a log house and two stables; afterwards, McClaine built a one-room log house, a frame smoke house, dug two cisterns and made rails to fence a portion of the land; that on July 1, 1894, McClaine had some of the land in cultivation; that McClaine's residence on the tract has been continuous since October, 1893. The county clerk of Ripley county, Missouri, testified that on May 28, 1894, McClaine went to his office to make out his homestead application papers, for land embraced in Sec. 17, T. 22 N., R. 3 E., but was in doubt as to the correct description of the land on which he settled, so he (the clerk) filled out the blanks, except the description of the tract, and McClaine signed the papers and left them and the necessary fees

with the clerk; after that, and before August 1, 1894, McClaine ascertained the correct description of the tract he intended to enter, and went to the clerk's office to get his application papers, and thereupon, at the suggestion of the clerk, executed a new application to enter, dated August 1, and filed August 3, 1894.

The railroad company did not introduce any evidence.

The register and receiver made no decision, but transmitted the evidence and record to your office, and, in view of the somewhat irregular proceedings in the case, you exercised your supervisory authority and passed upon the whole record as it was presented.

On September 24, 1895, resident counsel for the railroad company filed a motion in your office to dismiss the appeal of McClaine from the action of the local officers of August 3, 1894, rejecting his application. Said motion was based upon the ground that the appeal was not served upon nor any notice thereof given to the railroad company.

Upon consideration of the case on the merits, your office set aside the action of the local officers in rejecting McClaine's application,

as being contrary to the facts and merits of the case, and, under this showing, I will hold that it is immaterial whether a notice of said appeal was served upon the railroad, or whether he had filed any appeal.

Your office further found that

McClaine had a *bona fide* settlement and residence upon the land prior to its selection by said railroad company, and also that he endeavored to make homestead entry for the tract May 28, 1894.

In its appeal, the company alleges error in your office decision on five grounds, all of which may practically be considered under two general heads: 1. Did your office err in its action on the company's motion to dismiss McClaine's appeal? 2. Was the finding of your office erroneous in holding that McClaine's settlement and improvement on the land were sufficient to defeat the railroad company's selection? Each of these must be answered in the negative.

Your office evidently treated McClaine's appeal as an application for a hearing, and as such found it was sufficient to justify an investigation. The matter of ordering a hearing was discretionary with you. *Reeves v. Emblen*, 8 L. D., 444; *Ulitalo v. Kline et al.*, 9 L. D., 377.

The action of your office in ordering the hearing has not been questioned by the company. It is clear that your office had authority to make the order for an investigation without notice to the railroad company. When that action was taken it disposed of the appeal; the case was not pending on said appeal at the time the motion to dismiss it was filed, nor when it was decided on the merits. When the hearing was ordered, in a legal sense, the whole case was sent back to the local officers for disposition *de novo* by them in the light of such evidence as might be adduced by the parties.

At the time your office decided the case on its merits, the case was pending on the report of the register and receiver and the evidence

taken at the trial. The irregular manner in which the case on its merits reached your office can not be held to revive the original appeal, in fact it had nothing to do with it.

The motion to dismiss clearly related to an immaterial matter.

From a careful examination of the evidence, the conclusions reached by your office are concurred in.

PRACTICE—NOTICE OF APPEAL—BURDEN OF PROOF.

MAJORS v. RINDA.

Rule 105 of Practice, providing for the service of notices upon attorneys, is one of convenience, and not of exclusive right; hence an appeal is not defective in the matter of notice, if the service is made upon the appellee, and not upon his attorney.

The local officers, after due notice given, may inspect the premises in dispute, and use the information thus obtained as an aid to the proper understanding and valuation of the evidence adduced at the hearing.

The burden of proof is properly upon one alleging the mineral character of a tract that has, prior thereto, been adjudged agricultural.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 24, 1897. (E. B., Jr.)

This is an appeal from the decision of your office dated September 25, 1896, in a proceeding wherein Alexander Majors appears as contestant against the homestead entry of Venzel C. Rinda, made January 21, 1895, for the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 13, T. 10 N., R. 4 W., Helena, Montana, land district, the grounds of Majors' contest, as set out in his corroborated affidavit thereof, filed February 27, 1895, being that the land is more valuable for the gold it contains than for agriculture, and that he claims the same under placer locations made December 3, 1894. The decision of your office was in affirmance of the decision of the local office dated May 26, 1896, after hearing duly had June 17 to 29, 1895, and held the land to be agricultural and not mineral in character and dismissed the contest.

Mr. George B. Foote, attorney for Rinda, has filed a motion to dismiss the appeal on the ground that the same was not served upon him (Foote) as required by the Rules of Practice, citing Rules 86, 104, and 105.

The rules are cited as follows:

RULE 86. Notice of an appeal from the Commissioner's decision must be filed in the General Land Office and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision.

RULE 104. In all cases, contested or ex parte, where the parties in interest are represented by attorneys, such attorneys will be recognized as fully controlling the cases of their respective clients.

RULE 105. All notices will be served upon the attorneys of record.

It appears from the record that notice of your office decision was mailed to Majors' attorney on October 2, 1896, and that on December 10, 1896, within the seventy days allowed in such case (Rule 87), Majors, by his attorney, filed an appeal, a copy of which was received by Rinda, himself, the same day, having been mailed to him the day preceding. It does not appear that any direct notice of appeal was given Rinda's attorney. None was necessary in view of the notice to Rinda (*New Orleans Canal and Banking Co. v. State of Louisiana*, 5 L. D., 479; and *Northern Pacific R. R. Co. v. Bass*, 14 L. D., 443). Rule 86 is specific and controlling as to the person to whom the notice may be given. Rules 104 and 105, under the subhead "Attorneys," were intended to give due recognition to attorneys practicing before the land department, in their representative capacity, but not to operate in any way to accord to them standing or authority there superior to that of their clients, nor divest the latter of the right to recognition and supreme control in litigation. Rule 105 is one of convenience and not of exclusive right. The motion is accordingly denied.

Of the numerous errors assigned in the appeal, only three require any consideration:

1. Error to hold that the burden of proof is upon the plaintiff.
2. Error not to find that the local officers ignored the weight of the evidence and rested their conclusion as to the character of the land upon alleged tests made in their presence upon the land and by partisans of the defendant procured by him for the purpose and upon unsworn testimony there received by the local office and error not to reverse their decision because thereof.
3. Error not to find that the land is shown to be mineral in character as a present fact and more valuable for mining purposes than for agricultural purposes.

The land above described has been the subject of litigation before the land department for several years. It is within the granted limits of the Northern Pacific Railroad Company, and adjoins the city of Helena, Montana, on the north. Application having been made on July 29, 1881, by Karl Kleinschmidt and others to make mineral entry for the land, the said company and Rinda filed protests against the same, alleging the land to be agricultural. Upon the testimony submitted at a hearing in June, 1888, at which the mineral applicants made default, the local office decided the land to be non-mineral. Your office affirmed the decision of the local office, and on May 24, 1889, canceled said mineral application. A second hearing involving the land was had in July, 1889, at which Rinda, said company and Majors were parties, the company claiming under its grant and Rinda and Majors as applicants to make homestead entry therefor. The history of this second case is given in *Rinda v. Northern Pacific R. R. Co. et al.* (19 L. D., 184). The right of entry was awarded by the Department to Rinda, as against Majors, by virtue of his successful contest against the mineral application of Kleinschmidt *et al.* and of his prior homestead application, it being held that, despite his prior settlement, Majors, who had previously made and relinquished a homestead entry

for another tract, could not make a second entry under the act of March 2, 1889 (25 Stat., 854), in the presence of Rinda's adverse claim. Rinda's entry above mentioned, now under attack by Majors, was made pursuant to this decision.

The decisions of the local office and your office in the first contest involving this land and the entry of Rinda pursuant to the decision of the Department, were beyond question abundantly effective to bestow upon this land a strongly agricultural status, and to place upon anyone thereafter asserting its character to be mineral, the burden of proof. The onus was therefore rightly placed upon Majors.

I am unable to discover from a very careful examination of the record before me any evidence of irregularity, or of undue or improper influence by or in behalf of the defendant, in or in connection with the visit of the local officers, July 17, 1895, to the land, and their personal examination thereof. Their visit and examination were in pursuance of motion and notice duly made and given, and it does not appear that the information thus gathered by them was used by them otherwise than as an aid to the proper understanding and valuation of the evidence adduced at the hearing, nor that they substituted in any extent their personal knowledge of the character of the land for such evidence. The second assignment of error is not therefore well founded.

The testimony taken at the hearing is very voluminous, and, as to the character of the land, very conflicting. At both previous hearings hereinbefore mentioned Majors testified very positively that the land was non-mineral in character. He had resided upon the land since about April, 1882, he stated, and had had experience as a miner and had prospected it and was satisfied that it was not worth anything for mining purposes. He testified at the hearing in the case at bar that when he learned that the Department had awarded the land to Rinda he went ahead and prospected it, and in the latter part of November, 1894, discovered gold, and on December 3, following, located one-half of the land as a placer claim for himself and the other half for his wife. Certified copies of these locations covering the entire forty acres are on file—the location for the north twenty acres made in the name of said Majors and for the south twenty in the name of his wife.

It is not necessary to discuss the testimony as to the character of this land at any length. It has been very carefully read and considered. The land has been quite thoroughly prospected. According to the testimony for Majors, gold, ranging from minute particles to nuggets as large as a pea, is quite evenly distributed throughout the entire soil (which is gravelly, with some boulders), from the grass roots down to an unknown depth; and will pay from about two to six dollars per day per man, with the use of water which can be readily obtained at reasonable cost; and the land is of but very little value for agriculture. Rinda's witnesses testify that from extensive and careful

examinations of ground taken from the same shafts, holes, and points on the surface, from which Majors and his witnesses obtained the ground they tested, they (the former) could only get, at the best, a few scant colors of gold and very often nothing at all; that the mineral product of the land would not, at the utmost, amount to more than a few cents per day per man with plenty of water and improved processes; and that by the reasonable use of water and fertilizers the land is far more valuable for agriculture than for mining. Nearly all of the witnesses for the respective parties testified that they were experienced miners. The local officers who saw and heard the witnesses evidently gave more credence to those of the entryman, Rinda, and, I am constrained to believe, properly so, from my reading of the testimony.

The burden of proof has not been successfully carried by Majors, and his contest must therefore fail. I find no warrant to disturb the decision of your office, and the same is accordingly affirmed.

PRACTICE—RECONSIDERATION OF CASE—TIMBER CULTURE
APPLICATION.

NORTHERN PACIFIC R. R. CO. *v.* COFFMAN ET AL.

Prior to the issuance of patent, the land department may re-open a case, to correct an error in the decision thereof, and readjudicate the same, after due notice to the parties.

The right secured by a timber culture application, erroneously rejected and pending on appeal, may be exercised by the heir of the applicant.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (A. B. P.)

This case involves the SE. $\frac{1}{4}$ of Sec. 19, T. 15 N., R. 42 E., Walla Walla, Washington.

The land was within the limits of the executive withdrawal on amended map of general route filed by the Northern Pacific Railroad Company February 2, 1872, and fell within the indemnity limits of said company's grant on map of definite location of its road filed November 17, 1880.

It appears that Thomas H. Coffman made timber culture application for the tract in June, 1883, but the same was rejected by the local officers because of conflict with the said withdrawal of 1872. Coffman appealed.

On March 20, 1884, the company selected the land for indemnity purposes under its grant.

The appeal of Coffman was considered by your office on October 2, 1888, and the decision below was reversed. Upon the company's appeal to this Department, your office decision was, on August 8, 1894, affirmed. Coffman was thereupon allowed thirty days after notice within which to make timber culture entry for the land, in which event

it was directed that the company's selection should be canceled, but otherwise, his application would be finally rejected and the company's selection allowed to stand.

On June 10, 1895, the local officers reported that notice had been given as directed, by letter addressed to Coffman at Colfax, Washington, but the letter had been returned uncalled for. Upon this report your office, on June 26, 1895, finally rejected Coffman's application and closed the case.

It further appears that on July 8, 1895, Maud A. Coffman filed in the local office her affidavit, dated May 13, 1895, at Bexar county, Texas, setting forth that she is the only child of Thomas Coffman, deceased; that said Thomas Coffman never exercised his right to make timber culture entry; and that at the date of his timber culture application for the land in question, he was qualified to make such an entry. She at the same time tendered the necessary fees, and formally applied to be allowed to complete the timber culture filing of her father.

The affidavit and application were at once forwarded by the local officers, and upon examination thereof your office, on August 3, 1895, re-opened the case for further consideration, and returned the application papers to the local officers for appropriate action, with directions that Miss Coffman be advised thereof, and allowed thirty days within which to make entry for the land in accordance with the provisions of the timber culture law (20 Stat., 113), if found qualified and entitled to do so, in which event it was further directed that the company's selection of the land be canceled.

From this action by your office the railroad company has appealed.

By the errors assigned in this appeal it is, in effect, asserted:

1. That having finally rejected the application of Thomas H. Coffman, on June 20, 1895, your office was without authority thereafter to reopen the case in the absence of any motion for rehearing by either party;

2. That Thomas H. Coffman having failed to make entry during his life, it was error to allow his daughter to complete his timber culture application by entry after his death, under the timber culture act; and

3. That in the absence of notice to the company, your office was without authority to consider, in any manner, the application of Maud A. Coffman.

The point raised by the first assignment is, in my judgment, wholly untenable. While it is true that the case was formally closed, as stated, and the company so notified by your office, it does not follow that the Land Department thereby lost jurisdiction of the land involved, prior to patent to the company, so as to absolutely preclude a reopening of the case of its own motion, or upon application of any party interested, in the event it should subsequently appear that the action in closing the case was probably premature, or otherwise erroneous in any respect. Of course it would be improper to re-open, and

proceed with the re-adjudication of a case without notice, but such does not seem to have been done or attempted in this case. The records of your office show that the attorneys of the appellant company were advised by letter the very day the action complained of was taken, not that the application of Miss Coffman had been allowed, but that the case had been that day "re-opened, with a view to the allowance of" said application, the letter closing with the statement: "You will take due notice hereof." This notice gave the company abundant opportunity to reappear and do whatever was necessary to protect its interests in the premises.

Nor is there, in my judgment, any merit in the third assignment of error. The simple act of re-opening the case was in no sense a re-adjudication of any question involved in it, and from the very nature of the proceeding, could not be. Notice of that act was duly given, and the company was thereby afforded every opportunity of defending the newly presented application that it could have had, if it had been notified before the case was reopened. There has been, as yet, no final action in the case in favor of Miss Coffman. She appears to have been allowed by the local officers to make timber culture entry for the land, on September 11, 1895, and the entry papers were forwarded to your office, and are filed in this record (though not properly a part thereof), but there has been no action thereon by your office. The company has still the right, and will be allowed to appear and protect its interests in the premises, by interposing such defense as it may wish. While, therefore, it would have been the better practice, upon the receipt of the application of Miss Coffman, to have notified the company to show cause, if any it could, why the case should not be re-opened for the consideration of that application, yet I do not think the failure to do so, was, under the circumstances of this case, reversible error. As the company still has opportunity to make any defense not now properly presented by its said appeal, I do not see that any good could be accomplished by sustaining its appeal in this particular even were it otherwise proper to do so.

The second assignment of error goes to the merits of the controversy as far as they can be determined at this stage of the proceeding. It involves a denial of the right of Maud A. Coffman, as the legal heir of Thomas H. Coffman (if indeed she is such) to complete the latter's application or filing by entry under the timber culture law. The facts on this point are that Thomas H. Coffman while in life, did everything he could do toward perfecting his entry. He filed his application to enter as early as June, 1883, and tendered the necessary fees, as shown, but the same was rejected for the reasons stated, which action was afterwards held to be erroneous by this Department. But for this erroneous action his entry would have been allowed and in all probability, before this time, passed to patent. Thus by the erroneous action of the local office he was prevented from making any further

compliance with the timber culture law, and was compelled to await the final adjudication of his rights upon his appeal, which he did, and although his appeal was filed in 1883, it was not acted upon until 1888, a seemingly unreasonable delay, due to no fault of his. By his affidavit filed in this case October 27, 1887, it appears that at that date he had erected two miles of fence on the land (presumably enclosing it) at a cost of \$320. He also, at the same time, filed a renewal of his application to enter the land, but no action appears to have been taken thereon.

Can his heir now complete his entry, and by further compliance with the law thereunder save the land and the improvements thereon?

In the case of *Southern Pacific Railroad Company v. Sturm* (2 L. D., 546), which arose under the timber culture law, and was in some respects similar to this case, Secretary Teller held:

Although Sturm did not actually make an entry of the tract, he nevertheless applied in good faith so to do and tendered the requisite fees. . . . And just as there is no difference in principle between a case where the filing was recorded and one where the filing was offered and rejected, neither is there any difference in such a case as this, so far as the applicant's rights are concerned, for they inure to the benefit of the heirs. That the tract was subject to his entry cannot, in the light of the aforesaid state of facts, be questioned. His right to enter the tract was not prejudiced by the register and receiver's denial of his application. See *Duffy v. Northern Pacific Railroad Company* (2 Copp, 51), and *Shepley et al. v. Cowan et al.* (91 U. S., 330).

But inasmuch as he was prevented by death from perfecting his application, entry will be allowed in proper form in the name of his heirs, provided the same is made within ninety days from receipt of notice hereof.

The principle announced in that case has been followed by the Department in a number of cases. In *Tobias Beckner* (6 L. D., 134-7) it was said:

The broad underlying principle that controls the question is—that when a person initiates any right in compliance with, and by authority of the public land laws, and dies before completing or perfecting that right, it will not escheat and revert to the government, but inure to those on whom the law and natural justice cast a man's property, and the fruits of his labor after his death.

See also the case of *Rosenburg v. Hale's Heirs* (9 L. D., 161); *O'Connor v. Hall et al.* (13 L. D., 34); *Thompson v. Ogden* (14 L. D., 65); *Bellamy v. Cox* (24 L. D., 181).

In the present case the right of entry was lawfully initiated by Thomas H. Coffman by the filing of his application and the tender by him of the requisite fees; and he appears to have done all he could to perfect his entry while in life. The land was undoubtedly subject to entry when his application was presented; and, therefore, the right initiated by him could not be prejudiced by the action of the local officers in rejecting his claim.

Under the authorities cited, I am of the opinion that upon his death the right thus initiated, though uncompleted, inured to his heirs, and that they should be allowed to perfect the right by entry under the

timber culture law. The application of Maud A. Coffman, as such heir, however, is not before me for action on this appeal, and no question relative to that application as allowed by the local officers is intended to be decided. All that is now decided is that the lawful heir or heirs, if any, of Thomas H. Coffman should be allowed to perfect the entry initiated by him. Whether Maud A. Coffman has properly shown herself to be such heir is not a question now before me. Upon that question the company will be allowed ample opportunity of proper defense.

In view of the foregoing, I find no error in the decision appealed from, and the same is therefore affirmed.

LAND RESERVED FROM ENTRY—APPLICATION.

LOWELL D. TETER.

Lands embraced within a departmental order directing their reservation until further instructions are not subject to entry during the pendency of said order.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (C. J. G.)

I have considered the appeal of Lowell D. Teter from your office decision of March 29, 1895, wherein is affirmed the action of the local office in rejecting his homestead application for the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 13, T. 17 N., R. 2 E., Guthrie land district, Oklahoma.

The said application was rejected

for the reason that the schedule of lands opened to settlement by the President's proclamation dated September 18, 1891, on September 22, 1891, does not show tract described to be open to entry.

The record shows that the land in question was embraced in allotment No. 104, made to Sydney, an Iowa Indian. The said allotment was approved by the Department and patent regularly issued therefor. Subsequently, under the provisions of the act of October 19, 1888 (25 Stat., 612), the said Indian relinquished said land to the United States, and the patent therefor was canceled. At the same time your office was "directed to reserve the lands thus relinquished until further instructions concerning the disposition of them."

If there were any question as to the proper disposition of the land embraced in this allotment after its relinquishment by the allottee and the cancellation of the patent, or from whatever cause, the Secretary of the Interior undoubtedly possessed the power and authority to hold said land in reservation subject to future instructions. In the case of *Wolsey v. Chapman* (101 U. S., 755) the supreme court held that the act or order of the head of a Department, within the scope of his power or authority, is in contemplation of law, the act or order of the President.

So long, therefore, as the instructions referred to remain unrevoked,

the land in question is not subject to entry. Accordingly the action of your office in rejecting the appellant's application to enter said land was entirely proper.

Your said office decision is hereby affirmed.

INDIAN LANDS—PATENT—ACT OF JANUARY 26, 1895.

HARDY v. McCLELLAN ET AL.

The patents issued on Indian allotments in the Cherokee Outlet were not conditional, but conveyed a fee simple title, and the Department is consequently without jurisdiction over the lands covered by said patents.

The act of January 26, 1895, authorizing the Secretary of the Interior to cancel patents issued on Indian allotments, for the correction of mistakes therein, is limited in its operation to a specified class of trust patents, and is not applicable to a patent that conveys a title in fee simple.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (E. M. R.)

This case involves the SE. $\frac{1}{4}$ of Sec. 23, T. 27 N., R. 1 W., Perry, Oklahoma.

The record shows that this tract of land is covered by Cherokee Indian allotments Nos. 56 and 57, made on behalf of John F. McClellan and Mary E. McClellan, and were approved by the Department on September 8, 1893, and patents issued thereunder on November 18, 1893.

June 17, 1895, Noah Hardy made homestead application for the above described land, which was rejected by the local officers on account of the allotments made to the McClellans.

An appeal having been taken, your office decision of August 27, 1895, was rendered, affirming the action of the local office, from which decision Hardy appeals to the Department, alleging—

that the said appellees obtained this land fraudulently by allotment wherein the agreement between the United States and the Cherokee Indians providing for allotments were not complied with by these appellees. That this land so allotted is not now nor never was used for farm purposes and that they have not now and never had any valuable farm improvements, that these appellees had not lived in that part of the territory and at the time provided by the proclamation and the law governing these allotments. That they did not conform to the wishes and requirements of the association of settlers on the Cherokee strip and that these appellees were not entitled under the law to these allotments. That patents were erroneously issued by the United States to these appellees for this land—

wherefore the appellant asks that the patents be canceled.

There is contained in the record the affidavits of James W. Hamilton and A. J. Blackwell—that of the former being as follows:

Personally appeared before a notary public came James W. Hamilton who upon his oath says that he is acquainted with, and has been since about 1872, the tract now known as John F. McClellan and Mary E. McClellan allotments, viz. The south-east quarter, section 23, town. 27 range one west of the I. M. and knows that there

never was any sign of any permanent and valuable farm improvements of any kind or description ever made upon said land by any Indian or any other person prior to 1891, and that there was never any improvements of farm nature, made upon any lands adjoining or in the vicinity of said land by Charles M. McClellan or the allottees of said land. That he has for several years known that the home of the allottees and Charles M. McClellan and family was in the Indian Territory east of the 96° but that said Charles M. McClellan had at one time a cattle ranch upon the eastern portion of the strip or triangle part of the Cherokee outlet.

In the affidavit of Blackwell the only material portion sets forth that the McClellan allotments had originally been located about six miles east of where they are now located, but that one Owens, whom he alleges had a contract with Charles McClellan, succeeded in having them located adjacent to the townsite of Blackwell.

By the act of Congress of March 3, 1893, 27 Stat., 612, page 641, in speaking of the Cherokee outlet, after reciting that a commission had been appointed to enter into an agreement with these Indians, it is stated that—

said agreement is fully set forth in the message of the President of the United States, communicating the same to congress, known as executive document numbered fifty-six, of the first session of the Fifty-second Congress, the lands referred to being commonly known and called the "Cherokee Outlet;" and said agreement is hereby ratified by the Congress of the United States.

Article five of that agreement, as found on page 18 of said document, is as follows:

Fifth. That any citizen of the Cherokee nation who, prior to the first day of November, 1891, was a bona fide resident upon and further had, as a farmer and for farming purposes, made permanent and valuable improvements upon any part of the land herein ceded and who has not disposed of the same, but desires to occupy the particular lands so improved as a homestead and for farming purposes, shall have the right to select one-eighth of a section of land, to conform, however, to the United States surveys; such selection to embrace, as far as the above limitation will admit, such improvements. The wife and children of any such citizen shall have the same right to selection that is above given to the citizen, and they shall have the preference in making selections to take any lands improved by the husband and father that he can not take until all of his improved land shall be taken.

That any citizen of the Cherokee nation not a resident within the land herein ceded, who, prior to the first day of November, 1891, had for farming purposes made valuable and permanent improvements upon any of the land herein ceded, shall have the right to select one-eighth of a section of land to conform to the United States surveys; such selection to embrace, as far as the above limitation will admit, such improvements.

In the agreement made for the cession of the Cherokee outlet it is provided that—

It is further agreed and understood that the number of such allotments shall not exceed seventy (70) in number and the land allotted shall not exceed five thousand and six hundred (5,600) acres; that such allotments shall be made and confirmed under such rules and regulations as shall be prescribed by the Secretary of the Interior, and when so made and confirmed shall be conveyed to the allottees, respectively, by the United States in fee simple.

In other words, that the patent given should convey absolutely the

title of the government. And in fact the patents issued under this agreement were unconditional and conveyed a fee simple title.

The act of January 26, 1895 (28 Stat., 641), is as follows:

That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian and for which a conditional patent may have been issued, to rectify and correct such mistake and cancel any patent which may have been erroneously and wrongfully issued, whenever in his opinion the same ought to be canceled for error in the issue thereof, or for the best interests of the Indian, and, if possession of the original patent can not be obtained, such cancellation shall be effective if made upon the records of the General Land Office; and no proclamation shall be necessary to open the lands so allotted to settlement.

The question presented for determination is: Do the facts set forth present such a case as comes within the purview of that act?

In the first portion of the act it is said: "That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made," that the Secretary of the Interior would have the authority to cancel such patent.

But there has been no double allotment in this case; and whilst the rest of the language in the statute is broader, it will be construed as a whole, and the same general language following thereafter will, if possible, be construed as carrying out the object first set forth.

It is further noted that the act apparently contemplates the canceling of patents only where the patent itself is a "conditional patent." For, after speaking of errors that might be corrected by the Secretary, it is said—

Said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian and for which a conditional patent may have been issued, to rectify and correct such mistake and cancel any patent.

I am therefore of opinion that the case presented is one which does not fall within the purview of the act, and the patent issued to the tracts in controversy not being a conditional one, the Department is ousted of jurisdiction.

The decision appealed from is therefore affirmed.

TIMBER CULTURE ENTRY—EQUITABLE ACTION.

CARTER v. DAVIDSON.

Where the notice of the expiration of the statutory life of a timber culture entry is not given in accordance with the address furnished in the entry papers, and the entry is thereafter canceled for failure to submit final proof within the statutory period, such entry should be reinstated; and equitable action thereon will not be defeated by the intervening entry of another, if good faith is manifest, and the final proof shows due compliance with the law in all respects except in the matter of submitting proof within the statutory period.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (R. W. H.)

It appears from the record in this case that Arthur M. Davidson made timber culture entry No. 2736 for the SW. $\frac{1}{4}$, Sec. 9, T. 6 N., R. 42 W., McCook land district, Nebraska June 27, 1879; that October 10, 1894, the local office reported the entry for cancellation on account of the expiration of the statutory period without proof; and said entry was canceled by your office October 25, 1894, for this cause; that, March 31, 1895, John D. Carter made homestead entry No. 10961 for the tract; that, May 1, 1895, Davidson made final proof showing the cultivation and planting of ten acres, there being at that date five hundred trees to the acre, and one hundred acres in cultivation.

Supplemental testimony was submitted by Davidson and his witnesses to the effect that his entry was made in good faith; that it had always been his impression that he was entitled to sixteen years within which to make proof, having learned the contrary only two weeks since; that he never received notice of the expiration of the statutory period, which he would have done had the same been addressed to the post office nearest the land, viz: Earl, six miles distant, whereas they were sent to Elwood, sixteen miles away, in a different county, and to Homer-ville, which was discontinued as a post office long before the notice was sent.

Davidson further alleges that he had made arrangements for making proof August 1, 1894, but on July 15, 1894, having been thrown from a wagon, received such serious injuries that he was confined to the house until November, 1894, and thus prevented during the winter from going to the land office, and will be a cripple for life. He states that about March 30, 1895, he was approached by a man, since learned to be John D. Carter, who made inquiries regarding his timber culture claim, and has since made entry therefor. Further that he has been obliged by reason of crop failures and other misfortunes to mortgage his homestead claim, and if his timber culture proof is rejected, he will be deprived of long years of toil. He therefore prayed for the reinstatement of his entry, acceptance of his proof, and cancellation of the entry of Carter.

A physician's certificate dated May 5, 1895, sets forth the fact of Davidson's accident and its consequences, from which, it states, he will never entirely recover.

In transmitting these papers the local officers report that, not being informed of the address of Davidson, the offices to which notices were addressed were taken from an old map on which the county lines were not well defined; and the fact that the land was in Frontier county was not observed until their attention was called thereto at the time of proof. The local office found the proof satisfactory, and also that the failure to submit the same within the statutory period, was due, to his ignorance of the law and that he is equitably entitled to the land.

The time within which Davidson should have made proof expired June 27, 1892. Your office held that the notices addressed to Davidson at Elwood (which were returned unclaimed) not having been sent to "Frontier county," the place of his residence as stated in the entry papers, nor any known address of the claimant, cannot be considered the notice required by law.

In view whereof the cancellation of Davidson's entry was found irregular and void. It was ordered that Carter, the adverse claimant, be notified, and that thirty days be granted him to show cause why his homestead entry No. 10961 should not be canceled, and the timber culture entry of Davidson be reinstated.

July 19, 1895, the affidavit of Carter, uncorroborated, made July 1, 1895, was forwarded to your office, in which he stated his grounds of complaint and asked for a hearing to sustain them, unless deemed sufficient as presented. Your office held that Carter's application did not present sufficient grounds for a hearing, and it was denied.

He then moved for a review of your decision, which resulted in its modification in several non-essential respects, but you adhered to your "former ruling that Davidson, having given 'Frontier county' as his residence, without further specifying his address, he was entitled to notice mailed to 'Frontier county,' or to the post office in Frontier county nearest the claim."

In connection with your decision on this point you state that,

It seems from the statements made by the register and receiver that notice would have been sent to some post office in Frontier county, but for the mistaken idea that Davidson's claim was in Gosper county, into which county the notices were sent.

Carter's motion for review was accordingly denied, and he appeals from both of your said decisions, alleging that it was:

(1) Error to accept the *ex parte* statements of Davidson as a basis for the restoration of a canceled entry, an adverse right having attached, without first calling a hearing in which all parties could be heard.

(2) It was error on the part of the Commissioner to refuse him a hearing when applied for under oath, and under the showing made.

(3) It was the fault of the entryman that he did not furnish the local office with his address at the time of making entry.

(4) No valid or even plausible excuse is given by Davidson as to his failure to make proof within the statutory time.

(5) It is error on the part of the Commissioner to hold that notice should have been sent to "Frontier county," when no address is given, as it would never leave the McCook post office, but would be returned to the writer from the office where mailed or sent to the Dead Letter Office &c.

Without observing the exact order in which these specifications are presented I find the reinstatement of Davidson's entry on the ground that it had been canceled without notice to the entryman as required by law, was proper; and it appearing that the fact that such notice had not been served was officially known to and certified by the local officers, it was not necessary to order a hearing, notwithstanding another entry of the tract had been inadvertently allowed.

The only question in the case is whether there was such notice to Davidson as the law requires. It is admitted that he did not receive actual notice. He had given no other address at the local office than "Frontier county"—a circumstance which may be explained, perhaps, by the necessity of frequent changes in post office addresses to meet the needs of new settlements.

It is also in evidence that the local officers, in sending out the notices to Davidson, were misled by an old map in which the county lines were not well defined, and instead of sending them to some office in "Frontier county" sent them to offices in Gosper county. They state, that but for this mistake, the notices would have been sent to an office in Frontier county. Davidson was an old settler, well-known at the county-seat and throughout the eastern part of the county where his entry was made, and it is reasonable to conclude that if a notice had been sent to the county-seat or to any office near the land in "Frontier county" it would have reached him.

I agree in the conclusion of your office that Davidson

was entitled to notice in accordance with the address as mentioned in his entry papers, viz: Frontier county, or the office in that county nearest the land.

The only difficulty in the case arises from the fact that Davidson failed to make his final proof within the period prescribed by law. His entry was on June 27, 1879; its life expired June 27, 1892; and his final proof was not made until May 1, 1895.

The excuses he offers for his default—that he was ignorant as to the time when his proof ought to have been made, and, also, that he was disabled by an accident, which occurred after the statutory period of his entry, are of no avail against the plain requirement of the law.

The fact, however, that Davidson's good faith is not questioned, and that he has fully complied with the timber culture law in every respect, except as to the time of making proof—it appearing that for the period of ten years last preceding that ten acres of timber had been planted, cultivated and protected and were kept in a healthy growing condition,

that the trees were of an average diameter of three inches and an average height of from eight to fourteen feet, consisting of ash, box elder, elm, mulberry, with a few cottonwood trees,—5,168 by actual count, being more than five hundred to the acre—entitle his claim to equitable consideration.

The cancellation of Davidson's entry without notice being void for want of jurisdiction—said entry must be regarded as legally subsisting at the date of Carter's homestead. The latter is not, therefore, such an adverse claim as will defeat equitable confirmation of Davidson's entry. Carter's homestead entry will therefore be canceled, and Davidson's timber-culture entry after reinstatement upon the record will be submitted to the board of equitable adjudication for its consideration and action.

SOLDIER'S ADDITIONAL HOMESTEAD-ACT OF AUGUST 18, 1894.

ROBORDS *v.* LAKEY ET AL.

Under the act of August 18, 1894, an entry made on a certificate of a soldier's additional homestead right is valid, and must be approved, where the land is held by a bona fide purchaser, though the issuance of the certificate may have been secured through fraud; and the patent in such case should issue in the name of the assignee.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (E. B., Jr.)

This is a contest for title to the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 31, T. 21 N., R. 3 E., Helena, Montana, land district. On November 1, 1882, Simon Lakey, who had previously made original homestead entry at Springfield, Missouri, for eighty acres of land (final certificate No. 4315, issued December 19, 1881, patented August 5, 1882), executed an application for a certificate of right to enter, under section 2306 of the Revised Statutes, an additional eighty acres of land. This application and evidence in support thereof tending to show service by Lakey in Co. "I", 46th Mo. Vol. Inf., were filed in your office in December, following, by W. C. Hill, then a resident attorney.

On March 19, 1893, your office rejected said application upon the ground that the evidence showed that said Lakey was not the person who performed the military service above indicated. Subsequently, under a power of attorney from Lakey to L. D. Stone, dated February 7, 1889, to make application for, select, locate, receive duplicate receipt of entry for, and demand, receive, and receipt for patent, for any land to which he might be entitled under said section 2306, Lakey's application was by some means, which do not appear, revived and allowed, and such certificate was issued by your office February 26, 1889. Acting under an appointment as attorney in fact of Lakey, made by Stone under a power of substitution in said power of attorney, one Ashburn

K. Barbour, on May 4, 1889, entered in the name of Lakey at Helena, Montana (final certificate No. 1381), the land above described, as an additional homestead. This entry has been the subject of repeated attacks, on the ground of fraud, by different parties, commencing with that made by one Amy Gregg November 19, 1890. The history and disposition of certain of these attacks is set out in decisions of the Department in case of Gregg *v.* Lakey, dated May 11, 1892 (unreported), and January 10, 1893 (16 L. D., 39), and in Gregg *et al. v.* Lakey, dated July 7, 1893 (17 L. D., 60), and need not be recited here.

The present contest by Ezra M. Robords, referred to in said decisions, was initiated October 20, 1891, and charged that said additional entry was fraudulent in this, that Simon Lakey, who made said original homestead entry, final certificate No. 4315, at Springfield, Missouri, had not rendered service as alleged, nor rendered at any time the service necessary to entitle him to make said additional entry; that said original entry was not made under section 2304 but under section 2289 of the Revised Statutes; and that said Lakey had knowingly, wilfully and fraudulently, in the matter of said additional entry, personated his uncle Simon Lakey, then of Douglas county, Missouri, who had served from October, 1864, to May, 1865, in the company and regiment hereinbefore mentioned. On June 2, 1892, your office ordered a hearing upon these charges of Robords.

In its decision of July 7, 1893 (*supra*), the Department said, among other things:

In promulgating the departmental decision of May 11, 1892, you directed a hearing on the contest of Robords. Such hearing was suspended by the filing of motion for review. After that motion was denied, you ordered said hearing to proceed, but it is now again suspended by the motion for rereview. . . .

On the 29th of March, 1893, Lucius B. Kendall, who described himself as a party in interest, filed a motion, asking that the pending motion for re-review, filed by Amy Gregg, be dismissed, and that departmental decisions of May 11, 1892, and January 10, 1893, be sustained, in so far as they dismiss the claims of said Gregg, and reversed and set aside, in so far as they recognize the rights of Ezra M. Robords to contest said soldier's additional homestead entry; that the homestead application of Burlingame for the land be rejected, and his pending appeal be dismissed; and that the entry of Lakey be confirmed, and he (Kendall) be allowed to purchase under the act of March 3, 1893.

His motion is supported by his affidavit, in which he makes oath that said entry was made upon a certificate of the Commissioner of the General Land Office, of the right to make the same; that said land was conveyed to him by warranty deed on the 4th of May, 1889, for a valuable consideration, to wit, \$3,000; that he purchased the land in good faith, without any knowledge of the fact that the certificate to said Lakey had been fraudulently procured; that there are no adverse claimants to the land, which fact the official record will prove, and that he is still the owner thereof. He further states that the invalidity of the certification to the said Lakey has been clearly established by affidavits now in the record; that by the confirmation of this certificate he will not acquire more than one hundred and sixty acres of public land, and he asks that he be permitted to perfect his title by paying the government price for said land, as provided in the act of March 3, 1893 (27 Stat., 593).

To his affidavit is attached an abstract of title to the land, certified to by the

clerk and recorder of the county, which shows the title to be in Kendall, his deed therefor having been recorded on the 6th of May, 1889.

Among numerous other things, the act of March 3, 1893, provides:

"That where soldier's additional homestead entries have been made or initiated upon certificates of the Commissioner of the General Land Office, of the right to make such entry, and there is no adverse claimant, and such certificate is found to be erroneous, or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for the land; but no person shall be permitted to acquire more than one hundred and sixty acres of public land through the location of any such certificate."

If all the matters stated in the affidavit of Kendall, filed in support of his motion, are true, he is brought within the provision of law quoted above. I can not accept, however, without further proof, his statement that the entry was made upon a certificate issued by you on the 26th of February, 1889. Neither does he make it satisfactorily appear that such certificate is found to be erroneous or invalid. These facts must be clearly established, in order to entitle him to the benefits of the act of March 3, 1893. . . .

You will direct the local officers to proceed with the hearing ordered by you on the 2d of June, 1892, on the charges of Robords, against the entry of Lakey, that the truth as to the charge made that Simon Lakey was not a soldier may be ascertained, and whether this fact was known to Kendall before his purchase.

Upon the showing made by Kendall, on his motion now before me, he will be allowed to intervene at such hearing, and submit any proof which he may desire, to establish his interest in, and title to the land in question.

The decision of July 7, 1893, eliminated Amy Gregg as a party from the case and denied the application of one J. M. Burlingame Jr. to be allowed to intervene therein. By departmental decision of October 13, 1893, George W. Bird, claiming to be a transferee of the entryman Simon Lakey, was allowed to intervene in the case. A hearing was had December 13, 1893. The day following, the local office rendered a decision dismissing Robords' contest. Robords appealed, and on July 14, 1894, your office remanded the case for hearing *de novo*. By reason of various causes of delay, recited in the decision of the local office dated March 5, 1895, but not necessary to be narrated here, the date of the hearing was not fixed until March 11, 1895, when, as reported by the local office, "all parties of interest were cited to appear at this (local) office May 13, 1895, for the trial of the cause." The hearing was not finally concluded until December 16, 1895. All parties were represented at the hearing except Lakey, who, the local office reports, made default. Robords offered no testimony at the hearing, but was represented there by counsel.

The local office held that the fraudulency and invalidity of the certificate issued to Simon Lakey, upon which entry was allowed, was "fully established by the testimony adduced by Kendall," but that said "certificate and its assignment before entry are in all respects confirmed and validated by act of August 18, 1894 (John M. Rankin, on re review, 21 L. D., 404)," and that patent should issue to Simon Lakey, and recommended the dismissal of Robords' contest, and the rejection of the applications of Kendall and Bird to purchase under the act of March 3, 1893 (*supra*). Upon appeal by Robords your office affirmed

the decision of the local office as to Robords and Bird, holding that Robords "was a party to the fraud in procuring the issuance of said certificate," and that Bird's alleged interest was acquired subsequently to and with full knowledge of the sale and conveyance to Kendall, but held that the act of August 18, 1894 (28 Stat., 397), gave Kendall no right not already given him by the act of March 3, 1893, and that his application to purchase under the latter act would be allowed. Appeals by Bird and Robords now bring the case before the Department.

It clearly appears from the evidence that said certificate was procured by fraud and that Robords was the chief instrument in perpetrating the fraud. He induced Simon Lakey, the nephew, to make application for the certificate, leading him to believe that a short service, which said Lakey informed him he (Lakey) had had in the Missouri militia in 1865, entitled him (Lakey) to such certificate and additional homestead, and himself (Robords) making or procuring to be made the false representations of service by Simon Lakey as hereinbefore charged by him (Robords). Due to the agency or instrumentality of Robords, apparently, the second and successful effort for the issuance of said certificate was prosecuted, the said power of attorney to Stone was procured, and a sale by Lakey of his supposed right to make additional entry was effected, Stone paying Lake \$200 therefor. The allegations of Kendall as to the purchase by him in good faith and conveyance to him of said land by Simon Lakey, the entryman, are shown to be true. A warranty deed from said Lakey and wife, duly executed May 4, 1889, by Ashburn K. Barbour, as their attorney in fact, under a power of attorney previously given, conveyed said land to said Lucius B. Kendall. In addition, said Lakey and wife executed a confirmatory deed to the land, to said Kendall, April 15, 1893, ratifying and confirming their previous deed by Barbour, attorney in fact, and reciting that their certain deed dated May 2, 1890, to George W. Bird, was procured by misrepresentation and deceit, the same having been executed by them (Lakey and wife) in blank, with the understanding that the name of said Kendall was to be inserted therein, and that the same was intended to confirm title to said land to said Kendall.

The provision in the act of August 18, 1894 (*supra*), relative to soldier's additional homestead certificates, is as follows:

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of *bona fide* purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

As construed in the case of John M. Rankin (*supra*), this legislation was intended to afford larger relief than the said act of March 3, 1893, and "should not be limited to validating the transfer of certificates," but was intended "to validate all certificates heretofore (theretofore) issued, in the hands of *bona fide* holders," notwithstanding any invalidity attending the issuance thereof.

It would seem unnecessary, therefore, to discuss at length the contention of Robords that his contest gives him any right or valid claim under the act of May 14, 1880 (21 Stat., 140), as against the claim of Kendall. It would be sufficient answer to any claim of Robords, even had the fraud charged by him been proven by the testimony adduced by him—which was not the case—that he was shown to be the prime mover in the fraud. He would not be permitted, as such, to have judgment in his favor, and thus reap advantage through his own wrong. But were he blameless in the entire transaction proof that said certificate was fraudulently obtained would avail him nothing against the right of Kendall under the acts of March 3, 1893, and August 18, 1894. The proposition can not be entertained that in the former act Congress intended in one breath to enable the purchaser under a fraudulent certificate to perfect his title, and in the next, to enact that a contestant might defeat that provision by proving the fraud alone. These acts being *in pari materia* are to be construed together and so construed they were clearly intended to protect any purchaser mentioned in either against the consequences of invalidity, whether by reason of fraud, or otherwise, of the certificate to which he traced his title.

The only color of title in Bird to the land in question is under said quit claim deed. But as Kendall's deed was duly recorded, thus giving Bird constructive notice thereof, and as Lakey had no title when the deed to Bird was made, the latter could certainly take nothing by his deed, and his application was properly denied. This disposes of the entire case so far as the issues between these parties are concerned.

It will be noticed that the act of 1894 directs that

all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

Under this provision, following the construction of the act in case of Rankin (*supra*), said entry will stand, and patent will issue to said Kendall. The only difference in point between the positions of Rankin and Kendall is that the former purchased prior to entry, and Kendall after entry. In both cases the entry was made in the name of the party named in the certificate. The difference is immaterial.

Your office decision as herein modified is affirmed.

ISOLATED TRACT—ACT OF FEBRUARY 26, 1895.

JOHN P. SHANK.

Section 2455 R. S., as amended by the act of February 26, 1895, contemplates that no tract shall be regarded as isolated, within the meaning of the law, unless at the time of the application to have it sold under said section the land surrounding said tract is included within entries, filings or sales, made at least three years prior thereto.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 25, T. 15 N., R. 18 E., Lewistown land district, Montana, and is before the Department upon appeal, by John P. Shank, from your office decision of February 8, 1896.

The record shows that on January 16, 1896, the appellant made application, as a prospective purchaser, to have the above described tract sold under section 2455 of the Revised Statutes of the United States, as amended by the act of February 26, 1895 (28 Stat., 687).

Your office decision states that the records show that the land involved is vacant, but does not come within the statute for the reason that the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 25, same township and range, is embraced in coal entry No. 1, made by Frank Bland on October 2, 1894, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 26, same township and range, is embraced in coal entry No. 2, made March 4, 1895, by Millie L. Conway.

Section 2455 as amended by the act of February 26, 1895, is as follows:

Sec. 2455. It shall be lawful for the Commissioner of the General Land Office to order into market and sell for not less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of the public domain less than one quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided*, That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the government: *Provided*, That not more than one hundred and sixty acres shall be sold to any one person.

The appellant contends that whilst the entries mentioned in your office decision (those of Bland and Conway) have not been made long enough to bring the land within the time required by the act, to wit, three years, that in fact the land surrounding the tract in controversy has been filed upon for a much longer period than the time required by the act, and he therefore asks for the reversal of your decision.

It will be noted that the section is not mandatory in its requirements. It says, "It shall be lawful for the Commissioner of the General Land Office," and again, "which in his judgment it would be proper to expose to sale;" and I am of opinion that the interpretation placed upon this act by your office is the correct one, conceding the assertion of the

appellant to be correct, that other entries had been allowed and filings made from time to time covering a period greater than that required by the statute, that nevertheless the true meaning of the section contemplated that no tract became isolated within the meaning of the law unless at the time of the application to have it sold, such tract was surrounded by entries or filings, or land already sold, which entries or filings or sale had been made at least three years prior thereto.

The decision appealed from is therefore affirmed.

SETTLEMENT RIGHT—ADVERSE CLAIM—ESTOPPEL.

PHILLIPS *v.* MATTHEWS.

The right of a settler to make homestead entry will not be defeated by the prior application of an adverse claimant, if, by the conduct of said claimant, he is estopped from asserting his claim as against such settler, and it appears that said claim is wanting in good faith.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (E. M. R.)

This case involves that tract of land in the Gainesville land district in the State of Florida known as the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 5, T. 15 S., R. 22 E.

The record shows that on December 15, 1890, Duncan D. Matthews made homestead application for the tract in controversy, together with an affidavit of contest against the claim of the Florida Transit and Peninsular Railroad Company, and subsequently, on November 28, 1892, he was allowed to make homestead entry.

On the second day of December, 1892, Clifton J. Phillips made application to enter under the homestead law the same land, which was rejected, and on January 3, 1893, he filed his affidavit of contest against the entry of Matthews on the ground of prior settlement and superior equities and that the entry of the defendant-respondent was not made in good faith.

On the day following, the local officers issued notices of hearing to be had on February 15, 1893, before the clerk of the circuit court at Ocala; at which time and place the parties appeared and submitted testimony.

November 23, 1893, the local officers issued a new notice setting January 9, 1894, as the date of the new hearing and the local office as the place. May 7, 1894, the local officers rendered their decision in favor of the plaintiff and recommended the cancellation of the entry of the defendant. Upon appeal, your office decision of December 6, 1894, was rendered, wherein was reversed the action of the local officers and the homestead entry of Matthews held intact. Further appeal brings the cause before the Department for final adjudication.

From an examination of the evidence it appears that in November, 1887, Phillips, the contestant, secured the quitclaim of E. W. Agnew, his brother-in-law, or more accurately, one C. E. L. Schmidt, who had entered into a contract for the purchase of this land from the Florida Transit and Peninsular Railway Company, and who, in consideration of an indebtedness due Agnew, left with said Agnew this contract as collateral security, it being in the nature of an equitable mortgage, and having thereafter left the country, the said Agnew, at the time above mentioned, told the plaintiff that he might go into possession of this land.

In November, 1887, the plaintiff commenced his improvements upon the land by building a fence around forty acres; a well was also dug and a house twelve by fourteen feet was built. He cleared ten acres and planted in orange trees, and set out about 15,000 nursery stock trees. In November, 1892, he added three rooms to his house. His intention from the start was to acquire title from the railroad company. In June, 1892, he discovered that the company could not give title, and soon thereafter made settlement under the homestead law. His improvements are worth \$2,500.

On June 4, 1892, your office, in reply to a letter from the plaintiff, stated that the tract in controversy was within the limits of the grant to the Florida Railway and Navigation Company and had been selected by said company on September 3, 1887; that on June 18, 1883, your office had passed upon the case of said company *v. Schmidt*, and rejected the claim of the company, from which action the company had appealed, and on April 22, 1884, the Department had affirmed your action; that thereafter the entry of Schmidt had been canceled; that the tract was at the time of the communication involved in the case of the said company *v. Matthews*; and that on June 9, 1891, your office had considered the above entitled cause and had decided against the company, and appeal had been taken to the Department.

Subsequently, and to wit, on June 14th, your office, in reply to another communication, informed the plaintiff that the claim of Matthews was based upon an application to enter under the homestead law. The plaintiff, after the receipt of the first letter, saw the defendant and asked him if he laid any claim to the land, and he denied that he laid any claim to any land in that neighborhood. He denied that he had ever had any contest with the railroad company over any land.

After the receipt of the second letter from the then acting Commissioner, the plaintiff went on a visit to his former home in Kentucky, and upon his return ascertained that the defendant was absent, but succeeded in locating him in North Carolina, and wrote to him with a view to securing his relinquishment of all claim in and to the land. He received a letter from the defendant offering to sign any papers that the plaintiff might desire, if he were paid \$15.00; whereupon this appellant forwarded to him a check for that amount, which check was used by the defendant-respondent.

It further appears that in July, 1892, the defendant was employed by the plaintiff to work on the land in controversy, upon his orange trees, and was duly paid for such services. Early in December, 1892, Phillips took his wife on the land to live. Prior to this time, and extending back for some time, the plaintiff had kept up a desultory residence upon the land, going out from Ocala, where he was employed in the warehouse of Agnew, to spend a day or night, at which times he occasionally prepared his own meals. About the first of December, 1892, Matthews put up notices on the land, which the plaintiff tore down. Matthews, in answer to the fact that he worked for Phillips upon the land, states that he did not know it was the land in controversy. This land is just on the outskirts of Ocala. He admits that in reply to a letter from the plaintiff he promised to sell his interest for fifteen dollars. He says that at that time he expected to remain in North Carolina at least one year; that he had used the check sent by the plaintiff through mistake; that he had several other checks in his possession and had inadvertently cashed the check. On the day he presented the check he returned to Ocala and shortly thereafter deposited in his name, at the First National Bank of that place, an amount equal to the check. He had the land surveyed on the 3rd of December, 1892, and built a house on the land in January, 1893, and has two or three acres under enclosure and raised some few things.

The decision of your office was based upon the fact that the application to enter by Matthews, whilst subsequent to some of the improvements of Phillips, was prior to his settlement, and as Matthews' entry was followed within a reasonable time by residence, the settlement and extensive improvements of Phillips could not inure to his advantage because of the pending application of the defendant. When viewed by itself this position is impregnable, but an examination of the entire record shows that the plaintiff is entitled to judgment.

An estoppel is the preclusion of a person from asserting a fact by previous conduct, inconsistent therewith on his own part, or the part of those under whom he claims, or by an adjudication upon his rights which he can not be allowed to call in question (7 American and English Encyclopedia of Law, page 1).

The defendant told the plaintiff that he did not claim any land in that neighborhood and had never had a contest with the railroad company over any land. This it seems, under the authorities, amounted to an *estoppel in pais*. There was a false representation of a material fact (*Pittsburg v. Danforth*, 56 N. H., 272), which was knowingly made, and the plaintiff was ignorant of the fact; at least the denial came from the very highest authority—the applicant himself. And in this connection, as intent is a material part of all proceedings before this Department having as an ultimate end the acquisition of title to the public domain, the fact that the applicant disavowed any claim to any land in that neighborhood, would render the claim of record ineffectual as against Phillips. The false representations were apparently made

to mislead this plaintiff in order that he might act thereon, which he did.

It further appears that the defendant contracted to sell his relinquishment to this plaintiff. It is clearly shown by the record that the defendant, in answer to a communication received from the plaintiff, wrote him a letter in which it was stated that for the consideration of \$15.00 he would sign any paper the plaintiff considered necessary to clear the record; that the said sum was accordingly sent, and thereafter used by this defendant. It is true that the defendant claims that the presenting of the check was an inadvertence, but an examination of the record shows that this is not true. Equitable considerations are sufficient to demand that this defendant be prevented from denying the sale.

It is shown that at the time of the application of the defendant to enter, the plaintiff had valuable improvements upon the land, which facts suggest that the application of the defendant was not made in good faith, but with the intent to appropriate the valuable improvements of another. This Department has in various decisions indicated that one would not be allowed to appropriate the improvements of another in the manner here attempted. Thus in the case of *Caldwell v. Carden* (4 L. D., 306) it was held that the improvements and settlement of one, made with due notice of the *bona fide* claim of another, was not sufficient to defeat such prior claim. See also *Turner v. Bungardner* (5 L. D., 377) and the recent case of *Tustin v. Adams* (22 L. D., 266), wherein it was held, *inter alia* (syllabus):

The right of entry will not be accorded to a homestead applicant who, with full notice of the prior equities of an adverse claimant, fraudulently seeks to secure title through legal technicalities.

And again in *Roberts v. Gordon* (14 L. D., 475) it was held, *inter alia* (syllabus):

One who fails to assert any claim to a tract of public land which is in the adverse possession of another, and remains silent, though knowing that the adverse occupant continues to claim, occupy and improve the land, is estopped thereby from subsequently denying the good faith of said occupant and asserting a right of priority in himself.

I am therefore of opinion that a rightful regard to the equities of this cause demands a reversal of your office decision. The entry of Matthews will accordingly be canceled.

PRACTICE—REVIEW—OKLAHOMA LANDS—SETTLEMENT.

BRADEN *v.* SHAW.

The sufficiency of the charge, on which a hearing has been held, can not be called in question on review, if no objection thereto was made at the hearing.

The prohibitory provisions of section 14, act of March 2, 1889, with respect to settlement in Oklahoma, are general in character as to lands opened to settlement in said territory, and extend to Sac and Fox lands, becoming effective from the date of the act announcing the acquisition of the Indian title to said lands.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (P. J. C.)

Counsel for Knowles Shaw have filed two petitions for re-review of departmental decision of May 20, 1896 (333 L. and R., 129), on the merits of the contest initiated by George W. Braden; also of the decision on the motion for review of October 3, 1896 (342 L. and R., 45), and on a motion for rehearing on November 12, 1896 (344 L. and R., 366).

The petitions were entertained. Service of the same, together with the affidavits, was made on Braden, and the matter now comes up regularly for consideration.

It appears that Shaw, through his agent, filed soldier's declaratory statement for the NE. $\frac{1}{4}$, Sec. 10, Tp. 16 N., R. 4 E., Guthrie, Oklahoma, September 23, 1891; on September 30, following, Braden made homestead entry of the tract. On March 18, 1892, Shaw presented to the local officers his application to make entry under his said soldier's declaratory statement. This application was "suspended awaiting the determination of rights of" Braden for the said tract "who will be cited to appear at this office to show cause why his entry should not be canceled."

The record does not show whether Braden was actually cited, but on April 16, 1892, he filed an affidavit alleging:

That the said Knowles Shaw did not make settlement on said land prior to this affiant, that on Sept. 22, 1891, in the afternoon of said day, this affiant was in actual possession of said land; that at that time defendant was not on said land; that on said afternoon this affiant made settlement thereon as follows: set stakes on said land, and on Sept. 23, 1891, in the forenoon he laid foundation for dwelling and built a shed thereon; slept on land on night of 22 Sept. '91; have built a dwelling thereon, planted fruit trees, broken one acre; that his settlement was prior to said Shaw, and his claim superior to his, and he asks that his H. E. may remain intact on said land, and that he may be allowed opportunity to prove said allegation of prior settlement.

A hearing was ordered for August 26, 1892, before the local officers, when the parties appeared with their counsel. On September 30, the date to which the hearing was adjourned, counsel for Shaw filed a motion asking the local officers to set aside the suspension of his application to make homestead entry. This motion was granted.

As a result of the hearing the local officers found

from the evidence in this case that George W. Braden, the plaintiff, made settlement upon the claim in dispute as a homesteader, in the afternoon of September 22, 1891, and that he has in good faith complied with the requirements of the homestead law since said date.

They recommended the cancellation of Shaw's entry, and that Braden's remain intact. In discussing the facts as disclosed by the testimony the local officers say:

We are of the opinion that the question of soonerism and disqualification of the plaintiff as a homesteader can not be questioned in this proceeding, because there is no evidence showing that plaintiff entered upon said lands embraced in the act of February 13, 1891, subsequent to said date and prior to noon September 22, 1891.

On appeal, your office affirmed the action of the local officers upon the facts in relation to settlement on the land, but the question as to Braden's disqualification was not discussed, though raised by the specifications of error. The Department, May 20, 1896, formally affirmed the concurring conclusions below.

Motion for review of the latter decision was filed in the local office August 12, 1896. On October 3, following, this motion was denied. The errors assigned by this motion were, (1) that the decision was not responsive to the evidence, but repugnant to it; (2) that the affidavit of contest failed to allege sufficient grounds of contest, and that the decisions of your office and the Secretary did not consider or pass upon this question of practice; and (3) that Braden's alleged disqualifications to take land in Oklahoma was not passed upon. The Department decided these questions: (1) that this assignment was in substance an allegation that the judgment is against the testimony, and was insufficient to warrant consideration; (2) "Upon the question of priority, which was fairly raised by the affidavit of contest, your office rendered the judgment which was formally affirmed by the Department," and (3) that Braden was not disqualified by reason of entering the Territory after the passage of the act opening the same to settlement, and before the President's proclamation was issued. It was said:

If it be conceded that he did so enter, he would not be disqualified, for the reason that Congress did not fix any such penalty. The testimony that he did so enter, however, is not at all clear or convincing. Braden expressly denies that he was there or that he did any of the acts he is charged with.

On August 21, 1896, nine days after the motion for review was filed, Shaw filed a motion for rehearing. Through some oversight in the local office this motion was not forwarded to your office till October 10, following. The sole ground of this motion was Braden's alleged disqualification, and inasmuch as it had been decided that he was not disqualified, the Department, on November 12, 1896, denied the motion.

Two petitions for re-review of the former departmental action are now presented; one by counsel in Oklahoma, and the other by local attorneys. In the first, it is alleged (1) that the decision on review is not

responsive to the motion; and (2) that it "violates all the precedents of the Department heretofore rendered on the question of soonerism, and is in violation of the laws of Congress upon said question." In the second it is charged (1) "that the decision of May 20, 1896, absolutely ignores the facts shown by the record," and presented by counsel in argument in respect of Braden's "unlawful entry" on the land; (2) that it was error to find that Braden was not disqualified in the motion for review and in the decision on the motion for rehearing; and (3) that in view of the testimony of the contestant and the affidavits filed, it was error not to order a hearing to determine contestant's qualifications.

On the "question of practice," that is, as to whether the affidavit of contest raises the issue of prior settlement, there is but little to be said. The position of counsel is, that inasmuch as Shaw did not claim by reason of prior settlement, but because of filing his soldier's declaratory statement, the charges in the affidavit of contest are not sufficiently full or explicit to raise this issue. This contention is without potency in this case. It was said in the decision on the motion for review, that the question of priority was fairly raised. The reasons for this naked announcement were not given, because it seemed so apparent that this was the only issue upon which Braden could recover; that is, his settlement must antedate Shaw's filing, assuming the latter to be sufficient. This is the question that was tried and upon it the several concurring decisions have been rendered. Besides, the allegation, though not expressed in apt language perhaps, is sufficient in my judgment to raise this issue. It is certainly so when the circumstances are considered: the filing of the soldier's declaratory statement; the subsequent homestead entry of Braden, and the order citing him to appear and show cause why it should not be canceled for conflict with Shaw's.

But aside from this, the question as to the sufficiency of the charge can not now be raised. There was no objection made to it at the hearing, and both parties proceeded upon this theory of the case. Counsel will not, therefore, be permitted now to raise the objection. (*Paxton v. Owen*, 18 L. D., 540.)

It is urged by all the counsel who now appear that Braden was disqualified from making entry because, as charged by them, he entered the territory after the passage of the act—February 13, 1891,—and before the issuance of the President's proclamation declaring said land open to settlement, and it is insisted that Braden's own testimony is sufficient in itself to establish this fact.

The record does not sustain this charge. In the first place, the local officers distinctly ruled on the question as to whether the testimony was sufficient to warrant this finding, and held that it was not. This judgment has been affirmed, and it was expressly held by the Department, in the decision on the motion for review, that the evidence was not sufficient to justify this allegation. This finding of fact will not therefore be reviewed.

The ruling of the Department, however, in all its decisions in the case that Braden was not disqualified, even though he may have been in the territory after the passage of the act and before the issuance of the President's proclamation was erroneous. This question has been previously decided in *Rittwage v. McClintock* (21 L. D., 267), and the conclusion was (syllabus):

The prohibitory provisions of section 14, act of March 2, 1889, with respect to settlement rights in the Territory of Oklahoma, were intended to be general in character as to lands opened to settlement in said Territory, and it therefore follows that said prohibition extends to lands formerly embraced in the Cheyenne and Arapahoe reservation, and became effective from March 3, 1891, the date of the act announcing the acquisition of the Indian title to said lands.

This ruling was followed in *Griffard et al. v. Gardner*, Id., 274.

These decisions refer to the Cheyenne and Arapahoe reservations, which were opened to settlement by the President's proclamation of April 12, 1892 (27 Stat., 1018-1021), but the exact language used therein is found in the proclamation of September 18, 1891 (27 Stat., 989-992), opening the lands in the Sac and Fox, etc., reservations, wherein the tract in controversy is situated. The ruling in those cases would, therefore, apply to the one at bar. In the unpublished case of *Johnson v. Henderson*, decided October 3, 1896, the Department applied the ruling in those cases to land within the Sac and Fox reservation.

It is clear that the ruling in this case on the point as to whether Braden would not be disqualified if within the territory during the prohibited period, as construed by the prior decisions of the Department, was erroneous, and that part of it, so holding, must be revoked.

In view of this determination, it remains to consider the motion for a rehearing, the decision on this having been based on an erroneous construction of the law.

The motion for rehearing is based on the allegation of newly discovered evidence, and relates entirely to Braden's presence in the territory after the passage of the act, February 13, 1891, and the issuance of the President's proclamation. At the trial of this case this matter was gone into to some extent in the cross-examination of Braden, and, as before said, the testimony was not sufficient to warrant a judgment that he was in the territory during the prohibited period. He swore positively that he was not, and there was no testimony offered by the other side to contradict this. It is alleged by Shaw that the first he knew that Braden was disqualified was by reason of this testimony.

This motion is supported by several affidavits. Vandruff swears that Braden admitted to him in 1893 that he had been in the territory in "March, before said country was opened to settlement." The other affidavits are made by Burger, Todd and Stockton, and are all to the effect that they and some other persons named, together with Braden, made a trip into the country early in 1891. The date of this trip is not fixed with any degree of accuracy. The first witness says that it was in the latter part of the winter of 1891, and states that "probably the

last snow of the winter fell while they were out." Another says it was "after the cold weather was over, in the spring of 1891, but does not remember the month." The last witness fixes the time "on or about the last of February or the first of March in the year 1891."

In his own affidavit Shaw recites what other witnesses named will testify to. It is not deemed necessary to set forth the matters he thus states, for the reason that under the rulings their own affidavits must be presented, and for the further reason two persons named by him have made affidavits denying the statements attributed to them.

Braden, in his affidavit, admits having been in the territory in January, 1891, and unqualifiedly denies being there after that date until September 22, 1891. He also denies having made the declaration sworn to by Vandruff.

The showing made here by Shaw is not sufficient, in my judgment to warrant a rehearing. The statements made by his witnesses are too, indefinite to overcome the positive and direct denials made by Braden.

The petition for re-review is therefore denied.

HOMESTEAD ENTRY—NON-CONTIGUITY—MORTGAGEE.

JOHN R. CORRY ET AL.

When an entry is found to embrace non-contiguous tracts the entryman should be called upon to elect which tract or tracts he will relinquish in order to bring the entry within the rule as to contiguity; and if the entryman fails to take such action, the entry may then be canceled as to such tracts as may be deemed proper, having due regard to interests shown by incumbrancers.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) 30, 1897. (J. L. McC.)

John R. Corry, on August 19, 1894, made homestead entry for lots 10 and 11 of Sec. 4, lots 13 and 14 of Sec. 5, lot 1 of Sec. 8, and lot 4 of Sec. 9, T. 11 N., R. 4 W., Oklahoma land district, O. T.

The several lots named contain in the aggregate an area of 49.95 acres.

On March 18, 1895, Corry commuted said entry to cash, under Sec. 21 of the act of May 2, 1890 (26 Stat., 81); and cash certificate issued thereon.

When the entry papers were forwarded to your office, it was found that lots 10 and 11 of Sec. 4, and lot 13 of Sec. 5, were not contiguous to one another, nor to the other subdivisions embraced in the entry. Thereupon your office, by letter of June 2, 1895, allowed Corry thirty days within which to show cause why his entry should not be canceled.

A motion for review of the above decision was filed by J. H. Everest, attorney for J. R. Corry, J. M. Cox, William Maxwell and R. C. Hager.

On September 4, 1895, said motion for review was denied, and the homestead entry held for cancellation.

Thereupon, J. M. Cox, claiming to be transferee of said Corry, filed application to relinquish all the land embraced in said entry, except lot 10 of Sec. 4, and to have the entry as to that lot remain intact—transmitting his relinquishment for the other lots mentioned. Thereupon your office, by letter of December 17, 1895, directed the local officers to advise the parties that inasmuch as there was no evidence of the land having been transferred—only that it had been mortgaged—they should “advise the parties in interest that it will be necessary for them to furnish evidence of the transfer of said claim.”

From this action Cox has appealed, contending that your office erred in not holding that, by reason of his mortgage, he was the real party in interest as transferee of said John R. Corry.

In the view taken of this case, it is not deemed necessary to consider and decide the matters involved in that contention.

I am of the opinion that instead of calling upon the entryman to show cause why his entry should not be canceled, the better course would have been to have called upon him to elect which portions of his entry he would relinquish in order to make it contiguous.

The case is therefore returned to your office that you may pursue this course; and, in the event that the entryman does not elect and relinquish within the time named in the rule so issued, you will proceed to make such cancellation as in your opinion may seem proper, having due regard to the wishes of the mortgagee or incumbrancer.

The decision of your office is modified as above indicated.

DESERT LAND ENTRY—ANNUAL PROOF—COMPACTNESS.

ABRAM M. REID.

Orders of the General Land Office made on the submission of annual desert land proof are interlocutory in character, and no appeal will lie therefrom.

In determining whether a desert land entry is within the rule as to compactness no inflexible rule can be laid down, but each case must be considered in the light of the facts presented.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) 30, 1897. (W. C. P.)

Abram M. Reid has appealed from your decision of September 14, 1896 requiring him to relinquish a portion of the desert land entry, held by him as assignee of D. M. Limbaugh, for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 20, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 21, T. 4 N., R. 2 E., Tucson, Arizona land district to make it comply with the requirements as to compactness.

This entry was made by Limbaugh on April 11, 1893, the land being then unsurveyed and assigned to Abram M. Reid by an instrument executed May 19, 1893. The deed of assignment, together with the first year's proof, was filed in the local office April 18, 1894. On March 1,

1895, Reid as assignee, filed in the local office proof for the second year. The local officers recommended that his proof be not accepted because the claimant's affidavit was executed "without the Territory contrary to the requirements of the act of May 26, 1890 (26 Stat., 121)," and the claimant filed exceptions to their action. When the matter was considered in your office it was said as to this proof:

The testimony of the assignee having been made before a United States Circuit Court Commissioner in Minnesota, the proof is not acceptable to this office. It, however, is disposed of under the Clayberg case. See 20 L. D., 111.

In the same decision, however, it was held that the entry is not compact, and the claimant was required within sixty days from notice "to adjust his entry so as to make it a consolidated body, by the relinquishment of a portion thereof." The claimant asked a review of that decision, setting forth that by reason of a range of mountains to the north and east of said land substantially all the irrigable lands in said sections 20 and 21 were included in said entry, and that of Julia A. Reid; that at the time these entries were made the plats upon which the entryman relied as correct showed that section 29 had been entered, although it was afterwards discovered that it was section 28 instead of 29 that was thus appropriated, and praying that in view of these facts, and the further fact that the entry was accepted by the local office without criticism or objection and had been allowed to stand for more than two years, it be allowed to remain as made. By decision of September 14, 1896, your office adhered to the former ruling and the claimant appealed.

A large part of the argument in support of said appeal is directed to the proposition that the proof for the second year of said entry was properly made. No order was made by your office as to that proof and under the decision in the case of Andrew Clayberg (20 L. D., 111) any order that might have been made would have been interlocutory in character, from which no appeal would lie. It follows, therefore, that no question touching the yearly proof is now before this Department.

This entry embraces five tracts of forty acres lying alongside of each other, making a tract one and one-quarter miles in length, and of the uniform width of one-quarter of a mile. It is asserted by the claimant that the lands to the north of this entry are not irrigable, and this assertion is borne out by the statement in the decision appealed from, that it is shown by the field notes "that a chain of mountains run north-west and south-east near and east and north-east of this entry." There is no stream in the immediate vicinity of this land, and nothing to indicate that the entryman selected the land for the purpose of securing any advantage by reason of the form in which it was taken. Indeed, it would seem from the statements in the decision complained of as to the character of the land in section 29, that the entry would have been more desirable both as to form and quality of land, if it had been made to embrace lands in that section instead of the two tracts in

section 21. This tends to support the claim that the entry was made in its present form, because it was then understood that the land in section 29 had been appropriated. As has been frequently said by this Department, no inflexible rule can be laid down as to what does constitute compactness, but each case must be considered in the light of the facts presented. In this case, as said above, the entryman has apparently secured no benefit by taking the land in its present form, and the government has suffered no disadvantage thereby. In fact, it would seem that adjoining irrigable tracts left unappropriated are in a much more desirable shape for future purchasers than they would have been had this entry extended into section 29 instead of section 21. In that case the two tracts of irrigable land in the latter section would have remained unconnected with any other tracts of unappropriated irrigable land, and therefore undesirable for any purpose.

In view of all the circumstances surrounding this entry, and the fact that it was allowed to stand, as made, for more than two years, whereby the claimant was induced to expend his money thereon, I am not inclined at this time to require a relinquishment of any portion of the land embraced in said entry, even though that might be done under a strict application of the requirements as to compactness.

The decision appealed from is reversed, and the entry will be allowed to stand as made.

DESERT LAND ENTRY-REPAYMENT.

WILLIAM F. SLOCUM.

A desert land initial entry made under the act of March 3, 1877, by one not a citizen of the State in which the land is situated, but a qualified citizen of the United States, may be perfected under the amendatory act of March 3, 1891.

Repayment of the purchase price of the land can not be allowed a desert entryman who fails to furnish supplemental proof of reclamation properly called for by the local office, and abandons his claim to the land.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) 30, 1897. (W. M. B.)

William F. Slocum appeals from your office decision of July 2, 1894, wherein was denied his application for repayment of the purchase money paid on his desert land claim initiated by the filing, on October 28, 1889, of his declaration No. 697, and the payment of the first instalment of purchase money, for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$; the NW. $\frac{1}{4}$; the SW. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 18, T. 24 S., R. 29 E., Las Cruces land district, Territory of New Mexico.

The material facts in the case, as they appear of record, are:—that final proof was made, November 3, 1892, before A. A. Mermod, U. S. Commissioner of the fifth judicial district of New Mexico, and that said proof, and certificate of deposit for \$440.00, payable to Frank Lesnet, receiver, as purchase money for the land, were forwarded to the

local office at the same time; that said certificate of deposit was converted into cash, and the proceeds placed in bank to the credit of said receiver; that the final proof which was submitted on November 6, 1892, was found defective, but was retained in the local office, with the endorsement "Held for supplemental proof of reclamation"; Slocum being notified to furnish such proof.

It further appears that the required supplemental proof was never submitted, and that Lesnet never accounted to the government for the purchase money received by him.

There is embodied in the appeal, and made a part thereof, the copy of an affidavit made by Slocum himself—said affidavit being forwarded and submitted with the final proof—which clearly shows that there was no flow of water upon the land involved at the time final proof was made and submitted, which fact of itself was sufficient to warrant a rejection of the said final proof.

Appellant's proof being held to be incomplete by the local office, he abandoned his claim, as appears, and instead of making further effort to reclaim the land, elected to make application for repayment—under section 2 of the act of June 16, 1880 (21 Stat., 287)—of the purchase money on the ground that being a resident of the State of Colorado—and not the Territory of New Mexico, in which the land in question is situated—he was estopped by provision of section 8 of the amendatory act of March 3, 1891 (26 Stat., 1095), from making entry of the said land. There is no merit in such contention. The word "entry" as employed in said section of said act has reference not to the final entry but to the original or initial entry. Vide case of *ex parte* Fred W. Kimble (20 L. D., 67).

Slocum, though a citizen of the State of Colorado, having initiated his claim under the act of 1877, which allowed any qualified citizen of the United States to make desert land entries, could have completed his proof and made *final* entry under provisions of sections 6 and 7 of the amendatory act of March 3, 1891, which, among other things, protected all valid rights which had accrued under the former or original act.

There is no relief for appellant under provision of section 2 of the act of June 16, 1880, for said section only authorizes repayment where an entry of public land is "canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed." As shown, Slocum never made final entry of the land involved, and his initial entry was not, and could not be, canceled for conflict for the reason that there was no adverse claim to the land in question, nor can it be said that the same was erroneously allowed, for it was properly permitted to be made, and could have been prosecuted to final entry and confirmation by compliance on the part of Slocum with the requirements of law and existing regulations.

For the foregoing reasons your referred to office decision rejecting appellant's application for repayment is hereby affirmed.

HOMESTEAD ENTRY—TIMBER LAND—CONTEST.

LUCAS v. DUDLEY.

A contest against a homestead entry on the ground alone that the land embraced therein is unfit for cultivation, and of no value except for the timber thereon, will not be entertained.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) 30, 1897. (J. L. McC.)

Robert Dudley made homestead entry, on January 24, 1895, of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and lot 4, of Sec. 30, and lot 1, of Sec. 31, T. 149, R. 31, St. Cloud land district, Minnesota.

Later in the same day John W. Lucas offered for filing his sworn statement to enter the same land under the provisions of the timber and stone act of June 3, 1878 (20 Stat., 89); but his application was rejected because of Dudley's prior homestead entry.

On the next day Lucas filed contest affidavit against Dudley's entry, alleging:

That said land is unfit for cultivation, and has no value except for the timber thereon; that the same is valuable for the timber thereon; that the same is unfit for agricultural or farming purposes, and crops cannot be raised thereon; that about January 12, 1894, affiant selected said land under the timber and stone act as soon as the same should be subject to entry, and at said time he erected thereon a comfortable house for use in utilizing the timber thereon, and much other improvements.

Due notice issued for a hearing on the day fixed (March 20, 1895); the defendant moved to dismiss the contest, contending, in substance, that it set forth no sufficient cause of action; that it did not charge the homestead entryman with want of good faith; and that an allegation that land entered as a homestead is unfit for cultivation is not sufficient basis for a contest.

The local officers granted the motion and dismissed the contest.

The contestant appealed to your office, which, on December 21, 1895, sustained the action of the local officers. The contestant has appealed to the Department.

The law which provides that land unfit for cultivation, and chiefly valuable for its timber, shall be (in certain states named), subject to entry as timber land, does not prohibit the entry of such land under the settlement laws. It is true that settlements on land chiefly valuable for timber should be closely scrutinized, and that the character of the land may, in connection with other facts in the case, affect the question of the settler's good faith (*Porter v. Throop*, 6 L. D., 691). But in the case at bar the applicant to contest relies *solely* upon the character of the land, not connecting it with any "other facts" tending to show bad faith on the part of the homestead entryman. The burden of proof showing bad faith is on the contestant; and the character of the land is not, alone, sufficient proof of such bad faith. (*Hoxie v. Peckinpah*, 16 L. D., 108.)

The decision of your office is affirmed.

INDIAN LANDS--ALLOTMENT--CITIZENSHIP.

ULIN *v.* COLBY ET AL.

Children born of a white man, a citizen of the United States, and an Indian woman, his wife, follow the status of the father in the matter of citizenship, and are therefore not entitled to allotments under section 4, act of February 8, 1887, as amended by the act of February 28, 1891.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) 30, 1897. (C. W. P.)

William W. Ulin has appealed from your office decision of July 15, 1896, in the case of the said Ulin against Elizabeth and Harry Colby.

The land in controversy is the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 15, T. 32 N., R. 13 W., Seattle land district, Washington.

The record shows that on April 14, 1893, Eliza Obalthsa (Mrs. Colby) made allotment application No. 5, under the general allotment act of February 8, 1887 (24 Stat., 388), as amended by the act of February 28, 1891 (26 Stat., 794), for unsurveyed land, supposed to be the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lot 3 of township 32 N., range 13 W. Lot 3 is the fractional S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$. The section is not given, but it elsewhere appears to be section 10.

At the same time she made application No. 3 for her minor child, Elizabeth Colby, for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 10, the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 15, Tp. 32 N., R. 13 W., also application No. 4, for her minor child Harry Colby, for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 10, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 15, Tp. 32 N., R. 13 W. The official plat of survey was filed August 2, 1893.

On October 30, 1893, the local officers allowed William W. Ulin to make homestead entry (No. 15,696) of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 15, Tp. 32 N., R. 13 W. On December 23, 1893, your office held Ulin's entry for cancellation. On April 18, 1895, the Department reversed this action and ordered a hearing.

The local officers found in favor of the allottees, on the ground that the testimony showed that Ulin was aware when he first went to the land in 1892 that it was claimed by said Indians, and that, furthermore, he failed to make settlement on the land and to establish residence before the year 1895.

Ulin appealed. Your office affirmed the judgment of the local officers and held for cancellation Ulin's homestead entry as to the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 15, T. 32 N., R. 13 W.

The testimony shows that the father of Mrs. Colby, the mother of these children, belonged to the Hoko tribe of Indians and her mother to the Makah tribe; and it is admitted that she was married to a white man, a citizen of the United States, who is the father of Elizabeth and Harry Colby. It also appears that Mrs. Colby was not residing on any

Indian reservation at the time she made selection of the lands for herself and her children.

These being admitted facts, the question arises, are these children entitled to allotments under the fourth section of the act of February 8, 1887, as amended by the act of February 28, 1891.

The circular of September 17, 1887, relating to allotments under the act of 1887, directs that Indian women married to white men, or to other persons not entitled to the benefits of this act, will be regarded as heads of families. The husbands of such Indian women are not entitled to allotments, *but their children are*. But in the case of *Black Tomahawk v. Waldron*, reported in 13 L. D., 683, it was held by the Department, adopting the opinion of the Assistant Attorney-General, that:

The common law rule that offspring of free persons follows the condition of the father prevails in determining the status of children born of a white man, a citizen of the United States, and an Indian woman his wife. Children of such parents are, therefore, by birth not Indians, but citizens of the United States, and consequently not entitled to allotments under the act of March 2, 1889.

In the same case, reported in 19 L. D., 311, it is said:

Upon further considering the matters involved in this controversy, I see no good reason for changing the conclusions heretofore reached by the Assistant Attorney-General, on the record then before him, and which conclusions were approved by me.

There can be no doubt of the correctness of the general rule as laid down, that, among free people, the child of married parents follows the condition of the father. But it has been suggested that the laws and usages of the Sioux Indians may have made Mrs. Waldron a member of the tribe on March 2, 1889, the date of the agreement between the tribe and the United States, either by furnishing a different rule as to the effect of her birth, or by causing her adoption as a consequence of the facts connected with her life. While the general rule is as has been before held, yet it must yield to the laws and usage of the tribe when laws and usage upon the subject are satisfactorily proven.

Upon the authority of these cases, it must be held that Elizabeth and Harry Colby are not entitled to allotments under the acts of February 8, 1887, and February 28, 1891.

Consequently your office decision is reversed.

ALASKAN LANDS—SURVEY—INDIAN OCCUPANCY.

BENJAMIN ARNOLD.

A survey of Alaskan lands under sections 12 and 13, act of March 3, 1891, should not be allowed to include a ditch or water way, used by native Alaskan villagers for the purpose of securing the necessary fresh water supply for domestic use and consumption.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) 30, 1897. (W. M. B.)

This is an appeal by Benjamin Arnold from your office decision of May 8, 1895, wherein was suspended, in its present form, survey No. 22,

executed by Albert Lascy, U. S. deputy surveyor, under provisions of sections 12 and 13 of the act of March 3, 1891 (26 Stat., 1095), of a tract of land claimed by appellant, containing 7.19 acres, situated on Kayanak Bay, Kadiak Island, district of Alaska, and used as a trading post.

The field notes and plat of this survey show that the tract of land claimed, as laid off, is about four times as long as its average width, that the same is very irregular in form, and it appears that your office suspended the said survey in its existing form for the reason that it does not embrace a tract of land in square form as near as practicable, and for the further reason that the whole of the tract does not appear to be used by the claimant for carrying on the business engaged in.

The right of the claimant to the tract in its existing form appears to be affected by a feature or condition other than those already mentioned, with respect to which your said office decision contains the following statement:

Upon the tract of land embraced within this survey and running across from one side to the other is shown a ditch almost a half mile long which the deputy says "leads the water from the lake on the west boundary line to another below the native village of 1'0 inhabitants on the southeast, and supplies the same with water". It is not stated whether this ditch is a natural water course, or built by and for the natives for supplying the necessary fresh water for their consumption. Upon this fact hinges the right of the claimant to lands including any portion of the ditch.

An emendation of the survey is suggested in your office decision in manner therein particularly described, but it appears from a careful examination of the plat of the survey that if said survey was so amended the entire portion of the referred to ditch which is included in the survey in its original or present form would still be embraced within the lines of a survey amended and made in the form indicated in your said office decision, and it matters not whether said ditch be an artificial or natural water course the right of the native villagers to the free and uninterrupted use and enjoyment of the said stream of water would appear to be protected by that particular portion of section 14 of the said act of March 3, 1891, in words following:

That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands to which the natives of Alaska have prior rights by virtue of actual occupation.

If it be ascertained that said ditch is an artificial water course constructed by or for the natives for the purpose stated, no portion of the land upon which it is located should be included in a purchase and entry made by claimant, and if on the other hand it is found to be a natural water way the actual and prior appropriation of the same by the native Alaskan villagers for the purpose of securing the necessary fresh water supply for domestic use and consumption entitle the said villagers to the exclusive use, control, and possession of said water way, and the particular portion of the land which is occupied by said

water way, and sought to be purchased and entered by claimant, may be considered, as land in or under the "actual occupation" of the said villagers, by virtue of which they have a prior right thereto, within the meaning of said section 14 of the act herein cited.

For the foregoing reasons if there be an emendation of the survey, the same should not be amended as suggested in your office decision, but on the other hand the lines of survey should be run in such manner as not to include any portion of the above described ditch.

The decision of your office, with the modification herein indicated, is hereby affirmed.

ALASKAN LANDS—ACTUAL USE AND OCCUPANCY.

SOUTH OLGA FISHING STATION.*

On application to purchase Alaskan land under the act of March 3, 1891, the extent of the actual use and occupancy of the land should not be determined on the report of the deputy-surveyor alone, and prior to the submission of final proof.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (W. C. P.)

The South Olga Fishing Station (a corporation) has appealed from your office decision of June 27, 1895, in the matter of survey No. 47, of a tract of land claimed by said company, situate on the south shore of Olga Bay, Kadiak Island, Alaska, containing 39.30 acres, and used as a fishing station.

It seems that said survey was approved on May 29, 1893, but afterwards by the decision appealed from herein, that action was revoked, and the survey "suspended pending emendation, for the reason that more land is claimed than is actually occupied by the claimants for their business." It is stated in the appeal from this decision that final proof has been submitted in support of the application to purchase, but this proof presumably had not reached your office when said decision was rendered. There seems to be no objection to the manner in which the survey was made nor to the form of the tract.

Claimants are entitled to purchase only so much land as is occupied, that is, actually used for trade and manufacture, in no case to exceed one hundred and sixty acres. Instructions (20 L. D., 434); McCollom Fishing and Trading Co., (23 L. D., 7).

The character of the use made of the land and the extent of the occupancy thereof can not as a rule be satisfactorily determined until final proof shall have been submitted, as required by the regulations provided under said act. Among other things required to be shown by the final proof are the actual use and occupancy of the land as a trading post or for manufacturing purposes, the date when the land

* Not reported in Vol. 23.

was so occupied, the character and value of the improvements, and the annual value of the trade and business conducted upon the land. (12 L. D., 533, 590).

The conclusion reached by your office that the tract as surveyed contains more land than is actually occupied is based upon the report of the deputy surveyor alone. While the surveyor is instructed to report the facts as to occupancy as shown upon the ground, yet it was not contemplated or intended that such report should be accepted as conclusively determining the extent of such occupancy. If such had been the intention no further proof would have been required. It would be unwise and unfair to all interested parties to rest the determination of so important a question upon the statements of the surveyor.

It cannot be satisfactorily determined from the information furnished by the record now here whether the occupancy of this tract is of the character contemplated by the act of March 3, 1891, nor can the quantity of land thus occupied be determined.

The decision complained of having been rendered before the questions involved had been properly presented, and therefore upon an incomplete record, is for that reason set aside, and the case will be now returned to your office for consideration in connection with the final proof therein, and such action as may be proper.

SETTLEMENT RIGHTS—ADVERSE CLAIMS.

HENLEY ET AL. v. SHARPNACK.

An alleged act of settlement, set up to establish priority of right as against an adverse settlement claim, can not be accepted as sufficient, if said act is not of a character to give notice of a settlement claim.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (E. B., Jr.)

The land involved in this case is the NE. $\frac{1}{4}$ of section 20, T. 21 N., R. 7 E., Perry, Oklahoma, land district, for which George Sharpnack made homestead entry No. 203 September 19, 1893. It lies within what was formerly known as the Cherokee Outlet and was opened to homestead settlement at twelve o'clock, noon, of September 16, 1893.

On October 12, 1893, John Newell, and on December 14, 1893, Edward S. Henley, respectively, initiated contests against said entry, each alleging settlement on the land prior to any other person, and prior to the date of the entry. The contests were consolidated and hearing were duly had, ending March 12, 1895. The local office found in favor of Henley, recommending the dismissal of Newell's contest and the cancellation of Sharpnack's entry, on the ground that although Newell was first upon the land his only prior act of settlement, which consisted in nailing a small board, on which his name was written, in a "black

jack thicket," was insufficient notice to Henley; that Henley made due settlement prior to said entry, upon which alone Sharpnack relied; and that Henley had duly complied since with the homestead law. The local office also found from the testimony that charges of "soonerism", made at the hearing by Newell and Henley against each other, were not sustained by the evidence. Your office decision of September 23, 1895, on appeal by Sharpnack and Newell, affirmed the decision of the local office, held said entry subject to the prior settlement right of Henley, and dismissed Newell's contest. Motions for review and rehearing by Newell were denied March 2, 1896. Appeals by Sharpnack and Newell, presenting questions relative to priority of settlement and "soonerism" in the case, now bring the same before the Department.

Sharpnack offered no testimony at the hearing, resting his claim of priority of right to the land upon his entry alone. The testimony in the case is voluminous and very conflicting. It is familiar doctrine that the Department accords great respect to the decisions of the local officers upon questions of fact, where, as in this case, they heard the witnesses and had opportunity to observe their demeanor in giving testimony; and it is well settled that the concurring decisions of your office and the local office upon such questions, where the evidence is conflicting, will generally be accepted here as conclusive (*Tyler v. Emde*, and cases cited therein, 12 L. D., 94).

The evidence in this case has been carefully read and considered, and therefrom no warrant is found for disturbing the conclusions of your office upon the questions of fact. I find, substantially as found by your office, that while Newell reached the land early in the afternoon of September 16, 1893, the day of the opening, he did no act of settlement thereon that day, save only to nail a small piece of board, about ten inches long and less than two inches wide, to a tree in the midst of a piece of black jack timber near the west side of the land, where it was not conspicuous; that he remained on the land that day only a few minutes; that he did not return thereto until September 25, following; that he left again the next day and did not return and actually take up his residence upon the land until October 5, following; that Henley went upon the land early in the forenoon of September 17, 1893; that he laid, that day, two foundations of poles thereon, blazed trees and put up a stake eight or ten feet high with flag attached; that he remained there claiming the land and warning persons off and doing other acts of settlement for one week, when he spent about two days going to Pawnee, about fifteen miles from his claim, to make application to enter the land; that from his return, September 26, 1893, until early in November, following, save a few days absence on a trip to Perry, early in October, for the purpose of filing a homestead application, he was on and about the land, chiefly engaged in building a house, which was completed October 28, and also in plowing, and doing what he could

with his scanty means to improve his claim; and that, with the exception of about one month ending in December, 1893, during which he was absent at Okmulgee, Indian Territory, earning money to maintain and improve his claim, he has continued to reside upon the land and make permanent improvements thereon. He denies any knowledge whatever, and it is not shown that he had any, direct or indirect, of the claim of Newell to the land until after the latter's return thereto in October, 1893.

I concur in the conclusion of your office and the local office that the evidence fails to show that Henley was in any part of the Cherokee Outlet at any time between August 19, and noon of September 16, 1893, the period of inhibition against entrance therein as fixed by the President's proclamation opening the same for settlement (28 Stat., 1222). And see, as to the period of inhibition, *Bowles v. Frazier* (22 L. D., 310).

Under the facts in this case, and the law applicable thereto, Henley's settlement right to the land is clearly superior to the right of Sharpnack to the same under his entry. I think it is likewise superior to the claim of Newell thereto. This conclusion does not in any way contravene, but, on the other hand, I think, harmonizes with, the views of the Department in *Hurt v. Giffin* (17 L. D., 162); *Bowles v. Frazier* (*supra*); and *Penwell v. Christian* (23 L. D., 10), which are leading cases upon the question:—What are valid acts of settlement upon Oklahoma lands as between adverse claimants who made the race for a homestead therein?

In the first of these it was held (syllabus):

As between two claimants for Oklahoma lands, each of whom alleges settlement in the afternoon of the day on which the lands were opened to settlement, priority of right may be properly accorded to the one who first reaches the tract and puts up a "stake" with the announcement of his claim thereon, where such initial act of settlement is duly followed by the establishment of residence in good faith.

In the second it was said that—

The initial acts of settlement are addressed to the purpose of giving notice that the land is taken and claimed;

And it was held that (syllabus):

Initial acts of settlement are sufficient if of such character as to give notice that the land is claimed under the settlement laws.

In the third it was held that (syllabus):

The conditions attendant upon the opening of Oklahoma to settlement require the recognition of extremely slight initial acts of settlement in determining priorities between adverse claimants, if such primary acts are followed by residence within such time as clearly shows good faith;

and it was further said that—

In cases of this nature, where the good faith of both parties is established and neither party is guilty of laches, I am of the opinion that the only sound rule that can be adopted is to award the land to the person who was first upon the land and performed any act that evinces an intention to assert title.

In each of these cases the successful contestant was not only actually first upon the land but gave immediate notice of his claim to all comers by setting up his stake thereon, apparently where it could be readily seen, and by his personal presence thereon during much of the day of the race and on the day following. Each of those parties gave, therefore, much better notice of his settlement, than did Newell, of his alleged settlement; and neither of the cases cited affords any sound basis for an argument in his (Newell's) favor. The several acts of settlements therein, on the day of the race, were sufficient notice for that day, and were, perhaps, all that could well have been given under the conditions of fatigue, anxiety, hurry and confusion of that day. But Newell's single proven act, done and hidden away in a piece of woods—a small piece of board containing his name in pencil, nailed to a small tree surrounded by many others in full foliage; inconspicuous, and practically invisible at any considerable distance, as he substantially admitted at the hearing,—was not sufficient notice to protect his claim against adverse settlement even on the day of the race, and much less was it notice for more than a week thereafter, against one who, during that period, made a sufficient settlement thereon in ignorance of such act or claim, and duly complied with the homestead law thereafter.

This disposes of the case upon the merits. It is unnecessary to discuss appellant Newell's assignments of error relative to the denials of the motions for review and rehearing. The affidavits of Hook and others, relative to Newell's alleged settlement, are merely cumulative upon that point and afford no ground for a rehearing.

The decision of your office is affirmed in accordance with the foregoing.

RAILROAD GRANT—SECTION 2, ACT OF APRIL 21, 1876.

INMAN *v.* NORTHERN PACIFIC R. R. CO.

An entry allowed, under the rulings and decisions of the Land Department, of land to which a homestead claim had attached prior to notice of withdrawal on general route, that remained of record till after definite location, and was then abandoned, is within the confirmatory provisions of section 2, act of April 21, 1876, though made after the passage of said act.

Secretary Francis to the Commissioner of the General Land Office, February 23, 1897. (I. H. L.) (F. W. C.)

James Inman has appealed from the decision of your office, dated October 26, 1895, holding for cancellation his homestead entry covering the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 35, T. 13 N., R. 2 W., Vancouver land district, Washington, for conflict with the grant to the Northern Pacific Railroad Company.

Said tract is within the primary limits of the grant to said company

upon the portion of its road between Portland, Oregon, and Tacoma, Washington, to aid in the construction of which a grant was made by the joint resolution of May 31, 1870 (16 Stat., 378). It is within the limits of the withdrawal upon the map of general route filed August 13, 1870, and within the primary limits adjusted to the map of definite location filed September 13, 1873.

The withdrawal upon the map of general route was not received at the local office until October 19, 1870. Prior to this time, to wit, on August 23, 1870, Anna M. Lane was permitted to make homestead entry No. 1131 for the SE. $\frac{1}{4}$ of said Sec. 35, which entry remained of record until November 26, 1877.

In the case of Northern Pacific Railroad Company *v.* Burns (6 L. D., 21), it was held that a homestead claim, existing prior to the receipt of notice of withdrawal on general route of the Northern Pacific, excepts the land covered thereby from the operation of the grant, it being held that said entry was confirmed by the first section of the act of April 21, 1876 (19 Stat., 35), without regard to the question as to whether said entry was ever completed.

This decision was overruled by departmental decision of March 12, 1895 (20 L. D., 192), in which it was held that the confirmation of entries under section 1 of the act of April 21, 1876, is solely for the benefit of the individual claimant, conditioned upon his compliance with law, and was not intended to confirm the entry absolutely, as against the right of the company, so as to except the land from the grant in favor of any other settler.

Following the decision in the Burns case, before the same was overruled, James Inman, the present claimant, was, on November 27, 1888, permitted by the local officers to file pre-emption declaratory statement for the land here in controversy, which filing he afterwards, on October 31, 1889, transmuted to a homestead entry.

By the second section of the act of April 21, 1876, it is provided:

That when at the time of such withdrawal as aforesaid valid pre-emption or homestead claims existed upon any lands within the limits of any such grants which afterward were abandoned, and, under the decisions and rulings of the Land Department, were re-entered by pre-emption or homestead claimants who have complied with the laws governing pre-emption or homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto.

The facts heretofore recited bring the entry by Inman clearly within the provisions of the second section of said act. (See decision in case of Northern Pacific Railroad Company *v.* Symons, 22 L. D., 686.)

Your office decision holding Inman's entry for cancellation is therefore reversed, and upon showing compliance with law his entry will be deemed valid and patent issue thereon under the second section of the act of April 21, 1876.

RAILROAD GRANT—CONFLICTING GRANTS—ADJUSTMENT.

NORTHERN PACIFIC R. R. Co.*

In the adjustment of the Northern Pacific grant between Thomson and Duluth said grant should be charged with all lands received by the Lake Superior and Mississippi company between said points under the prior grant thereto, whether within the primary or indemnity limits of said grant.

Secretary Francis to the Commissioner of the General Land Office, November 17, 1896.
(I. H. L.) (F. W. C.)

With your office letter of October 7, 1896, was forwarded, with favorable recommendation, clear list of selections, made on behalf of the Northern Pacific Railroad Company, covering 1,250.20 acres, within the St. Cloud land district, Minnesota. These lands are within the second indemnity belt, and were selected on account of losses set forth in the list submitted, which upon inquiry at your office I learn are lands lost to the grant by reason of patents issued to the Lake Superior and Mississippi River Railroad Company under the grant of May 5, 1864 (13 Stat., 64). These lands are opposite the portion of the last mentioned road between Thomson and Duluth, which road was used by the Northern Pacific Railroad under an agreement entered into with the Lake Superior and Mississippi River Railroad Company, which agreement has been held by this office to have been in effect a confederation, consolidation or association of the latter company as contemplated by the provisions of Sec. 3 of the act of July 2, 1864 (13 Stat., 365), by which the grant to the Northern Pacific Railroad was made.

In considering the question as to the proper establishment of the terminal of the Northern Pacific grant at Duluth, it was held in departmental decision of October 29, 1896 (23 L. D., 428), that the Northern Pacific Railroad Company will not be entitled to indemnity for any lands received by the Lake Superior and Mississippi River Railroad Company opposite the portion of the road between Thomson and Duluth. In referring to that part of the act of July 2, 1864, *supra*, wherein it is provided

that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have heretofore been granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act,

it was held that the intention of Congress evidently was to provide against making a double grant where two land grant railroads were found to be upon the same general line, and this can only be arrived at by charging to the Northern Pacific all lands received by the company to which the first grant was made, opposite the portion of the lines which are similar, whether within the primary or indemnity limits of that grant.

* Not reported in Vol. 23.

It is clear therefore that the basis as assigned in the list submitted for the approval of this Department is not a satisfactory basis, and the list is herewith returned without my approval.

RAILROAD SELECTIONS MINERAL LANDS.

INSTRUCTIONS.

Secretary Bliss to the Commissioner of the General Land Office, April 9, 1897.

I am in receipt of your letter "N" of the 2nd instant, requesting an amendment of the last paragraph of the circular of July 9, 1894 (19 L. D., 21), providing for the examination of selections by railroad companies of lands in mineral belts so as to read as follows:

That all lists that have been heretofore prepared in accordance with any rules, regulations or instructions of the Secretary of the Interior, where such rules have been complied with (such as furnishing affidavits showing the non-mineral character of the lands in accordance with the instructions of the Interior Department) and such mineral affidavits furnished *for each and every legal subdivision* shall be excepted from the terms of the foregoing regulations.

Said paragraph, as now in force, reads in lieu of the underscored words in the proposed amended paragraph above indicated, "for each subdivision of 40 acres."

After reciting the history of the occasion that gave rise to the circular of July 9, 1894, you stated as follows:

To require the non-mineral affidavits to specify "each subdivision of forty acres" would disturb the established practice of this office, require new affidavits in State and railroad selections, and compel a new form of affidavit to be made in these cases.

After an examination of the question it appears to me that the proposed amendment of said paragraph will operate as effectually to protect the government against the selection of mineral lands by railroads and states under their grants as it now does in the present form.

Said paragraph is therefore hereby amended so as to read as follows:

That all lists which have been heretofore prepared in accordance with the rules, regulations or instructions of the Secretary of the Interior, where such rules have been complied with (such as furnishing affidavits showing the non-mineral character of the lands in accordance with the instructions of the Interior Department) and such mineral affidavits furnished *for each and every legal subdivision* shall be excepted from the terms of the foregoing regulations.

It is also hereby ordered that the form of the non-mineral affidavit now in use in your office be amended as follows: After the following clause in the body of the affidavit "but with the object of securing said land for agricultural purposes", you will insert the following: "and the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof."

PRACTICE—NOTICE OF APPEAL—JURISDICTION.

VAN DYKE *v.* LEHRBASS.

An appeal will not be entertained, if notice thereof is not served on the opposite party within the time allowed for filing the same.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 19, 1897. (E. B., Jr.)

In the case of Frank H. Van Dyke *v.* Albert Lehrbass, involving the homestead entry No. 6484 of the latter, made November 6, 1891, for the SW. $\frac{1}{4}$ of section 8, T. 17 N., R. 3 E., Wausau, Wisconsin, land district, said Van Dyke has filed a motion to dismiss the appeal of Lehrbass, on the ground that no copy of the appeal was served upon appellee within the time allowed for filing the same.

It appears that on November 19, 1896, your office, on appeal by Lehrbass, affirmed the decision of the local office, holding that Lehrbass had failed to reside upon his homestead as required by law, and that his entry should therefore be canceled. On November 21, 1896, the local office notified Lehrbass by mail of your office decision and of his right of appeal therefrom, enclosing a copy of the decision. This notice, it is alleged under oath by Van Dyke, and not denied by Lehrbass, the latter received on November 24th following. On February 8, 1897, the following notice was served on Van Dyke by Lehrbass:

In the matter of the homestead entry of A. Lehrbass No. 6484, to the SW. $\frac{1}{4}$ of Sec. 8, township 17 N., R. 3 E.—

TO FRANK H. VAN DYKE,

Contestant,—

Take Notice, That on affidavits of which the following are copies, I have and do hereby appeal from the decision of the Register & Receiver of the Land Office at Wausau, Wisconsin, denying said H. E., to the Secretary of the Interior at Washington, D. C., for a reversal of said decision, and the allowance of my said H. E. February 4th, 1897.

(Signed) ALBERT LEHRBASS,
Appellant.

With this notice were what purport to be copies of affidavits of eight persons, including Lehrbass and his daughter, relative to Lehrbass' residence and improvements on the land. A duplicate of the above notice, to which were attached what appear to be the originals of the above copies of affidavits, sworn to before "Richard Smith, Ct. Com. Juneau Co. Wis.," was filed in your office on February 11, 1897. Said Smith is the attorney of record for Lehrbass.

Under the rule in *Murphy v. Logan* (19 L. D., 478), allowing seventy days within which to file appeal from a decision of your office when notice of the same is given through the mails by the local office, the time within which appeal from your office decision in this case might have been filed expired on January 30, 1897. Notice of appeal was not,

therefore, given the appellee within the time required by the rules of practice (Rules 87 and 93), which make it necessary that a copy of the notice of appeal and specification of errors shall be served on the opposite party within the time allowed for filing the same.

It is unnecessary, in view of the foregoing, to discuss the inherent and obvious defects in the appeal itself. Notice of the appeal having been given too late, the Department is without jurisdiction, under its rule, to entertain the same (*Gregg v. Lakey*, 16 L. D., 39).

The motion is allowed, and the appeal dismissed.

INDIAN LANDS—ALLOTMENT RIGHTS—ADVERSE CLAIMS.

PHILOMME SMITH ET AL.

The burden of proof rests upon one who attacks an approved allotment, alleging a superior right to the land covered thereby.

An allotment duly made and approved must be regarded as a judicial determination that the allottee is entitled to an allotment in the reservation involved, and such question, so determined, must thereafter be held *res judicata*.

A departmental determination that an applicant for the right of allotment is entitled to recognition, so far as tribal relationship is concerned, removes such question from further consideration in subsequent proceedings involving the assertion of said right.

An allotment made and approved on the selection of the allotting agent, and without a formal selection on the part of the allottee, is not for such reason invalid.

An adverse claim set up against an approved allotment by another applicant for the right of allotment and based on alleged prior selection and improvement of the tract in question, can not be recognized, in the absence of an affirmative showing of injustice done, amounting to a fraud upon his equitable rights in the premises.

The relinquishment of an allotment is inoperative if not approved by the Department.

Assistant Attorney-General Van Devanter to the Secretary of the Interior,
April 19, 1897. (E. M. R.)

I am in receipt, by reference from you, of the report of the Commissioner of Indian Affairs, of date March 16, 1897, together with a request for an opinion "as to the rights of Philomme Smith *et al.* and Mrs. Louisa Morrisette *et al.*, to the allotments of lands claimed by them respectively on the Umatilla reservation."

The record shows that on July 1, 1893, Assistant Attorney-General Hall rendered an opinion in which he held that these parties were not entitled to allotments in the Umatilla reservation; but, subsequently, the matter being before him on review, he reversed his holding and decided that they were so entitled.

The matter having been referred to his successor, Assistant Attorney-General Little, an opinion was rendered by him on August 6, 1896, in which the conclusion reached by Assistant Attorney-General Hall in his last-mentioned opinion, was affirmed and the suggestion made that

inasmuch as it appeared that the showing then before the Department was *ex parte* in character, a hearing be had to determine the question as to whether these applicants were entitled to have allotted to them the various tracts selected by them. Accordingly, a hearing was duly had and the allottees hereinafter referred to were called upon to show cause why the allotments made to them should not be canceled and these petitioners awarded the land.

In this connection, it appears that Philomme Smith claims the SE. $\frac{1}{4}$ of Sec. 20, T. 3 N., R. 34 E., Oregon. This tract has been allotted to Heyutsemilkin, an Indian, and the allotment was approved by the Department April 12, 1893, and, by the approval of the Department, leased for two years from March 1, 1894.

Charles Smith, a minor child of Philomme Smith, claims the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 29, of said township and range. The NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, same section, is claimed for Maggie Smith, minor child of Mrs. Smith. The SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the said section is claimed for Jennie Smith, minor child of Mrs. Smith. The SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section, is claimed for Lura Smith, minor child of Mrs. Smith, all of which four forties were allotted to Martha Hebeart, a Walla Walla Indian, and approved by the Department April 12, 1893.

The NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 29, of the same township and range, is claimed for George Smith, minor child of Mrs. Smith. The SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, is claimed for Soffa or Sophia Smith, a minor child of Mrs. Smith. The W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section is claimed for James Smith, minor child of Mrs. Smith, which eighty, with the two above mentioned forties, were allotted to Margaret Bourner, a Walla Walla Indian, approved by the Department April 12, 1893, and, by its approval, were leased for two years commencing on November 1, 1894.

The W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 29, is claimed for William Smith, minor child of Mrs. Smith. The NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ was allotted to Mary B. Guyott, a minor child of Mary Guyott, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ to Carrie Chalifoe, a minor child of Julia Ann Chalifoe. The portion allotted to Mary B. Guyott was leased, with the approval of the Department, for three years from March 1, 1894.

Mrs. Louisa Morrisette, or Marcette, claimed the NE. $\frac{1}{4}$ of section 14, T. 3 N., R. 3 E., which tract was allotted to Charles McWhirk and the allotment was approved by the Department April 12, 1893.

Mrs. Mary Pecar, daughter of Louisa Morrisette, and over eighteen years of age, claims the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 29, and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 32. These tracts were allotted to Mary Guyott and approved by the Department April 12, 1893, and by its approval have been leased for three years from March 1, 1894.

August Meshee, or Misplay, a minor child of Mrs. Mary Pecar and grandson of Louisa Morrisette, claims the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, and John Meshee or John Albert Misplay claims the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$

of said section, both of which tracts were allotted to Louis Chalifoe, and approved by the Department on April 12, 1893.

It thus appears that there are eight contests in this proceeding between as many, or more, parties, and involving different tracts of land.

The hearing ordered by the Department in carrying out the suggestion of Assistant Attorney-General Little was had before the Indian agent at the Umatilla agency in Oregon, to which place and before whom the various parties were cited to appear. On February 17, 1897, in rendering his opinion, the Indian agent said:

If settling on land before allotment in good faith, and by direction of the chief of the tribe, whose word seems to have been law at that time, and making valuable improvements on the same gives an Indian a right to that particular land, then the allotments to the different parties of the land so claimed, by reason of priority of occupancy and improvement by Mrs. Philomme Smith ought to be canceled and Mrs. Smith and children allotted thereon, and I so recommend.

As to Mrs. Morrisette's claim, I am not so positive, and cannot, from the evidence, make a conclusion in the matter, and respectfully submit the same without recommendation.

In the letter of the Commissioner of Indian Affairs of date March 16, 1897, it is stated as a reason for making no finding of facts upon the various issues joined, that—

As the claims of Mrs. Smith and Mrs. Morrisette *et al.* to the land involved, were passed upon by the Assistant Attorney-General for this Department in his said opinion dated August 6, 1896, concurred in by the Department, and in view of the instructions contained in departmental letter of September 24 last, it is thought proper to submit the new evidence in these cases to the Department without comment or recommendation, to the end that the Department may reach such conclusions in the matter as may be justified by the evidence submitted by the allottees when considered in connection with the opinion of the Assistant Attorney-General and the evidence submitted before the same was rendered, by the petitioners.

It is to be regretted that the Commissioner of Indian Affairs made no findings of facts to assist in determining the vexed questions of fact presented by this voluminous record and its complicated issues.

It appears that the standing of the parties has been misunderstood. It is set out in the record that Smith and Morrisette *et al.* are the claimants and the allottees are the contestants. This is an error and one of moment. The contestants are Smith and Morrisette *et al.* and the allottees are the defendants. Upon the attacking party rests the burden of proof. The fact that these allottees were called upon to show cause why their allotments should not be canceled in no wise affected their status. It is the duty of these contestants to affirmatively show such a state of facts as will necessitate the cancelling of the allotments already made. It was not even incumbent upon the defendants to enter an appearance; had they not done so it would have been no less the duty of these contestants to present the requisite showing of superior rights.

Much testimony was introduced at the hearing for the purpose of showing that certain of the allottees were not entitled to allotments on

this reservation. The allotments have been duly made and approved by the Department. The determination that those allotted were so entitled was a judicial one, and the question thus raised became *res judicata* and will not now be entered into in these proceedings.

On the other hand, an attempt is made to show that Philomme Smith and Louisa Morrisette are not Indians entitled by reason of tribal relationship to allotments. In so far as they are concerned, this Department by approval of the opinion of Assistant Attorney-General Little, *supra*, has determined that question in the affirmative and that issue is therefore concluded.

Aside from this it is doubtful if the allotments heretofore made could be attacked in the manner set out in these proceedings.

The question for determination presented by this record is: Are the petitioners entitled to have the allotments made and approved, canceled by reason of superior equities existing in them?

The act authorizing these allotments is that of March 3, 1885 (23 Stat., 340), and provides:

That the President of the United States cause lands to be allotted to the confederated bands of Cayuse, Walla Walla, and Umatilla Indians, residing upon the Umatilla reservation in the State of Oregon as follows, of agricultural lands:

To each head of a family, one hundred and sixty acres; to each single person over the age of eighteen years, eighty acres; and to each orphan child being under eighteen years of age eighty acres; and to each child under eighteen years of age, not otherwise provided for, forty acres.

Allotments to heads of families and to children under eighteen years of age belonging to families shall be made upon the selections made by the head of the family; allotments to persons over eighteen years of age not classed as heads of families shall be made upon the selections of such persons; and allotments to orphans shall be made upon selections made by the agent in charge, or other person duly authorized by the Department. . . .

Before any allotments are made, a commission of three disinterested persons to be appointed by the President shall go upon said reservation and ascertain as near as may be the number of Indians who will remain on said reservation and who shall be entitled to take lands in severalty thereon. . . . Said commission shall report to the Secretary of the Interior the number and classes of persons entitled to allotments, as near as they may be able to.

April 24, 1891, this Department approved the instruction issued to Messrs Bushee and Eddy, allotting agents upon this reservation, found in letter books 215-216, contained in Vol. 108, page 307, of the Land Division of the office of Indian Affairs.

Some stress has been laid by the contestants upon the fact that no formal selections of their allotments were made by some of these allottees prior to the making thereof. I am of opinion that there is no invalidating consequence by reason of allowing the allotting agents to select, and the approval of such selections when made.

In the case of Louisa Morrisette *v.* McWhirk, involving NE. $\frac{1}{4}$, Sec. 14, T. 3 N., R. 34, the evidence shows that in 1889 Charles McWhirk, the defendant, selected this land and that subsequently it was allotted

to him. The land was first claimed by one Maria Bushman, who afterwards married Morrisette. She improved the land by building a fence and cultivation. Before her death she expressed the desire that this allottee should have the land; thereupon, he came from Montana, where he resided, to this reservation and asserted claim to the land, which, as already set out, culminated in the allotment being duly made. It appears from the record that this plaintiff, Mrs. Louisa Morrisette, formerly Mrs. Ceror, married Morrisette after the death of Maria Morrisette, and asserted claim to this land subsequently in point of time to such assertion by the defendant. She did not in any way during her lifetime, as far as this record shows, make any improvements upon this land, and she never lived thereon.

In the case of *Philomme Smith v. Heyutsemilkin*, involving the SE. $\frac{1}{4}$ of Sec. 20, the same township and range, it appears from the record that at the time of the allotment to the defendant the land had been selected by Mrs. Smith, and that a barn had been built thereon, some fencing done, and a well dug, with probably some ploughing. There is absolutely no evidence offered by this contestant as to the value of these improvements and there is nothing in the record from which it can be judged.

This Department has determined that these plaintiffs (Mrs. Morrisette and Mrs. Smith) are entitled to allotments. That action was in nowise a determination that they were entitled to allotments to these tracts; that question depends solely upon the special equities present in them arising from their actions upon, and in reference to, these several tracts.

It is a familiar rule of the Department that needs no citation of authority, that the establishment of a reservation prevents the acquirement of individual rights inharmonious with the purposes of its formation.

The object to be attained by making this reservation was to have a general home for these Indians until the allotment in severalty. Under these circumstances, was it possible for one to acquire a personal property right prior to the time of allotment by mere selection and slight improvements? It was the duty of the allotting agents in the first instance, to set apart the allotments. Until this was done, it may be said in general, that no rights could be acquired by an individual. By this it is not meant that the acts of these officials in making allotments could not be reviewed by the Commissioner of Indian Affairs, or by this Department, but that in the absence of an affirmative showing of injustice done, amounting to a fraud upon their equitable rights by reason of the amount and extent of improvements placed thereon by some one other than the allottee, the acts of allotment should stand.

To hold that rights could be acquired by selection and improvement in the face of adverse action by the allotting agents, would be, in effect, to say that the establishment of the reservation was without force and effect in setting aside the land so withdrawn for the purposes in view,

and would be to apply the ordinary doctrine of settlements as applicable to the pre-emption and homestead law, which was clearly never contemplated.

Applying these views to the causes at bar it is easy to see that Louisa Morrisette was not entitled to the allotments asked for. There are no equitable rights in her, so far as this record discloses, such as demand the cancellation of the allotment heretofore made. Her selection of this land—even if that gave her any rights—was subsequent to that of McWhirk. I am, therefore of opinion that the allotment should stand.

A somewhat different case confronts us in the case of *Smith v. Heyutsemilkin*. As has been seen, that allotment was made after its selection by Mrs. Smith and after some improvements had been placed upon the land by her, yet the record fails absolutely to disclose the value of these improvements. It has been already said that mere selection and slight improvements would not suffice to defeat an allotment made in due form and which has received the approval of the Department.

The burden of proof rested with the contestant. Upon her the duty lay of affirmatively presenting a case that would demand the cancellation of the allotment. She has had her day in court, carrying with it the opportunity and obligation of presenting her case fully, and in the entire absence of any showing as to the value of these improvements the allotment made must stand.

In the case of Charles Smith, Maggie Smith, Jennie Smith and Lura Smith *v.* Martha Hebeart, now Martha Bonifer, involving the NE. $\frac{1}{4}$ of Sec. 29, it appears that prior to the allotment made the defendant, these plaintiffs—minor children of Philomme Smith—had this land selected for them by Mrs. Smith, who, prior to the time of allotment, had the house in which they lived, built thereon. As in the case, *supra*, no evidence whatever is introduced as to the value of this house, or the other improvements in the way of fencing and cultivation. For the reasons above given, the allotment will stand.

It appears in the case of George Smith, Soffa Smith and James Smith *v.* Margaret Bourner, involving the NW. $\frac{1}{4}$ of Sec. 29, that the land was selected for them the plaintiffs, by Mrs. Smith whose minor children they are, prior to the allotment to the defendant. Aside from some fencing and cultivation no improvements have been placed on this land by the plaintiffs. A house was built by the defendant. In consideration of these facts it is apparent that the allotment should stand.

In the contest of William Smith *v.* Mary B. Guyott and Carrie Chalfoe, involving the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 29, the plaintiff does not live upon this land. There is no evidence of the value of improvements upon the land, if any, and the allotment should stand.

In the case of Mary Pecar *v.* Mary Guyott, now Mary McIntyre, involving the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of Sec. 29 and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of

Sec. 32, the plaintiff is the daughter of Louisa Morrisette. One Pross Pecar was living on the defendant's land at the time of the allotment. The Pecars did not claim the land. They wanted to be paid for the house and fence. A law suit resulted and the Pecars got the crop for one year in settlement for the improvements. Mrs. McIntyre went into possession. It would seem from this that no good reason appears for disturbing the rights of the allottee.

August Meshee or Misplay, and John Albert Meshee or Misplay *v.* Louis Chalifoe involves the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 32. The evidence shows that these contestants were aware, or their natural guardian was aware, that this land was claimed by the defendant at the time they first asserted right thereto. They can not, in consequence, set up an equitable claim to the land in view of the fact that it was subsequently allotted to the defendant.

It appears from the evidence submitted at the hearing that William, George and Soffa or Sophia Smith, and Louisa Morrisette are dead. The question arises, therefore, whether their heirs are entitled to have land allotted to them. In the instructions issued to Messrs. Bushee and Eddy, allotting agents hereinbefore referred to, it was said (page 314) "all persons *now living* whose names appear on the census rolls of 1887, are entitled to and will be given allotments;" and further on therein it is more fully and specifically stated (page 320):

Since the foregoing was prepared my attention has been called to a recent inspection report at the Unatilla agency, by Inspector Gardner, in which he observes that a question which greatly concerns the Indians is "whether or not a person living at the time of making the agreement, and who has since died, is entitled through his or her heirs to receive an allotment of land." The inspector states that he informed the Indians that in his opinion deceased parties had no right and that allotments would only be given to those living at the time of making the allotments. Upon this subject I have to say that allotments will be made only to those who are living when the allotments come to be made. The heirs of an Indian who was living at the date of the acceptance of the act of 1885 by the Indians and who has since died cannot have the allotments to which the deceased party would have been entitled had he lived.

These instructions have been approved by the Department and it may be that the heirs of those mentioned would not be entitled to have allotments made. On the other hand, the true test in such cases may not depend upon the person in whose behalf the allotment is asked being alive when the specific allotment asked for is made. It may be sufficient if such person was alive when the allotment should have been made. It will be time enough to consider this question when it is presented by the applications of the heirs of these parties.

There is contained in the record the relinquishment of Charles McWhirk and Martha Bonifer. The former sets out that since the time of his "allotment of and to said lands (it) has been contested by Louise Morrisette (Marcette) who claims a right to the same premises," and in consequence recites "that it is my desire that the allotment made to me

of the north-east quarter of section fourteen (14) in township three (3) north of range thirty-four (34) east of the Willamette meridian, be canceled and vacated," on the express condition that he be allotted a certain tract of land thereafter described.

The relinquishment of Martha Bonifer, formerly Hebeart, was also upon the express condition that she receive a particular tract of land. On December 15, 1896, subsequently to the relinquishment which bears date December 9, 1896, she made an affidavit to the effect that said relinquishment was the result of annoyances to which she had been subjected on account of adverse claims to the land allotted to her, and representations that she could get other land equally good, and she requested that said relinquishment be disregarded.

No right of relinquishment exists in an Indian. It may be that such action, with the approval of the Department, might be taken, but in the absence of such approval the act of the Indian is valueless to clear the record of the allotment, or in anywise affect its validity. *Ex parte* George Price (12 L. D., 162). No good reason appearing why the allotments made to these Indians should be canceled, no reason is seen for approving the relinquishments made. Aside from the general views here expressed, it does not affirmatively appear from this record that the relinquishments—even if the Indians had the authority to make and execute them—have ever become effective or operative, because of the fact that they were conditioned upon obtaining certain lands. It is not shown that this Department is in position to award them the land for which they applied.

Approved, April 19, 1897.

C. N. BLISS,
Secretary.

INDIAN LANDS—ALLOTMENT—ACT OF MARCH 2, 1889.

J. H. SCISSON.

Under section 8, act of March 2, 1889, all "Indians receiving rations" at a reservation, on the date of the President's order directing allotments thereof, are entitled to recognition under said order.

Assistant Attorney-General Van Devanter to the Secretary of the Interior,
April 19, 1897. (W. C. P.)

I am in receipt of the papers in the matter of the application of J. H. Scisson, a mixed blood Sioux Indian, for allotments to his two minor children upon the Rosebud reservation, with a request from First Assistant Secretary Sims "for an opinion as to whether the children alluded to in the within letter are entitled to allotments on the Rosebud reservation."

By the act of March 2, 1889 (25 Stat., 888), certain portions of the great reservation of the Sioux Indians in Dakota were set apart as reservations of the Indians receiving rations at the several agencies

within said "great reservation," and provision was made for the cession of the remainder of said reservation to the United States. It was provided in said act (Section 8), that the President should, whenever in his opinion any of said reservations was advantageous for agricultural or grazing purposes, and the Indians were sufficiently advanced in civilization, cause the lands of such reservation to be allotted to the Indians located thereon. It was further provided (Section 13) that any Indian receiving and entitled to rations and annuities at either of the agencies named in said act, at the time the same should take effect, but residing upon any portion of said "great reservation" not included in either of the separate reservations therein established, might at his option have his allotment upon the land where he was thus residing.

J. H. Scisson, a mixed blood Sioux Indian drawing rations at the Rosebud agency, elected to take his allotment upon the ceded lands, and the same was awarded to him. Afterwards he was married, and before the President's order, dated June 22, 1893, directing the allotment of lands upon the Rosebud reservation, two children were born to him.

Section 8 of said act, so far as it is necessary to consider it in this case reads as follows:

That the President is hereby authorized and required, whenever in his opinion any reservation of such Indians, or any part thereof, is advantageous for agricultural or grazing purposes, and the progress in civilization of the Indians receiving rations on either of said reservations shall be such as to encourage the belief that an allotment in severalty to such Indians, or any of them, would be for the best interest of said Indians, to cause said reservation, or so much thereof as is necessary, to be surveyed, or resurveyed, and to allot the lands in said reservation in severalty to the Indians located thereon as aforesaid.

The phrase—"Indians located thereon as aforesaid"—does not of itself furnish a description of the persons entitled to allotments, but refers to a class previously described. Nowhere in said act, however, before this, is the word "located" used in describing the connection of the Indians with any reservation. The various reservations are set apart for the Indians "receiving rations and annuities" at certain agencies, and in said section eight it is provided that allotments shall be made when the "Indians receiving rations" upon any specified reservation shall be deemed prepared therefor. Naturally the condition of the persons entitled to take allotments would be taken as the best criterion for determining the time at which such allotments should be made, and therefore when the law provides that the condition of "Indians receiving rations upon any of said reservations" shall be the criterion for deciding as to when allotments shall be made on that reservation, it must be presumed that the persons thus described are the ones entitled to allotments. The only logical conclusion to be drawn from the language used is that the phrase "Indians located thereon as aforesaid" refers to the preceding descriptive phrase "Indians receiving rations" and is defined thereby.

These children were, at the date of the President's order directing allotments to be made on the Rosebud reservation, receiving rations there and, so far as the facts before me show, were entitled to allotments, unless it be that the fact that they were not actually residing within the boundaries of that reservation debars them from participating in the division of the lands therein. If the conclusion reached herein as to the proper construction of the law be the correct one they are not thus barred.

In my opinion, and I so advise you, these children are, so far as the record before me shows, entitled to allotments upon the Rosebud reservation.

Approved, April 19, 1897.

C. N. BLISS,
Secretary.

RAILROAD AND WAGON ROAD GRANTS—CONFLICTING LIMITS.

EASTERN OREGON LAND COMPANY.

Action will be suspended on all entries allowed for lands within the conflicting limits of the grants for The Dalles Military Wagon Road Co., and the Northern Pacific R. R. Co., pending a judicial determination of the status of said lands.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 21, 1897. (F. W. C.)

With your office letter of March 19, 1897, was transmitted a petition, filed on behalf of the Eastern Oregon Land Company, successor to The Dalles Military Wagon Road Company, requesting that action be suspended upon all entries allowed for lands within the conflicting limits of the grants for The Dalles Military Wagon Road Company and the Northern Pacific Railroad Company. Upon this said petition your office makes no recommendation.

The material facts governing the rights of The Dalles company in the premises are similar to those in the case of the conflict between the grants for the Northern Pacific Railroad Company and the Oregon and California Railroad Company, which were considered in departmental decision of February 17, 1892 (14 L. D., 187), in which it was held (syllabus):

The grant of the odd numbered sections within the overlapping primary limits of the Northern Pacific, and Oregon and California roads, east of Portland, Oregon, was for the benefit of the former company under the act of July 2, 1864, and the forfeiture thereof by the act of September 29, 1890, is to the extent of the withdrawal made under the sixth section of the act of 1864; and under said act of forfeiture no rights of the Oregon and California road are recognized within said conflicting limits.

Within the conflict last referred to, a large quantity of land had been patented on account of the Oregon and California Railroad grant, and

suit was instituted to restore the title of said tracts to the United States.

It appears that upon an application filed on behalf of the Oregon and California Railroad Company, for the suspension of action under the decision of February 17, 1892 (*supra*), the local officers were directed by your office to withhold the lands within the primary limits from entry, and such lands as had been selected within the indemnity limits; which action was approved by this Department.

The Eastern Oregon Land Company, successor to The Dalles Military Wagon Road Company through purchase, it appears from the petition, instituted two suits against E. I. Messinger and John D. Wilcox, in the circuit court of the United States for the district of Oregon, to set aside patents which had been issued under the land laws to said parties for lands within the overlapping limits of the grants for the said The Dalles Wagon Road Company and the Northern Pacific Railroad Company; that said court rendered a *pro forma* decree dismissing the bills, but upon appeal to the circuit court of appeals for the ninth circuit, the decrees were reversed; said circuit court of appeals holding that the lands in question belonged to the Eastern Oregon Land Company and that they had been wrongfully opened to settlement and wrongfully sold and patented by the United States.

It is stated in the petition that it is the intention of the defendants to appeal the said suits at once to the supreme court of the United States.

In view of the action taken upon the petition of the Oregon and California Railroad Company, and of the decision of the court as to the rights of the petitioners, I have determined to grant their request, and have to direct that you give proper directions to the local officers to carry into effect the suspension, and that all action upon entries heretofore allowed be suspended to await the result of the decision of the supreme court in the case referred to.

ACCOUNTS—ADJUSTMENT OF DEPUTY SURVEYOR'S CLAIM.

JAMES H. MARTINEAU.

The adjustment of deputy surveyors' accounts is made upon the intrinsic evidence furnished by the field notes of survey, sworn to and returned by the deputy, and not upon independent supplemental statements.

Secretary Bliss to the Comptroller of the Treasury, April 21, 1897.

(W. V. D.)

(W. M. B.)

This Department is in receipt of your office letter of February 20, 1897, wherein you state that there is pending in your office an "appeal from the settlement by the Auditor for the Interior Department of the

supplemental account of James H. Martineau, U. S. deputy surveyor for Arizona under contract No. 30, dated June 21, 1893."

The question involved, as appears from your said office letter, is whether or not should be paid to Martineau the sum of \$71.72 claimed by him as compensation for the resurvey of the exterior township line in T. 4 N., R. 1 E., and for the partial survey and resurvey of the exterior township line in T. 3 N., R. 3 E., Territory of Arizona.

In your above referred to letter you say:

As the lines originally rejected were not shown in the deputy's field notes, their subsequent acceptance must have been based on independent supplemental evidence. The action of the Commissioner seems therefore to have been in conflict with the decision of your office in the account of Pearson (22 L. D., 471). I am aware that this decision was subsequently reviewed and somewhat modified, but do not understand that the point now under consideration was overruled; nor have I been pointed to any subsequent decision of your office overruling that in the Pearson case , before acting upon Mr. Martineau's appeal I have deemed it proper to bring the case to your attention, thinking that the action of the General Land Office in allowing Mr. Martineau's supplemental account may have been inadvertently taken, and, if not, to request that the information upon the lines originally rejected were subsequently allowed be given me, and also to be informed whether the policy of your Department in the matter now under consideration has been changed since the Pearson case was decided.

The items for which the stated compensation is claimed, are as follows: resurvey of 6 mls. .02 chs. 16 lks. of township exterior line in T. 4 N., R. 1 E., and survey and resurvey of 3 mls. 41 chs. 52 lks. of township exterior line in T. 3 N., R. 3 E.

It appears from reports contained in letters of the chief of division of public surveys and the Acting Commissioner of the General Land Office, dated May 9, 1896, and March 9, 1897, respectively, herewith transmitted, that the acceptance by the General Land Office of the above described lines, and allowance of compensation claimed therefor, as stated in referred to supplemental account for surveys made in pursuance of supplemental special instructions issued under contract No. 30, were not based upon independent and supplemental evidence, but were, as a matter of fact, based upon the intrinsic evidence furnished by the field notes now on file in the General Land Office. How it happened that the designated lines were not originally accepted by the General Land Office, and payment allowed therefor, is fully explained in letters and reports above referred to, it appearing that the failure to take such action was caused by a misunderstanding between the division of public surveys and the division of accounts of the General Land Office. Upon the showing made it appears that deputy Martineau is entitled, under the rule laid down in departmental decision of April 24, 1896, in the case of *ex parte* George W. Pearson (22 L. D., 471), to the compensation claimed.

Referring to said departmental decision of April 24, 1896, and replying to your inquiry as to whether this Department has changed its policy and ruling, as enunciated in said decision, with regard to the

adjustment of deputy surveyors' accounts upon the intrinsic evidence furnished by the field notes sworn to and returned by such deputies, and not upon independent supplemental statements—forming no part of the field notes—where the original field notes are defective and fail to conform to *special instructions*, which said instructions, by the act of October 1, 1890 (26 Stat., 650), are made and accepted as a part of every surveying contract, I will state that the ruling in said departmental decision of April 24, 1896, in the cited case has not been revoked, but is still adhered to.

The particular point or question to which you invite attention and which was considered somewhat at length and passed upon in said departmental decision of April 24, 1896, was not discussed or specifically ruled upon in the reviewing decision of October 3, 1896, hence the decision of the former date upon said question or point can not be considered as having been overruled by that of the latter date.

PENWELL *v.* CHRISTIAN.

Motion for review of departmental decision of July 1, 1896, 23 L. D., 10, and for rehearing, denied by Secretary Bliss, April 21, 1897.

ABANDONED MILITARY RESERVATION—ENTRY. APPRAISAL—FINAL PROOF.

GEORGE H. DOE.

Final proof can not be submitted on a homestead entry made under the act of August 23, 1894, of lands within an abandoned military reservation, prior to the appraisal of the reservation.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 21, 1897. (E. B., JR.)

This is an appeal by George H. Doe from your office decision of November 23, 1895, affirming the rejection by the local officers of his application, filed June 6, 1895, to be allowed to offer final proof in the matter of his homestead entry No. 2404, made June 6, 1895, under the act of August 23, 1894 (28 Stat., 491), alleging settlement March 1, 1876, for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 31, T. 13 S., R. 15 E., in the abandoned Fort Lowell military reservation, Tucson, Arizona, land district. The ground of rejection of said application by the local office was that the lands in said reservation had not been appraised.

It is admitted by appellant that the lands in said reservation had not been appraised when he asked to be allowed to offer final proof, and the only question is, whether he should be allowed to offer such proof prior to an appraisal.

Under the said act, persons making homestead entry of such lands as are covered thereby are required to pay—

not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry, and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior. (Act of August 23, 1894, *supra*.)

In pursuance of this provision of the act, Mr. Secretary Smith directed, February 18, 1895, that, in disposing of the lands in the abandoned Fort Bridger military reservation—

the homesteader be given the option in making payment upon his entry of these lands, of making his payments in five equal annual payments to date from the time of the acceptance of his final proof tendered on his entry, and that the rate of interest upon deferred payments be charged at the rate of 4 per cent per annum (20 L. D., 118).

Under these instructions the first payment becomes due one year after acceptance of final proof. As both said reservations are subject to disposal under said act, your office very properly, in the absence of any other specific regulation for the disposal of the former reservation lands, applied to them the rule of February 18, 1895 (*supra*). As they had not been appraised when Doe applied to be allowed to submit final proof, his application was properly denied. The action of your office in the premises is accordingly affirmed.

On July 29, 1896, your office submitted the report of the appraisement under the act of July 5, 1884 (23 Stat., 103), of the lands in the Fort Lowell reservation, and also of the government buildings on the reservation. The appraisement of these lands, embracing an estimated area of 51,631.36 acres, ranging in value from ten cents to fifteen dollars per acre, was, on August 18, 1896, approved by the Department in the following language:

The appraisal of the lands to be disposed of, so far as it relates to the tracts valued at and above the minimum price, is accepted, and the price of the tracts valued below the minimum price is fixed at \$1.25 per acre.

At the same time, instructions to the local officers at Tucson for the disposal of these lands, submitted by your office, following the instructions of the Department dated April 9, 1895 (20 L. D., 303), for the disposal of the lands in the Fort Rice and Fort Bridger abandoned military reservations, were approved.

It thus appears that the objection to the submission of final proof by Mr. Doe, upon his homestead entry, which was the occasion of his appeal, no longer exists. He may therefore proceed to offer final proof, subject, of course, to any valid objections thereto that may exist.

HOMESTEAD ENTRY—ALIENATION.

SWAZE v. SUPRENANT.

The execution of a deed to a half interest in the land covered by a homestead entry, prior to the submission of final proof, defeats the right to patent, though it may appear that the entryman had lived on the land for five years prior to alienation, and that the grantee under the deed is asserting no claim thereunder.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 21, 1897. (C. J. W.)

April 27, 1887, Alexander Suprenant made homestead entry, No. 3428, for E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 21 and W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 22, T. 2 N., R. 7 W., Helena, Montana, alleging settlement in 1884.

The entry was canceled as to the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 21, T. 2 N., R. 7 W., by your office letter "G" of January 15, 1890, for conflict with pre-emption cash entry, No. 3391, by Frederick L. St. Onge. By your office letter "C", of date July 20, 1894, Suprenant's entry, then comprising the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 22, T. 2 N., R. 7 W., was canceled because of failure to submit final proof within the statutory period, but said entry was reinstated by office letter "C" of September 21, 1894, and the entryman given sixty days within which to submit his final proof.

On October 26, 1894, he gave proper notice of his intention to make final proof on the 8th of December following, before the clerk of the district court of Silver Bow county, Montana, in which said land is situated.

On the day indicated he appeared with his counsel and witnesses and submitted his final proof.

It does not appear that any affidavit of contest was filed, but Joseph Swaze appeared before the officer, with his attorney and witnesses, and after the final proof blanks were filled, both parties submitted additional evidence. From this evidence it appeared, *inter alia*, that, the entryman had joined with Swaze, the protestant, and others, on October 8, 1890, in a location of the Jersey Blue placer claim, which includes the land covered by the homestead entry. It further shows that on May 15, 1889, Suprenant executed a mortgage to John E. Loyd upon the NW. $\frac{1}{4}$ of Sec. 22, T. 2 N., R. 7 W., to secure the payment of a promissory note, and further that on March 11, 1889, he executed a deed in the nature of a quitclaim to one Jean Baptiste Guay for a half interest in and to a ranch containing one hundred and sixty acres, known as the sheep ranch situated at the fork of Blacktail creek with Little Blacktail creek, including the land covered by the entry.

On March 17, 1895, the local officers rendered a joint decision recommending the acceptance of the final proof, and that the protest be dismissed.

From this decision Swaze appealed to your office.

On February 7, 1896, your office considered the case and held the homestead entry for cancellation on the ground that the entryman had, before making final proof, parted with a half interest in the land covered by it, by deed of alienation.

From this decision Suprenant has appealed to the Department.

It is somewhat difficult to determine from the record how Swaze obtained standing as a party to the case, but it appears from a stipulation signed by the attorneys, representing the parties, that Swaze was claiming the land as a mineral locator and was thereby entitled to be heard. As his right to offer testimony was not questioned, but is conceded by the stipulation, he will be treated as having the standing of a protestant against the final proof. The hearing involved three questions:

First, the character of the land, whether agricultural or mineral. Second, the *prima facie* sufficiency of the final proof offered by the entryman. Third, the good faith of the entryman.

It was properly found both by the local officers and your office, that the land was agricultural and not mineral. It is not seriously disputed that the formal final proof offered shows *prima facie* a compliance with the requirements of the law upon the part of the entryman. If the final proof is to be rejected it must be on the ground of the bad faith of the entryman. This, it is alleged, must be imputed to him on account of two transactions which it is charged are incompatible with good faith. These transactions are the execution of a mortgage on the land covered by his homestead and the execution of a deed to a half-interest in it, before offering his final proof. The transaction in reference to the mortgage seems to have been regarded by your office as insufficient to show bad faith, in the light of the explanations given by him in his testimony and by the mortgagee in his testimony. It is not deemed necessary to consider the grounds of the conclusion reached in reference to this matter, or to consider it separately from the other acts of the entryman impeaching his good faith. The record affords abundant evidence that the entryman is uneducated and easily misled, and that he understands but imperfectly the transactions about which he testifies.

In passing upon any question as to his good faith, his ignorance of the law; his surroundings and liability to be imposed upon, may be considered, but he must be credited with capacity to understand the plain duties required by law of all homestead entrymen, or he would be deemed incapable of making a valid entry. He must be presumed to have known that it was unlawful to sell and convey an interest in the land covered by his homestead entry before he had earned the title by compliance with the homestead laws. It is true that he disputes the correctness of the deed and insists that it was to be for an interest only in the improvements. The terms of the deed (a copy of which is appended to the record) are so plain and explicit that the theory of the

defendant can get no support from the construction of the instrument. It purports to be an absolute deed to a half interest in the land it describes as well as in the improvements and appurtenances. No witness is called to impeach its correctness, except the defendant himself, and his statements are too vague and uncertain to authorize the deed to be disregarded. It is insisted in the argument filed that the entryman had in fact earned his title before the deed to Guay was executed, by five years of residence upon the land prior thereto. If this was conceded he would still not be authorized to sell and convey his homestead before offering final proof. It is insisted that Guay has abandoned any claim he may have had by virtue of the deed, and has left the entryman in sole possession, but this does not mend the broken law.

I see no escape from the conclusion that the entry has been forfeited, and your office decision is accordingly affirmed.

PRACTICE—NOTICE OF APPEAL—RAILROAD GRANT—ADJUSTMENT.

STAPLES ET AL. v. ST. PAUL AND NORTHERN PACIFIC R. R. CO.

Notice of an appeal served upon the land commissioner and agent of a railroad company is a proper and legal service on such company.

The grants to the St. Paul and Northern Pacific R. R. Co., and the Northern Pacific R. R. Co., were made by different acts of Congress, and are entirely separate and distinct, and the lease of its road and franchises by the former company to the latter, will not justify the Department in holding that rights granted to the company first named can only be exercised by its lessee.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 22, 1897. (E. M. R.)

This case involves certain lands lying in sections 19 and 21, T. 132 N., R. 31 W., St. Cloud land district, Minnesota.

The record shows that by letters dated March 21, and 22, 1894, the local officers transmitted to your office the appeals of Staples *et al.*, from their action of January 9, and 25, 1894, rejecting the application of Willis L. Staples to enter, under the homestead law, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and lots 1 and 2, Sec. 19, T. 132 N., R. 31 W.; the NE. $\frac{1}{4}$ of Sec. 21, T. 132 N., R. 31 W., by Elizabeth Bowman; and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lot 6, Sec. 19, T. 132 N., R. 31 W., by Gust Johnson.

On October 5, 1894, your office decision was rendered in favor of these applicants, together with Julia A. Warriner and Gust Bydberg.

These lands are within the twenty mile primary limits of the grant to aid in the construction of the Northern Pacific Railroad under the act of July 2, 1864 (13 Stat., 365), as shown by its map of definite location filed November 21, 1871, but were not included within the limits of the grant as shown by the maps of general route, which took effect on August 13, and October 12, 1870. They are likewise within the fifteen

miles indemnity limits of the grant to aid in the construction of the Brainerd Branch of the St. Paul and Pacific, now the St. Paul and Northern Pacific Railroad Company, under the act of March 3, 1857 (11 Stat., 195), as shown by the map of definite location filed March 28, 1858.

The latter company selected this land as indemnity on December 31, 1877, by its list No. 2.

Your office decision of October 5, 1894 (*supra*), held that these lands were excepted from the grant to the Northern Pacific Railroad Company at the date of the definite location on November 21, 1871, by reason of the withdrawal then existing in behalf of the St. Paul and Pacific Railroad Company, and held that the selection by that company of December 31, 1877, was superseded by the selection of December 4, 1889.

The selection of 1877 did not contain a specification of losses as a basis for the selection, because there was no requirement for the specification of losses until the circular of November 7, 1879. (*Clancy et al. v. Hastings and Dakota Railway Company*, 17 L. D., 592.)

The supplemental list of December 4, 1889, contained a specification of losses, but as it contained less lands than the list of 1877 (due to the fact that certain of the selections of 1877 had in the meantime been canceled), your said office decision held that this variance amounted to an abandonment of the selection of 1877; further, that the selection of 1889 was not effective to reserve the lands, in view of the revocation of the withdrawal of May 22, 1891, because it did not comply with existing regulation in stating the losses tract for tract with the selected land, and accordingly reversed the action of the local officers and directed that the application of the parties be allowed.

On January 31, 1895, a motion for review having been filed by the St. Paul and Northern Pacific Railroad Company, your office decision was rendered, in which was reversed, in part, the decision of October 5, 1894; it being found that your office had inadvertently overlooked the fact that the company had, on February 12, 1892, perfected its selection by the filing of a re-arranged list containing a proper designation of losses arranged tract for tract as required by the regulations of this Department, and accordingly overruled so much of said former decision as rejected said list, and in consequence thereof rejected the homestead applications of these appellants, but declared final so much of said former decision as held that these lands were excepted from the grant to the Northern Pacific Railroad Company, no motion for review or appeal as to said portion of said decision having been made, and held that said holding had become final.

Subsequently, to wit, on November 4, 1895, a motion for review of said last above named decision having been made, by attorney for the homestead applicants, your office decision adhered to its decision upon review.

The contention in said last motion for reconsideration of your action, was upon the ground that the St. Paul and Northern Pacific Railroad Company had been to all intents and purposes merged into and become a part of the Northern Pacific Railroad Company, under a lease executed by the first named company to the Northern Pacific on or about June 1, 1883, of its line and franchises, for a term of 999 years; that said lease was to all intents and purposes a complete sale of the said St. Paul and Northern Pacific Company to the said Northern Pacific Company; that the St. Paul and Northern Pacific Company had abandoned any attempt or pretence at separate organization of its land grant, and the same was now attended, to, and a part of, the grant to the Northern Pacific Railroad Company; and that the Northern Pacific Company claims to control the grant to the St. Paul and Northern Pacific Company, but as in this case the rights of the Northern Pacific Company having been passed upon adverse to said company, and it not setting up any claim to this land under the grant to the Northern Pacific Railroad Company, the lands now involved are free from any claim by either company.

There is contained in the record a motion to dismiss the appeal of the appellants herein, on the ground that it was not served upon F. M. Dudley, the attorney of record in this case for the St. Paul and Pacific Railroad Company, but was served upon one W. H. Phipps of St. Paul, Minnesota.

It appears that the party served is the Land Commissioner and Land Agent of the Northern Pacific Railroad Company and the St. Paul and Northern Pacific Railroad Company.

In the case of Northern Pacific Railroad Company *v.* Walters *et al.* (23 L. D., 331), it was held, *inter alia* (syllabus): "Notice of an appeal served upon a duly recognized agent of a railroad company is a proper and sufficient service." See also the case of Boyle *v.* Northern Pacific Railroad Company (22 L. D., 184), wherein it was held (syllabus): "Notice of an appeal duly served on a general land agent of a railroad company is sufficient service on said company."

The position of counsel is therefore not well taken, and the appeal is properly before the Department.

The ground of review of your decision of January 31, 1895, urged by counsel for the homestead claimants, appears to be unsound. The grants to the two roads were made as separate grants, under different acts of Congress, having individual and distinct limits, and the fact that one of these companies leased its road and franchises to the other does not appear to be sufficient to hold that rights granted by the act to aid in the construction of the St. Paul and Northern Pacific Railroad can only be exercised by the Northern Pacific Railroad Company.

After an examination of the case, I concur with your office that this land is not subject to homestead entry, and the decision appealed from is accordingly affirmed.

HOMESTEAD ENTRY—SETTLEMENT RIGHT—CANCELLATION.

· GOURLEY *v.* COUNTRYMAN (ON REVIEW).

The cancellation of a homestead entry as to part of the land covered thereby, on account of an adverse claim, will not prevent the entryman from subsequently asserting his right as a settler to the entire tract covered by his original entry, as against a third party.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 22, 1897. (C. W. P.)

On March 3, 1897, your office transmitted, on the part of George W. Countryman, a motion for review of the decision of the Department, rendered on January 18, 1897, in the case of William Gourley against the said Countryman (24 L. D., 49).

The land involved is the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 28, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma Territory.

With the exception of the second and fifth grounds, the errors assigned relate entirely to matters of law and fact which were fully considered by the Department when the case was decided. No new question of law or fact is presented for consideration by them. And no reason is shown for a departure from the rule that in such cases motions for review must be denied. (*Shields v. McDonald*, 18 L. D., 478.)

The second and fifth grounds are: 2. In not holding that Gourley had exhausted his homestead rights by his entry for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 28, etc.; 5. In not holding that Gourley being a resident on the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and his homestead entry being embraced in that tract only, his settlement was only co-extensive with the boundaries of the land embraced in his entry, and gave him no right to the land.

It is the general rule in the administration of the homestead laws, that if a party of his own volition enters a less quantity of land than he is entitled to, his election to take such less quantity is to be considered as a waiver of his claim for a larger quantity (General Circular, October 30, 1896, p. 33). And the question in this case is, whether or not Gourley has elected to take only eighty acres and thus waived his claim to a larger quantity, within the meaning of the above rule. I think he has not. When he made his original entry he intended to take the maximum to which he was entitled. The cancellation of that entry as to the eighty acres cannot under the circumstances of this case be considered as a waiver on his part of his right, under the homestead laws, to the full quantity of one hundred and sixty acres, or as an exhaustion of his homestead right.

The fifth ground is not tenable for the reason that Gourley's original homestead entry covered the entire one hundred and sixty acres—a technical quarter section.

The motion, not showing proper grounds for review, is denied.

HOMESTEAD—RESIDENCE—SECTION 5, ACT OF MARCH 3, 1891.

CLARK v. MANSFIELD.

An applicant for the right of homestead entry who has continuously resided on the land embraced within his application for a period of five years, and applied to enter during said period, is not thereafter required to maintain residence as a prerequisite to patent.

The prohibitory provision in section 2289 R. S., as amended by section 5, act of March 3, 1891, that "no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law," is no bar to the allowance of an entry based upon an application made prior to the passage of said amendatory act, and strictly in compliance with the laws and regulations then in force.

No settlement right is acquired by trespass upon the lawful possession of another.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 22, 1897. (J. L.)

This case involves the SE. $\frac{1}{4}$ of section 21, T. 16 N., R. 44 E., Walla Walla land district, Washington, containing one hundred and sixty acres of land. This tract lies outside of the withdrawal on the original map of general route of the Northern Pacific Railroad Company, filed August 13, 1870; within the limits of the unauthorized withdrawal on the amended map of general route filed February 21, 1872; and within the indemnity limits on the map of definite location filed October 4, 1880. It was selected by the company on March 20, 1884.

On February 24, 1883, William S. Hurlbert presented his application to make homestead entry of said tract, alleging settlement prior to October 1, 1880, and continuous residence. The local officers rejected it, on the ground that the tract was within the withdrawal which took effect on February 21, 1872, for the benefit of the Northern Pacific Railroad Company. Hurlbert appealed. Your office reversed the action of the local officers, and held the company's selection of said tract for cancellation with a view to allowing Hurlbert's application to make entry. The railroad company appealed to the Department. On February 21, 1894, first, and afterwards on October 14, 1895, this Department affirmed the decisions of your office; and on February 8, 1896, the company's selection of said tract (made March 20, 1884) was canceled, and Hurlbert was awarded the right to make homestead entry of said land, and the case was closed.

Pending said proceedings to wit: on August 15, 1887, Secretary Lamar directed

that all lands withdrawn and held for indemnity purposes under the grant to the Northern Pacific Railroad Company be restored to the public domain and opened to settlement under the general land laws, except such lands as may be covered by approved selections.

He further directed that:

As to all lands covered by *unapproved* selections applications to make filings and entries thereon may be received, noted and held subject to the claim of the com-

pany, of which the claimant must be distinctly informed and memoranda thereof entered upon his papers. Whenever such application to file or enter is presented alleging upon *prima facie* showing that the land is, from any cause, not subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service, within which to present objections to the allowance of such filing or entry.

Then followed further directions by the Secretary as to the mode of procedure in the case (see 6 L. D., 91-92-93).

After the promulgation of said order, to wit on October 27, 1887, Girard Clark filed his application to make homestead entry of said tract, alleging settlement on March 1, 1884, and continuous residence and cultivation thereafter; and that the tract was not subject to selection by the Northern Pacific Railroad Company because one William Hurlbert, a duly qualified homestead entryman, in the year 1878, (long before the company made its selection), settled upon said tract and continuously resided upon and cultivated the land until the day of Clark's settlement thereon. Said application was filed, noted and held in the local office subject to the claim of the railroad company. Notice thereof was served upon the company. And on December 6, 1887, the company filed its protest against said application, on one of its printed forms, alleging that its map of definite location was filed on October 4, 1880, and that it had selected said tract as indemnity on March 20, 1884. The local officers did not then order a hearing, doubtless because of the case of Hurlbert *v.* the company then pending on appeal as above stated.

In the meantime, on March 8, 1894, George T. Mansfield filed his application to make homestead entry of said tract, alleging settlement on March 4, 1894, and subsequent residence. The railroad company was notified of this application also, and on April 15, 1894, filed its usual protest against the same.

On April 23, 1894, after the first decision of the Department in the Hurlbert case had been promulgated, the local officers ordered a hearing of the case of Girard Clark *v.* The Northern Pacific Railroad Company, upon the protest filed on December 6, 1887; and directed that the testimony be taken before William A. Inman, a notary public residing at Colfax, Washington. On May 11, 1894, George T. Mansfield filed his application to be allowed to intervene in said hearing, and to set up a superior right in himself to enter said tract of land. His application was allowed by the local officers.

On May 28, 1894, all three of the parties appeared before the notary at Colfax, Clark and Mansfield in person with their attorneys, and the railroad company by its attorney. The taking of testimony was commenced on May 28, and concluded on May 31, 1894. All parties were fully heard.

On July 27, 1894, the local officers found the facts as follows:

1st. That the first settlement was made on this land in December 1877 by one Debolt who shortly thereafter abandoned it.

2nd. That in the spring of 1878, William Hurlbert made settlement on the land, which he followed with actual residence and cultivation and improvement of the same until February 1884, at which time he sold his improvements on the land to Girard Clark, one of the parties hereto.

3rd. That said Hurlbert claimed the land under the homestead law and was qualified to make entry of the land thereunder.

4th. That in the month of February 1884, Girard established actual residence on the land, which he maintained until about the 25th day of March 1889, during which time he fenced and broke the entire tract with the exception of about twenty acres fenced and broke by Hurlbert, his grantor. Clark also made other valuable improvements on the land during this time in the way of buildings.

5th. That about March 25, 1889, Clark moved from this land and established his residence on another farm some miles distant from the land in contest, where he continued to reside up to March 6, 1894.

6th. That Clark has never abandoned said land or relinquished his right thereto; but has at all times held possession thereof; and has farmed, cultivated and cropped the same continuously up to the date of this hearing.

7th. That on March 4, 1894, the land was in the quiet and peaceable possession of Clark. That it was enclosed and had a growing crop of wheat to the amount of one hundred and forty acres sown by Clark the fall before.

8th. That at the time Mansfield entered upon the land he had actual notice of Clark's right thereto.

And thereupon the local officers recommended, that the selection of this tract by the railroad company be canceled; that the application of Mansfield be rejected; and that Clark be allowed to make his homestead entry.

The railroad company and Mansfield both appealed to your office.

On July 15, 1896, your office reversed the decision of the local officers solely upon the ground that Clark is now the proprietor of more than one hundred and sixty acres of land in the State of Washington, and is therefore disqualified from making a homestead entry. After making a recapitulation of the facts proved, substantially agreeing with the findings of the local officers, your office in its decision proceeded as follows:

It is clearly shown by the testimony submitted at the hearing in this case, that Girard Clark is the proprietor of more than one hundred and sixty acres of land in the State of Washington, which, under section 2289 of the U. S. Revised Statutes, as amended by the fifth section of the act of March 3, 1891 (26 Statutes 1095), disqualifies him from making a homestead entry.

Therefore, your decision is reversed, and the homestead application of Girard Clark is hereby held for rejection.

Your office further decided that it was not—

Necessary to take any further action upon said selection (by the Northern Pacific Railroad Company) to the extent of the tract involved in this case, as such selection as regards the land in question, was canceled by letter "F" of February 8, 1896, as the result of the case of said company against William S. Hurlbert, and which result is fully set forth in this decision; the railroad claim to this land has been eliminated.

You will advise Girard Clark of this decision, and allow him the usual time, sixty days after notice, within which to appeal to the Honorable Secretary of the Interior.

Should this decision become final George T. Mansfield will be permitted to make homestead entry for this land. You will advise him of this action.

From said decision Clark has appealed to this Department. The railroad company has not appealed. The case is now a controversy between Girard Clark and George T. Mansfield, alone.

The evidence shows the following facts:

Clark bought Hurlbert's improvements on February 4, 1884, for \$300 in cash, and settled on the tract the same day. Before the 10th day of February he had completed the removal of his wife and children and household goods and established his residence on the tract. He resided there continuously and exclusively until the 25th day of March 1889, a period of five years and forty-three days; during which time he got the whole quarter section under cultivation and securely fenced; and built new structures, made his improvements worth \$1,000, and raised crops worth from \$2,000 to \$3,000 per annum: About the middle of February 1889, he bought from a Mr. Ladd a farm containing 268 acres, five miles distant from his home by the road. After that date he cultivated and improved both farms, spending part of his time with his family on each tract. In the spring during the plowing and seeding, in the summer during the harvesting, and in the fall of the year during the plowing and seeding again, he remained with his family at his home place and boarded his hired men. After work was done he went with his family to the Ladd farm, and worked there; and generally remained there during the winter. He continued to live in this manner—alternating between the two places—until March 6, 1894, when he went with his family to his homestead, and remained there continuously and exclusively until the time of the hearing. During the five years between 1889 and 1894 he continued to cultivate and improve the home place, kept up his fences, and made crops worth from \$2,000 to \$3,000, every year, except one, when he fallowed the whole tract to let the land rest.

Mansfield claims, (1) that Clark's manner of life during the five years aforesaid was equivalent to a change of residence, to an abandonment of his homestead claim, and to a restoration of the tract to the public domain as unoccupied land subject to entry by any qualified person; and (2) that by his (Mansfield's) settlement on March 4, 1894, and his residence thereon for four days, until the date of filing his application, he acquired a better right than Clark's.

While it is true that residence under the homestead law must be continuous and personal, it is also true that residence once established can be changed only when the act and intention of the settler unite to effect such a change. (Secretary Lamar in *Anderson v. Anderson*, 5 L. D., 6, and in *Penrose's case*, 5 L. D., 179. See also *Patrick Manning's case*, 7 L. D., 144-5, and *Alfred M. Smith's case*, 9 L. D., 146-148.)

The whole evidence by a clear preponderance proves that Clark did not intend to change his residence; that he did not intend to abandon his homestead on which he had resided for more than five years, and which he had rendered very valuable by improvements and cultivation.

Moreover, after Clark had resided upon his homestead for more than five years, he was not required to reside there any longer. In the case of *Lawrence v. Phillips*, 6 L. D., 140-143, this Department after quoting section 2297 of the Revised Statutes said:

It seems clear from this section that residence upon the homestead is not required after the expiration of the five years, as a prerequisite of obtaining patent to the land; nor does a change of residence after that period forfeit a right already acquired.

The railroad company's selection being canceled, it is evident, in view of the law above quoted and the third section of the act of May 14, 1880 (21 Statutes 140), and the facts shown by the evidence, that Girard Clark is now entitled to make homestead entry of the tract of land in contest, and to offer final proof immediately, unless he be disqualified as indicated in your office decision.

By the 5th section of the act of March 3, 1891 (26 Statutes 1095), Congress after re-enacting the first five lines of section 2289 of the Revised Statutes enacted a new law in the following words:

But no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law.

When Clark on October 27, 1887, filed his application to make homestead entry, in strict compliance with the laws and regulations then in force, he acquired homestead rights in the tract of land described, which were good against all the world, and were unquestioned except by the Northern Pacific Railroad Company which then had pending an application to make indemnity selection of said tract. Said selection was unlawful and invalid for three reasons. (1) Because of William S. Hurlbert's settlement on the tract in the year 1878, prior to the filing of the map of definite location, and his continuous residence thereon: (2) Because said selection was made by the company while Hurlbert's appeal involving the company's right to that very tract of land was pending before the Department: And (3) Because on March 20, 1884, when said selection was made, Clark was and for forty-four days had been a *bona fide* settler and resident on the tract. According to law and the facts of the case, Clark was then and there, to wit: on October 27, 1887, entitled to have his application allowed and to make his homestead entry. But action upon his application was suspended by Secretary Lamar's order above quoted, until the company's claim should be disposed of by this Department. This was not done until February 21, 1894, more than six years after the date of Clark's application to make entry. Then Clark promptly secured a hearing, and a judgment of the local officers in his favor. Clark is not responsible for the delay. He has been guilty of no laches. He has diligently prosecuted and insisted upon his rights, which must be determined and measured by the laws as they were on October 27, 1887, when he did all that he could do, or be required to do, to perfect the homestead entry, which he had initiated on February 4, 1884 by settlement and

continuous subsequent residence. The act of March 3, 1891, above quoted is not applicable in this case. Clark is now entitled to a decision recognizing and establishing his rights as they were at the time of the filing of his application to make entry. (*Ard v. Brandon* 156 U. S. 537-543, *Pfaff v. Williams*, 4 L. D. 455-457, *Williams v. Clark*, 12 L. D. 173-175, *Patrick Kelly* 11 L. D. 326-328, *Goodale v. Olney* 12 L. D. 324-325, *Rice v. Lenzshek* 13 L. D. 154, *E. S. Newman* 8 L. D. 448-450 and *McDonald v. Jaramilla* 10 L. D. 276-278.)

For the foregoing reasons this Department decides, that your office erred in holding that Clark was disqualified from perfecting and making his homestead entry in this case, by reason of the fact that at the time of the hearing he was, and is now, the proprietor of more than one hundred and sixty acres of land in the State of Washington.

The intervenor, George T. Mansfield, has failed to show by the evidence a superior right or any right at all to make entry of said tract. According to his own personal testimony his pretended settlement was made under the following circumstances:

He first saw the land on March 2, 1894 (testimony p. 105), although he had been living at Colfax within six miles of the tract for about three years, carrying on business as bar-keeper and horse-trader (p. 115). On Sunday March 4, 1894, between nine and ten o'clock A. M., he made his alleged settlement (pp. 105 and 110). It was a stormy day (p. 114). Snow covered the ground and hid the growing crop (pp. 107 and 110). With a team and wagon containing himself and one Charley Shroll, and a stove, a bedstead, bedding and some food, and a large tent, Mansfield drove across an adjoining field belonging to a Mr. French (p. 112), and drove either over or through Clark's fence, to reach Clark's land. On page 110 of the testimony, Mansfield relates it thus: "I went through the fence. There was no fence visible. For 25 or 30 yards there was a large snow drift at the place." On the evening of March 4, after he had got his foundation laid and his tent up, he went with his team to Riverside to fetch his wife and children. Returning with them he was refused permission to pass through the gate, and was obliged to go around through Mr. Parvin's place, and crawl through the wires of Clark's fence, to reach his tent. (pp. 114 and 115.)

Mansfield acquired no rights by reason of his unlawful trespass upon Clark's homestead as shown by the testimony (*Atherton v. Fowler*, 90 U. S., 513).

Your office decision of July 13, 1896, is hereby reversed. Mansfield's application to make homestead entry of said tract is hereby rejected, and Clark's application to make homestead entry of said tract, filed October 27, 1887, will be allowed, if he be otherwise qualified.

PRACTICE—MINING CLAIM—PROTEST—APPEAL.

GLADYS A. MINING CO. *v.* GROSS.

On appeal from the refusal of the local office to entertain a protest against a mineral application, the appellant is not required to serve the applicant with notice thereof.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (P. J. C.)

It appears that S. E. Gross filed mineral application No. 1696 for the Milwaukee and other mining claims, in Pueblo, Colorado, land district, and, after the period of publication, there was a protest filed by the Gladys A. Mining Company, which was dismissed by the local officers. The company filed its appeal, and your office dismissed the same, for the reason that notice thereof was not served on the applicant; and also held that the charges were insufficient to warrant the ordering of a hearing.

The protestant appealed, and a motion has been filed to dismiss the appeal, for the reason that notice thereof was not served on the applicant.

In view of the fact that the protestant has, since taking its appeal, filed a formal withdrawal of its protest against this entry, it would hardly seem necessary to discuss any other feature of this case, but it may not be amiss to call your attention to the fact that it has been decided, in the case of Henry C. Evans (23 L. D., 412), that

On appeal from the denial of an application to contest an entry, the appellant is not required to serve the entryman with notice thereof.

Hence, the action of your office in dismissing the appeal because service thereof was not made on the appellee was erroneous.

The decision of your office, however, that the charges in the protest do not state a cause of action, is affirmed.

Notwithstanding there has been filed a withdrawal of the protest, it is deemed advisable to pass upon the sufficiency of the protest, for the reason that the Gladys Company, in its withdrawal, seems to rely on the decision of *Gowdy et al. v. Kismet*, etc. (22 L. D., 624), concerning the requirements of publication notice. But since the withdrawal was filed that decision has been modified (24 L. D., 191). That the protestant may not, therefore, have its case disposed of under a mistaken view of the requirements in regard to the contents of publication notices, the matter in controversy is disposed of on its merits.

PRACTICE—NOTICE BY PUBLICATION—MOTION TO DISMISS.

POPP v. DOTY.

Service of notice by publication is defective, if a copy of the notice is not mailed by registered letter to the defendant at his post-office of record.

On objection to the service of notice the contest should be dismissed, if the ground of objection is well taken, and the contestant does not, at such time, apply for an alias notice.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (C. W. P.)

This case involves the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 21, and the N. $\frac{1}{2}$ of of the SW. $\frac{1}{4}$ of Sec. 28, T. 13, R. 5 E., Oklahoma land district, Oklahoma Territory.

On October 27, 1891, Samuel A. Doty made homestead entry No. 2011 of said land.

On October 2, 1893, Fred Popp filed affidavit of contest, charging abandonment. Notice was issued for a hearing on September 26, 1894, and on affidavit of Popp, that he was unable to find the defendant, service of notice was directed to be given by publication. At the hearing the defendant appeared by his attorney specially, and moved that the contest be dismissed on the ground that no proper notice of contest had ever been served upon him. Said motion was overruled, and the contestant called as a witness in his own behalf. The attorney for the defendant objected to the taking of any testimony and refused to continue in attendance.

On February 2, 1895, the local officers decided in favor of contestant, and, upon appeal, your office, on October 2, 1895, remanded the case to the local office for further hearing, on the ground that the notice of contest was defective. Popp appeals to the Department.

The record shows that the name of Doty's post office of record was changed from "Four Mile" to "Miami," Indian Territory; and that due publication of the notice was made.

Popp's attorney made affidavit that he presented a letter addressed to Doty at "Four Mile", Indian Territory, to the postmaster at Oklahoma City, and requested him to register same, but that the postmaster returned said letter, for the reason that there was no such post office. On the other hand, R. A. Davis, registering clerk at Oklahoma City post office, made affidavit that he never refused said letter, and if such a letter had been presented he would have accepted and registered the same, or given information as to the proper place to send it.

Popp, in his appeal, excepts to the consideration of the latter affidavit, on the ground that he was not served with a copy. But it appears to have been filed in the local office long before the decision was rendered by the register and receiver, and the objection applies equally to the affidavit of Popp's attorney, which does not appear to have been served on Doty or his attorney.

Independently of these affidavits, it appearing that a copy of the notice was not mailed to Popp by registered letter at his post office of record, as required by Rule 14 of Practice, the motion of the defendant should have been granted and the contest dismissed. In order to gain jurisdiction of the parties where notice is served by publication, it is necessary to follow strictly the requirement of the rule.

Upon the presentation of the motion to dismiss, if Popp had applied for an alias notice, the same would have been granted; but he elected to stand upon the sufficiency of the notice, and it being fatally defective, no jurisdiction thereunder was acquired by the local officers. Under the circumstances, the contest must fall.

Your office decision is accordingly modified, and the contest dismissed.

HOMESTEAD COMMUTATION—ACT OF JUNE 3, 1896.

ANDERS G. HASSELQUIST.

An order directing the cancellation of a prematurely commuted homestead entry will not defeat action under the confirmatory provisions of the act of June 3, 1896, if such order has not become final.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (W. C. P.)

Anders G. Hasselquist has filed an appeal from your office decision of December 17, 1895, holding for cancellation his commutation cash entry for the SE. $\frac{1}{4}$ of Sec. 26, T. 37 N., R. 8 E., Wausau, Wisconsin land district.

Hasselquist made homestead entry for this land on June 20, 1891, alleging settlement December 20, 1890, and was allowed to commute said entry to cash entry on August 28, 1891, the final proof showing residence on the land from December 29, 1890. Your office by decision of February 21, 1893, held that inasmuch as the original entry was made after the passage of the act of March 3, 1891 (26 Stat., 1095), the claimant must show residence and cultivation for a period of fourteen months to entitle him to commute the same. Upon appeal to this Department that decision was affirmed August 20, 1895. No motion for review of that decision having been filed, your office, by letter of December 17, 1895, held said entry for cancellation, and directed the local officers to notify the entryman that unless he should furnish supplemental proof as required or appeal from said decision holding his entry for cancellation within sixty days, it would be canceled without further notice.

The appeal forwarded is in the following words:

The above named Anders G. Hasselquist hereby respectfully appeals to the Hon. Secretary of the Interior from your decision in the above entitled matter, dated December 17, 1895, holding said entry for cancellation, and assigns as grounds for appeal that he believes his title to be valid under his commutation entry. Under

that belief, and after the commutation receipt had been issued, he sold said land in good faith, and the purchaser thereof has not had his day in court.

The fact that the land was transferred after issuance of final certificate affords no grounds for reversal of the decision holding the entry for cancellation. A purchaser of land prior to issuance of patent takes only the interest of his grantor and is charged with notice of the law and the supervisory control of the Commissioner of the General Land Office over the action of the local officers. (*Bender v. Shimer*, 19 L. D., 363.)

While the above in the general rule, and while under that rule the appeal here presents no sufficient ground for the reversal of the action of your office, yet the facts presented by the record in this case seem to bring it within the confirmatory provisions of the act of June 3, 1896 (29 Stat., 197), the first section of which reads as follows:

That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by the homestead entryman on the land prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs, and legal representatives, as of the date of such final certificate of entry and a patent issue thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman subsequent to the date of such final certificate: *Provided*, That this act shall not apply to commutation and homestead entries on which final certificates have been issued, and which have heretofore been canceled when the lands made vacant by such cancellation have been re-entered under the homestead act.

If this entry comes within the purview of said law it was confirmed notwithstanding the decision of this Department directing its cancellation. The decision of your office, holding said entry for cancellation, is set aside and the case is returned to your office for further consideration and appropriate action under said confirmatory act.

TIMBER LAND—SETTLEMENT CLAIMS.

BUCKLEY v. MURPHY.

The right to take lands chiefly valuable for the timber thereon under the settlement laws is limited to claims asserted in good faith for the purpose of securing a home.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (J. L. McC.)

The case above entitled is one of a considerable number of cases in which pre-emption filings were made, or attempted to be made, on the

morning of the day when lands were opened to entry or filing, in township 66 N., R. 19 W.; Ts. 67 N., Rs. 18, 19, and 20 W.; Ts. 68 N., Rs. 18, 19, and 20 W.; T. 67 N., R. 21 W., all in the Duluth land district, Minnesota.

Lands in the eight townships above described were opened to filing or entry on eight successive days in June, 1893.

On the day when each township was opened to filing or entry, a considerable number of pre-emption declaratory statements were received at the Duluth land office, by mail, which delivered the same at about eight o'clock a. m. The aggregate number of filings thus received were one hundred and twenty-four. They were at once noted on the respective plats and tract-books of the township named.

The declaratory statements above referred to were accompanied by notices of the pre-emption claimant's intention to make final proof.

When the door of the local office opened, at 9 o'clock a. m. of the days respectively when the townships above named were opened to entry, a line of applicants was found who presented applications to enter under the timber and stone act certain described lands embracing a part of those already applied for (*supra*) by applicants under the pre-emption law. The timber land applications were rejected, by the local officers, because they held that the applications of the pre-emption claimants to make final proof so far reserved the land covered thereby as to prevent its being properly entered by others, pending the consideration of said applications. (See case of L. J. Capps, 8 L. D., 406.)

Counsel for certain of the timber land applicants reported the above facts, in substance, to your office, and asked for information. Correspondence between your office and the local officers ensued, as the result of which your office sent instructions to the local officers, the gist of which is contained in the following extract from your office letter of July 19, 1893:

In my opinion the instructions on page 64, circular of February 6, 1892, clearly intended that no steps toward making final proof on filings should be taken until after the expiration of three months from the filing of the township plats of survey in your office. This rule was doubtless intended to allow adverse claimants an opportunity to place their claims of record; and this object would be defeated by permitting publication of notice of intention to submit final proof, which would constitute a segregation of the land, and thus debar the entry or filing of another within the three months. . . . You will therefore vacate any notice of intention to make final proof which is now being published in opposition to this opinion; and if no objection exists at the expiration of three months from date of filing plat of survey in your office, notice of intention to submit final proof can then be given.

The above instructions were carried into effect, and the timber-land applicants for land covered by pre-emption filings were allowed to complete their filings by paying their fees.

On September 23, 1893 (a few days before the expiration of the three months above mentioned), the register of the Duluth land office wrote to your office, recommending that a special agent be detailed to super-

vise an investigation of these claims, intimating that there was an attempt to defraud the government, the extent and particulars of which it would be difficult to determine in the absence of reliable testimony, as in nearly all cases tried before the office the testimony was directly contradictory; that the government would be better able to arrive at the facts of the case

by an examination of the land before the claimants got away, for it is a well known fact that ninety per cent of the entrymen in this district under the homestead or pre-emption law abandon their claims as soon as final proof is made and are thereafter hard to find; and if found they all stick together and help each other out, and the government is beaten.

The above recommendation was denied by your office letter of November 3, 1893, in which the local officers were directed as follows:

You are advised that any filings placed of record prior to the opening of your office on the day when said lands became subject to filing and entry are illegal, and final proof can not be based thereon. In such cases you will allow the claimant of record whose filing or entry is legal to publish notice of intention to submit final proof, duly citing all adverse claimants of record in accordance with the ruling in *Reno v. Cole* (15 L. D., 174), and advise the claimant whose filing was erroneously placed of record that his right, so far as requiring him to place his claim of record within three months after filing of the plat of survey is concerned, will not be affected by the erroneous action of your predecessor. Should there be cases in which each of two or more claimants have a legal filing or entry covering the same land, any or all of them who desire to do so should be allowed to publish notice of his intention to submit final proof, duly citing the adverse claimants; and if a protest is filed in either case, the hearing should be had on or subsequent to the date the last claimant offers his proof.

Other correspondence ensued, which it is not necessary to set forth in detail. It is sufficient to say that each of the pre-emption claimants, as suggested above, filed an amended pre-emption declaratory statement; that a considerable number of these pre-emption claims were contested by claimants under the timber and stone act; that hearing followed to determine their respective rights; and that, whatever the decision of the local officers might be, an appeal was (generally) taken to your office, and from your office to the Department.

The land in the several townships hereinbefore described is situated in the northeastern part of Minnesota. In numerous cases coming before the Department on appeal, it is shown by competent witnesses that there are from fifteen hundred or two thousand to three thousand dollars' worth of timber on each quarter section. The pre-emptors or their witnesses testify that it will cost fifty or sixty dollars per acre to clear the land of its timber; and that, after it has been so cleared, it will be worth for agricultural purposes five or six dollars per acre.

These statements are substantially corroborated by the investigation of the government and the records of this Department. According to the forestry map prepared to accompany the United States census reports, this region is among the most heavily timbered of any except a narrow strip close upon the Pacific coast. Its growth of pine timber

is unsurpassed anywhere. This land is comparatively worthless, however, for anything except timber. Surveyors recognize four grades of fertility in soil. The field notes of survey for the townships now under consideration report the soil as being, almost universally, fourth grade (the poorest quality). Thus, of township 68 N., 20 W., the surveyor says: "The soil is of a very poor quality, also being stony; the entire township is covered with a heavy growth of timber." The line as surveyed between sections 11 and 20, he says, "leaves swamp and begins to ascend a rocky ridge, through heavy timber." Between sections 10 and 11 of the same township, he reports the line runs along "the top of a granite ledge; . . . soil fourth rate, stony." Of township 66, range 19, the surveyor reports: "This township is mainly rolling, and is heavily timbered, with a mixed growth; there is considerable pine on the ledges and rolling ground. Pelican river, flowing across the SE corner, affords the means for lumbering." Of township 68, range 18, the surveyor reports: "This township is heavily timbered; it is mostly rolling and broken, except the swamps, of which there are quite a number. The soil is sterile." Such expressions are repeated by the score throughout the several townships here under consideration. This reference to the character of these lands is pertinent in view of the ruling of the Department that,

While lands chiefly valuable for timber and stone, and unfit for ordinary agricultural purposes, are not excluded from settlement by the act of June 3, 1878, yet settlements on such lands should be carefully scrutinized, as the exception in said act is in favor of the *bona fide* settler; [and] a settlement for the purpose of securing the timber on the land, or for any other purpose than establishing a home, is not a *bona fide* settlement within the meaning of the act. (Syllabus to *Wright v. Larson*, 7 L. D., 555.)

The lands here in controversy are distant, in an air line, from forty to fifty miles, and by the nearest practicable route from fifty to seventy miles, from the nearest village, post office, or market—to wit, Tower, Minnesota. Every article needed by the pre-emptor in supporting his own existence or improving his claim must be brought this distance, partly by steamer across Vermillion lake; partly by canoe down Vermillion river; thence by wagon for another part of the way; and finally "packed" by the pre-emptor upon his own back for a distance of from five to fifteen miles, dependent upon the location of his claim.

The most of these pre-emption claimants allege as an excuse for their almost continual absence from their claims, and for not having built better houses or made more extensive improvements, the fact that they were very poor. But it is shown, in most of the cases of this class now before me, that each of these pre-emption claimants paid certain so-called "locators" from fifty to one hundred and sixty dollars, for showing them what tracts were vacant. (This aside from the services of a surveyor, subsequently, to find the quarter-section corners and "stake out" the claim.) If these pre-emption claimants were so poor, and were in good faith seeking homes for themselves and their families,

it seems unaccountable that they should pay such a price for being led into the almost inaccessible depths of a vast wilderness, to one of the most infertile portions of the continent, and pay for such lands by taking it under the pre-emption law, when in order to reach them they were compelled to cross hundreds of thousands of acres of more productive land, less difficult to prepare for cultivation, and open to homestead settlement and entry "without money and without price" (except the fees and commissions of the local officers).

It is worthy of notice that in none of the contests herein referred to does it appear that the pre-emption claimant, if married, had brought his wife, or any other member of his family to the land. In such cases there is generally some excuse presented, more or less plausible on its face, for the wife's absence. A physician's certificate showing that the wife has been continuously ill and unable to remove to her husband's "home" during the years of his alleged residence upon his pre-emption claim, appears to be as uniform and indispensable an adjunct as an affidavit of citizenship.

Twenty or more of the one hundred and twenty-four pre-emption claims hereinbefore referred to have been contested by timber-land applicants. The testimony given by the opposing parties in these cases is usually conflicting, and irreconcilable upon any theory consistent with the veracity of the respective witnesses. The pre-emption claimants and their witnesses testify to amply sufficient residence, cultivation, and improvement to warrant the issue of final certificate and patent. The contesting timber-land claimants testify that the "house" built by the pre-emption claimant is a small and uninhabitable "shanty"; that there has been no "improvement" beyond the cutting down of trees about the shanty sufficient to furnish the logs to build it; and that the alleged "residence" on the part of the pre-emptor has consisted of occasional and rare visits to the land in controversy.

The leading witnesses for each pre-emption claimant whose filing is alleged to be fraudulent are almost uniformly other pre-emption claimants who are also charged with fraud. Thus in the case of Halstein Svergen, now before me, his witnesses are Simon Maley and Peter Eck, whose cases are also now before me, their pre-emption final proofs having been protested on charge of fraud, and John Quaderer, whose filing was ordered canceled upon that ground by departmental decision of October 3, 1896 (342 L. & R., 149). And so on, throughout the entire list.

While the preceding history of transactions connected with the opening to filing and entry of the townships hereinbefore named, can not properly be considered as evidence controlling individual cases, yet it shows a condition of affairs of which the Department, in its general supervision of the disposal of the public lands, must take notice, in connection with the facts disclosed upon the examination and consideration of the record in each case.

In the particular case which the Department is now called upon to consider, Barbara Murphy, on June 16, 1893, filed pre-emption declaratory statement for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 34, the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 35, T. 67 N., R. 19 W. This filing being held illegal because of having been received and allowed by the local officers before nine o'clock of the day when the land became subject to filing and entry, she made a second filing on December 28, 1893. She based her right to file such pre-emption declaratory statement upon the alleged settlement by her husband, John H. Murphy, in December, 1890.

On August 2, 1893, William Buckley filed timber-land statement for the same land.

This conflict of claims resulted in a hearing, at which testimony was taken that elicited the following facts:

The land in controversy is rolling, rough, and rocky; it has no value whatever except for the pine timber growing upon it. At the date of the pre-emptor's final proof and of the hearing there was no sign of cultivation of any part of the land; the only improvement was that the underbrush had been cut from about half an acre of the land; the only indication that any one had ever settled or resided upon the land was a log shanty, estimated to have cost \$18 or \$20. This shanty had a new floor in it—but this floor had been put in after the date of the timber-land entry. This had not been done by the pre-emption claimant's husband, for he had died a year and a half before it was placed there; and not by the pre-emption claimant herself, for she had never heard of its existence.

Mrs. Murphy, the pre-emption claimant, testifies that she and her husband were married in Michigan in 1882; that they moved to Duluth in 1883; that at the date of her husband's alleged settlement on the land in controversy (December 26, 1890), he and she were "living together right along" in West Duluth (between 125 and 150 miles from the land), where he was engaged in his business as carpenter, and continued to live together "right along" until his death (September 17, 1892); she knows that he left home with the avowed intention of going to the land in controversy *once*; she never went to the land, and does not know where it is.

The local officers, as the result of the hearing, rendered joint decision, recommending that Mrs. Murphy's pre-emption filing be canceled. She applied to your office, which, on February 25, 1896, affirmed the judgment of the local officers. Thereupon she appeals to the Department.

Her counsel, in said appeal, copies, verbatim or in substance, each sentence of the finding of your office decision, and alleges that it was an error; but he makes no reference to any testimony showing it to have been erroneous. He complains that your office erred "in refusing credit at final proof for residence prior to filing"—but ignores the fact that the testimony does not show an hour's residence prior to filing. At

the hearing, he drew from the pre-emption claimant a statement of the fact that she was a widow, in poor circumstances, with three little children; but this does not warrant your office or this Department in awarding to her a quarter-section of the public land without compliance with the law in any respect or degree upon her part or that of her deceased husband.

The decision of your office was clearly correct, and is hereby affirmed.

SETTLEMENT RIGHT—OKLAHOMA LANDS.

FRAZIER ET AL. v. TAYLOR.

Under the conditions attendant upon the opening of lands to settlement in Oklahoma the sticking of a stake may be recognized as initiating a settlement right, as against competing settlers on the day of opening, but such act will not be available as against subsequent settlers if not followed, within a reasonable time, by additional acts evidencing an intention to make a bona fide settlement.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 29, 1897. (G. C. R.)

James M. Frazier has appealed from your office decision dated October 8, 1895, which dismisses his contest against the homestead entry made October 16, 1893, by Willie G. Taylor, for the SW. $\frac{1}{4}$ of Sec. 28, T. 28 N., R. 1 W., Perry, Oklahoma.

Your said office decision reversed the finding of the register and receiver, which sustained the contest, and recommended the cancellation of the entry.

It appears that Alexander H. Sims also filed a contest, but upon the day of hearing (October 31, 1894,) he made default, and his contest was dismissed.

The land is a part of the Cherokee Outlet, and was opened to settlement September 16, 1893,—one month before Taylor made entry.

There is little or no controversy over the facts, which appear to be as follows:

Frazier had learned that the land was vacant, unimproved and uninhabited, and on October 1, 1893, he, in company with his father, mother, two brothers and a sister, settled upon it. He was twenty-six years old, and unmarried. He took with him to the land eight head of horses, a plow, wagon and harness, household goods, etc. He erected a tent, into which he and his father's family moved. With the assistance of his father and brother, he at once erected a house, fourteen by sixteen feet, which was completed for occupancy in about one week from date of settlement. At date of hearing, he had fenced about ninety acres of the land, had broken fifty acres and had sowed twenty acres to wheat. He, with his father's family, thereafter continuously resided on the land, and had purchased additional farming implements. The next day after he settled, he went to Perry to make

entry of the land; he remained there three or four days and returned to the land, being unable, for some reason, to obtain his entry; he assisted in the improvements, until October 16, 1893, when it appears that he presented his homestead application for the land; finding that Taylor on that day had made entry thereof, he at once filed his contest affidavit, alleging, in substance, his prior settlement upon the land, and that he had made the improvements above described. The testimony shows that he in fact was the prior settler, and that Taylor, the entryman, never made any settlement, or performed any act showing his intention to settle, until October 24, 1893.

It appears that Taylor made the race, with other intending settlers, on September 16, 1893; that he stuck a stake on another tract, where it remained until September 27, 1893; he then learned that another person had preceded him to that tract, and on the next day (September 28) he took the same stake and stuck it on the adjoining tract—supposing he had placed it on the land in controversy.

He testified that the stake was two and a half feet long, three inches wide, and had attached thereto a white muslin flag; inscribed on the flag and on the stake were the words: "This claim taken by W. G. Taylor." When, on October 1, 1893, Frazier erected his tent on the land, he discovered this flag, and saw Taylor's name, with the inscription as given above. Frazier began to investigate the situation of the lines and corners, and admits that he then thought that Taylor's flag was on the land; he thereupon plowed a furrow on what he supposed was the west line of the claim, and this furrow was west of the place where Taylor had stuck the stake. Subsequently, he had a surveyor run out the lines of the land, when he discovered that Taylor's flag had been placed about six rods west of the west line of the land. Neither Taylor nor his witnesses denied that the flag was in fact placed on the tract adjacent to and west of the one in controversy, although Taylor doubtless thought he had placed it on the land he afterwards settled on, being the land in question. From September 28, the day Taylor thought he placed his flag on the land, until October 5, following, he was not on the land; but upon the latter date he went to the land, and informed Frazier's brother, then on the land, and living in the tent erected by contestant, that he (Taylor) claimed the tract, and called attention to the flag.

It will not do to say that the mere placing of a flag on the public land is such an evidence of settlement as will in all cases defeat the rights of one who in good faith settles upon the land subsequently. In the general rush for lands on the day of opening, when thousands are competing, he who reaches the land first and gives notice of his intention to settle by the mere sticking of a stake will by such slight act defeat a slower man in the race. But such an act should in a reasonable time be followed by the performance of additional acts, evidencing the settler's intention to make a bona fide settlement.

Even if Taylor had, in fact, put his stake on the land, he at once left the tract to go to see his "cousin"; he did not return to the land until six days had elapsed; he gives no reason for not performing some substantial act of improvement, and he still postponed his settlement or doing anything more in relation to the land until after Frazier had been there more than three weeks.

Under this state of facts, Frazier has the superior right to the land. Your said office decision is accordingly reversed. Taylor's entry will be canceled, and Frazier's application will be allowed.

TIMBER LAND PURCHASE—APPLICATION.

COFFIN *v.* NEWCOMB.

An applicant for the right of timber land purchase must show that the land applied for is free from adverse occupancy, and that he has made no other application to purchase under the timber land act.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (J. L.)

This case involves the NE. $\frac{1}{4}$ of section 26, T. 12 N., R. 1 E., Humboldt meridian, Humboldt land district, California.

On June 16, 1885, William H. Newcomb made homestead entry No. 2440 of said tract.

On June 17, 1885, William H. Coffin filed his pre-emption declaratory statement No. 5672 for said tract, alleging settlement on March 20, 1885.

The official map of said township was suspended on February 15, 1886, and the suspension was removed on June 14, 1892. In the interval one Silas W. Epps contested Newcomb's entry. Said contest was dismissed by departmental decision of April 14, 1891 (217 L. and R., 170), holding in substance that during the period of suspension settlers were not obliged to reside upon, or improve and cultivate their claims.

On August 4, 1892, Newcomb filed his relinquishment to the United States, and his entry was then canceled. On August 5, 1892, in accordance with the act of June 3, 1878 (20 Stat., 89), entitled "An act for the sale of timber lands in the States of California" etc. etc., Newcomb filed his application to purchase said tract for \$2.50 per acre, and also his sworn statement as required by the second section of that act; and on the same day, August 5, 1892, the register issued the notice for publication required by the third section of the act, and fixed October 21, 1892, as the day for Newcomb to make his final proof, and requested all persons claiming adversely to file their claims.

Coffin appeared and filed his claim under his preemption declaratory statement aforesaid, and filed his protest alleging in substance (not literally) the following grounds of objection to Newcomb's proposed timber entry:

- (1) That he (Coffin) settled upon the land in March, 1885.

(2) That the survey of the township was suspended in 1886.

(3) That the suspension was removed in June 1892.

(4) That on the second day of August 1892, he (Coffin) again took up his residence upon said land and is now living upon said land with his family consisting of a wife and three children.

(5) That said Newcomb made his timber filing upon said land on the 5th day of August, 1892; and that he (Coffin) was an actual settler upon said land, and that there were improvements upon said land, at the time when said timber filing was made.

(6) That said land is agricultural land and not timber land.

Wherefore Coffin prayed that the timber filing of Newcomb be canceled, and that he (Coffin) be allowed to complete his pre-emption claim and enter the land.

On October 22, 1892, Newcomb offered his proof as advertised; a hearing was had, and witnesses were examined and cross-examined in the presence of both parties and their attorneys.

On January 12, 1894, the local officers recommended that Newcomb be allowed to complete his timber purchase, and that the contest of Coffin be dismissed.

Coffin appealed; and while his appeal was pending in your office, to wit: on April 16, 1894, Coffin filed a motion for a rehearing or new trial of the case, upon the ground of newly discovered evidence, supported by affidavits and copies of official records.

On June 21, 1895, your office denied the motion for a rehearing, affirmed the decision of the local officers, approved Newcomb's final proof, and held Coffin's declaratory statement for cancellation.

Coffin has appealed to this Department.

Newcomb filed a carefully prepared answer to Coffin's motion for a rehearing. A comparison of the motion and the answer shows the following undisputed facts:

(1) On October 2, 1884, Newcomb filed an application to purchase the NW. $\frac{1}{4}$ of section 10, T. 11 N., R. 3 E., Humboldt meridian, under the timber land act of June 3, 1878, and also his duplicate "sworn statement" as required by said act. (2) Notice of the application was duly published for sixty days. (3) In the meantime, on December 11, 1884, the survey of that township was suspended. (4) On January 3, 1885, the sixty days for publication of notice having expired, Newcomb tendered proof and payment. (5) A new map of the township was filed on November 22, 1889. And (6) "said statement was never withdrawn from the land office and is now on file therein among the papers of said office."

In explanation of said admitted facts Newcomb in his answer said:

November 22, 1889, a new survey and plat was filed, changing the lay of the rivers and streams in said township, and also changing the location of said NW. $\frac{1}{4}$ of said section 10 over a mile from where it lay on the old plat. Affiant further says that immediately after the new survey was filed in the local land office, he went upon the NW. $\frac{1}{4}$ of said section 10 as shown by the new plat and found the same to be entirely

different land from that he had sought to purchase from the government; that the said claim as located on the new plat has no timber upon it and was entirely worthless to this affiant or to any one else; that when applications were received upon the new survey, there was a great rush and a great crowd of people seeking to file upon the lands in said township, and affiant was prevented from filing upon the land covered by the NW. $\frac{1}{4}$ of said section ten as it appeared on the old plat; that affiant accordingly made application to get his right to file a timber claim back, and he was informed by S. C. Boom, the then register, and R. W. Hutchins the then receiver of the land office, and by B. F. Bergen the then special agent of the Land Department, that no action upon the part of the affiant was necessary, that if the new survey changed the location of his claim, he was at liberty to abandon his filing without prejudice to his filing another timber application.

An examination of the old and new maps of said township together, does not corroborate but contradicts Newcomb's statement that the new map changed the location of the NW. $\frac{1}{4}$ of section 10 over a mile from where it lay on the old map. In fact the change, if any, was slight and inconsiderable. And an examination of the tract book in your office shows, that said quarter section is yet vacant, and unclaimed by any other person; so that it remains reserved by Mr. Newcomb's application to purchase and publication of notice.

The facts stated and verified *prima facie*, in support of the motion for a rehearing, were newly discovered evidence in respect to which Coffin had not been guilty of laches. They are material and important in this case. Your office erred in denying the motion for a rehearing; and in assuming without inquiry that Newcomb's explanation was true, and in holding that his failure to purchase the tract formerly applied for under the said act was due to no fault of his own, and in concluding that his rights in the premises were not prejudiced thereby.

The "act for the sale of timber lands" aforesaid, in section 2, requires, that the applicant shall file under oath a written statement in duplicate, setting forth, among other things, (1) that the tract is uninhabited, (2) that it contains no improvements except for ditch or canal purposes, "save such as were made by or belonged to the applicant," and (3) that "deponent has made no other application under this act." Each one of these specifications is an essential condition precedent to the acquisition of a right to make a timber purchase. Section 3 of the act requires the applicant to prove that the tract was "unoccupied and without improvements other than those excepted." The record and the testimony in the case show beyond doubt, (1) that on August 5, 1892, when Newcomb filed his timber purchase application and sworn statement, the tract was, and since August 2, 1892, had been, occupied and inhabited by Coffin, (2) that there were on the tract improvements, which had not been made by and did not belong to Newcomb, and (3) that Newcomb had made another application to purchase timber land under the act of June 3, 1878. In consequence of the failure of each one of these three conditions precedent it follows, that Newcomb's application to purchase the tract in controversy must be denied. Moreover his allegation that "the tract is unfit for cultivation" is not sustained

by a preponderance of the evidence, and it is discredited by the fact that he made homestead entry of the tract in 1885, and resided upon it until some time after the suspension of the township map in February, 1886.

It is proved that Coffin made his first notorious settlement on March 20, 1885, by cutting down trees and making four logs, which he laid in the form of a square foundation for a house, in a conspicuous place on the tract. Within three months thereafter, on June 17, 1885, he filed his declaratory statement at the land office. In the month of August 1885 he returned to the land and began to cut brush for a clearing, but was taken sick in the woods and was obliged to stop work. The map was suspended in February 1886. After he was informed of the removal of the suspension, on August 2, 1892, he returned to the tract and resumed his residence thereon, occupying and living in a house or cabin built by one Hildreth. He immediately began to build for himself a house twenty-four feet long by sixteen feet wide; and to clear a patch for a garden. In September he moved his family consisting of his wife and three children upon the place, and he and they continued to reside there until the day of the hearing, with intent to maintain his home there to the exclusion of a home anywhere else. Coffin's claim appears to have been made and prosecuted in good faith. It is based upon his settlement made and his pre-emption declaratory statement filed in 1885; and also upon his rights as a *bona fide* settler, occupant and resident on and after August 2, 1892.

The act of Congress under which Newcomb claims, in section 1 provides: "That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States." Newcomb's application to purchase being eliminated from this controversy, Coffin remains in possession free to prosecute his claim either as a pre-emption or as a homestead, as he may be advised.

See cases of *Hughes v. Tipton*, 2 L. D., 334, and *Block v. Contreras*, 4 L. D., 380; Also *Crooks v. Hadsell*, 3 L. D., 258; *Houghton v. Junett*, 4 L. D., 238 and *F. E. Habersham*, 4 L. D., 282, and many other cases since in accordance with the views herein expressed.

It does not seem necessary to prolong this controversy by directing a rehearing as asked by Coffin.

Your office decision is hereby reversed. Newcomb's final proof is rejected, and his application to purchase the NE. $\frac{1}{4}$ of section 26, T. 12 N., R. 1 E., Humboldt meridian, California, is hereby denied. Coffin is left at liberty to prosecute his claim to said tract under the pre-emption or homestead laws as he may be advised.

RAILROAD GRANT—CERTIFICATION—SCHOOL INDEMNITY SELECTION.

ST. PAUL AND SIOUX CITY R. R. CO. *v.* STATE OF MINNESOTA.

A certification under the act of August 3, 1854, of lands on account of a railroad grant that were, at the date of the grant, embraced within a pending *prima facie* valid school indemnity selection, is no bar to the subsequent approval of such selection.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (F. W. O.)

The St. Paul and Sioux City Railroad Company has appealed from your office decision of January 3, 1896, holding for cancellation its listing of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 15, T. 104 N., R. 36 W., Marshall land district, Minnesota.

This listing was first held for cancellation by your office decision of November 5, 1892, for conflict with the indemnity school selection made December 9, 1863. The company appealed, and in its appeal urged that no such selection had been made by the State as described in your office decision, whereupon, by departmental letter of March 8, 1895, you were directed to make further examination of the records, relative to the posting of said school selection, in order to test the correctness thereof, and to make due report to this Department. By your office letter of March 26, 1895, report was made that a careful examination disclosed no such selection by the State, and that the posting, therefore, was deemed to be an error; further, that from a report of the State Auditor it appeared that there was no record by the State of any such selection.

Acting upon this report, by departmental decision of April 13, 1895 (not reported), your office decision of November 5, 1892, was reversed and you were directed to examine the listing by the company with a view to its submission for the approval of this Department. In November, following, the State school list of December 9, 1863, was found in your office, and on November 19th this Department was advised thereof; whereupon, by departmental decision of December 18, 1895, the decision of April 13, 1895, was revoked and you were directed to readjudicate the matter in the light of all the facts presented. It was under this order that you have again considered the matter and again held for cancellation the company's listing holding the land to have been excepted from its grant; from which action it has appealed to this Department.

The land is within the ten mile or primary limits of the grant for said company under the act of May 12, 1864 (13 Stat., 74), and is opposite the portion of the road shown upon the map of definite location filed June 28, 1865, upon which withdrawal was ordered August 10, 1865.

The tract under consideration was selected by the State of Minnesota December 9, 1863, in lieu of a deficit in township 104 N., range 34 W.,

prior to the passage of the act making the grant and the definite location filed thereunder. The State Land Commissioner, in his letter of November 4, 1895, claims that this selection was really made in lieu of the deficiency in township 104 N., range "36" W., and that the substitution of range "34" W., as it appears in the list, was due solely to a clerical error, which, your office decision states,

appears to be true, from the fact that the township plat shows no deficit in township 104 N., range 34 W., as above stated, while the plat of township 104 N., range 36 W., shows a deficit of 62.48 acres—the quantity reported in said list.

Relative to the railroad claim, it appears that on August 23, 1867, the State listed the entire section 15, township 104 N., range 36 W., which list was approved by the Department December 6, 1867. In this list approved in 1867 there appears to have been errors, and a new list correcting the errors was submitted for approval, which was approved June 10, 1866. This latter list included all of said section 15 except the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ —the tract now under consideration.

In the company's appeal it is urged that, as this tract was originally certified on account of the grant, it has passed beyond the jurisdiction of this Department; further, that the State's indemnity selection was invalid because the basis originally assigned did not exist, and that a substitution could not be made in the presence of the adverse claim made by the company.

The certification referred to was under the provisions of the act of August 3, 1854 (10 Stat., 346), which statute was considered by the supreme court in the case of *Weeks v. Bridgeman* (159 U. S., 541), in which it was held that certifications under that act are of no operative effect if the land in fact was excepted from the operation of the grant. The sole question for consideration, therefore, is, Did the State selection serve to except the tract from the grant for said company? If it did, the subsequent approval of the land on account of the railroad grant could not prevent the approval of the land to the State on account of its selection; and the question of the amendment of said selection by the State is solely one between the United States and the State.

As thus presented the case is in all important particulars similar to that of the *Southern Pacific Railroad Company v. State of California* (4 L. D., 437), in which it was held—

In the case at bar the selection was allowed and was *prima facie* valid, and the fact that long after the date of said grant and the time when the company's right attached, it was discovered that said selection was invalid, can not affect the company's claim. Its right had already been fixed, and the selection of said tract being intact upon the record, was such an appropriation of the land as excepted it from the grant. Such was the doctrine announced by this Department in the case between the same parties, reported in 3 L. D., 88.

Your office decision holding the tract under consideration to have been excepted from the company's grant, and holding for cancellation its listing thereof, is accordingly affirmed.

OKLAHOMA TOWNSITE—ADDITIONAL ASSESSMENT.

CITY OF GUTHRIE.

In the disposition of town lots under the act of May 14, 1890, an additional assessment, for the legitimate purposes of the act, is authorized where such action operates uniformly upon all lots alike; but there is no authority for such an assessment where the burden falls upon the unclaimed lots alone.

Secretary Bliss to the Commissioner of the General Land Office, April 29, (W. V. D.) 1897. (P. J. C.)

On August 13, 1894, the city attorney of Guthrie, Oklahoma, addressed a communication to your office, in the nature of a protest against the action of townsite board No. 6, in the matter of its settlement with the city on account of the sale of unclaimed lots, alleging that the board had made erroneous assessments against the fund realized from the sale, thereby diminishing the amount to the extent of several hundred dollars that should have been turned into the city's treasury. Your office, on September 7, 1894, denied the claim, and, in a rather informal way, the matter was brought to the attention of the Secretary of the Interior. The subsequent action of the Department will be recited later on in its chronological order.

By section 4 of the act of May 14, 1890 (26 Stat., 109), it was provided:

That all lots, not disposed of as hereinbefore provided for, shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of any such town.

The instructions of your office of March 31, 1893 (16 L. D., 341), in relation to this particular section, were that:

All moneys for which lots may be sold shall be paid to the disbursing officer of the respective boards, who will issue his receipt therefor, and from the proceeds of such sales, all expenses attending the sale and conveyance of the lots sold shall be paid, and all assessments upon the lots sold shall be deducted from such proceeds.

Upon the conclusion of each sale the board will report to this office the result thereof, the amount of money received from the sale of the lots, the expenses attending the sale and conveyancing, the amount of assessments upon the lots sold, and all claims by members of the boards for compensation for work in connection with such sales.

In pursuance of this act, and the instructions, the board on August 26, 1893, sold some unclaimed lots in East Guthrie, and on October 14, 1893, sold others in Capitol Hill and West Guthrie, and the recapitulation of its report to your office on these sales is as follows:

CAPITOL HILL.

Valuation of the lots sold \$14,900.

Total amount realized.....	\$1, 378. 50
Cost of publication notice.....	\$37. 34
Notary fees	7. 75
Clerk hire	5. 44
Original assessments	149. 00
7½ pr. ct. additional assm't on \$14,900 on original valuation..	1, 117. 50
	<hr/> 1, 317. 03
	61. 47

EAST GUTHRIE.

Valuation \$2,950.00.

Amt. of additional assess't (22½ % on valuation)		\$663.75
Pub. notice of sale	\$36.75	
Pd. W. B. Cherry, notary & clerk	7.75	
Original assessments	29.50	
		<u>74.00</u>
Total		<u>737.75</u>
Total am't of sales		811.00
Total bro't down		<u>737.75</u>
Balance due city gov't		73.25

WEST GUTHRIE.

Valuation \$1,300.

Total amount realized		\$188.25
Publication notice	\$3.91	
Notary fees (5 deeds)	1.25	
Clerk hire56	
Original assessments	19.50	
12½ pr. cent additional assessment on \$1,300, original valuation.	162.50	
		<u>187.72</u>
Balance due townsite		0.53

It will be seen that the total amount realized from the sale was \$2,377.75, and of this sum but \$135.25 was tendered the city, which it declined to receive.

The contention is, that there is no authority for levying the "additional assessments," as shown above. The other items of expense as reported are not objected to.

It appears by a letter from the chairman of the board, dated October 10, 1893, transmitting his report of the sale in East Guthrie, that the additional assessment was made to meet "current expenses." It is charged by the city that the additional assessment in each case was made for the purpose of covering expenses of the board in other matters, aside from those connected with these identical sales, and the money thus obtained was used in this way to the detriment of the city.

On January 30, 1895, Mr. Secretary Smith considered the matter, and held that under the regulations of November 30, 1894 (19 L. D., 334), the board had the authority "to make the additional assessments, which seem to have been rendered necessary by its financial embarrassment." Inasmuch as there was no detailed statement of the actual expenses incurred by the board in making these sales, the whole matter was returned to your office that such an account be stated and then transmitted to the Department for further action.

On January 26, 1897, your office transmitted the reports of the board, the recapitulations of which are quoted above, and, in addition, a report from the board of the time consumed by each member in connection

with the sales. By this latter statement it is shown that the board charges for forty-two days' service, at \$17 per day, which amounts to \$714. It will be observed that in its original report the board does not make any charge "for compensation for work in connection with such sales," as required by the instructions.

The Department took up the matter for consideration, and, on February 6, 1897, Mr. Secretary Francis again sent the matter back to your office for additional information as to the time actually spent by the board in connection with the sales; also to submit a statement of these accounts in conformity with the circular of March 31, 1893.

The whole matter is now before the Department for consideration, and, under the statement of the accounts as submitted by your office, as requested by departmental letter of February 6, 1897, there would be nothing due the city, the amount realized falling short of expenses and assessments about \$89.00. The difference between the two statements is accounted for by the fact that your office adds the per diem compensation of the board, which the latter omitted.

Aside from the fact that the reports of the board were not in conformity with the regulations, in that they did not include the time occupied by its members in connection with the sales, the real point in issue is, whether the board was justified in levying the additional assessments that have been so potent a factor in exhausting the funds that otherwise would have been turned over to the city.

It will be observed that the additional assessments made are not uniform; that against Capitol Hill being seven and a half per cent; East Guthrie twenty-two and a half per cent, and West Guthrie twelve and a half per cent. We are not advised fully the exact purpose for which they were made, but it appears that there was financial embarrassment with the present board by reason of the mismanagement of its predecessor, and that these assessments were levied for the purpose of meeting the current expenses of the board.

By informal inquiry in your office, it is learned that there were no other lots in its control upon which any such assessments were made by the board.

The decision of the Department of January 30, 1895, in this matter, holding that more than one assessment might be made, is based on paragraph 11 of the regulations of November 30, 1894. While it is true that this circular was not in force at the time of the transaction now under consideration, yet the ruling made there might be construed to apply to the circular of March 31, 1893. In this latter circular it is said: "And all assessments upon the lots sold shall be deducted from such proceeds," thus, in effect, authorizing more than one assessment.

But it is apparent that in that decision it was only contemplated that such assessments should be levied as were authorized by law, because your office was called upon to give a detailed statement of the transactions, for the very purpose, it will be assumed, of ascertaining

whether there was any violation of the law or regulations. In view of the showing now made to the Department for the first time, the question arises whether these assessments were authorized.

In my judgment, there was no warrant for this action in the case at bar, either under the law or the instructions. The net proceeds of these sales were in contemplation of the statute a donation to the municipalities, and any diversion of the funds, after paying the legitimate expenses attending the sales and the original assessment required to meet the items contemplated by statute, enumerated in the eleventh paragraph of the circular, November 30, 1894, was illegal. Ample provision is made for the compensation of townsite boards and for their current expenses in each individual case in which they are called upon to act officially, and there would seem to be no excuse for appropriating from the fund arising from such sales money to pay "current expenses" or for any other purpose not immediately connected with the sales.

There can be no objection to making more than one assessment for the legitimate purposes of the act, where it is made uniform, so that the burden will fall on all lots alike, but to make the unclaimed lots alone, as in this case, bear all the burden of the shortage, is, in my judgment, wholly unwarranted.

I can not agree to a construction of the law that will place it in the power of a townsite board to arbitrarily make assessments as their caprice or interest might suggest.

The result of the action of the board in this case was to make the municipality bear the burden of the former delinquencies, and thus deprive it of the fund Congress contemplated should go into its treasury.

The board did not in making its report include its per diem compensation, as required, but evidently paid its members out of the additional assessment. An examination of its weekly reports of service, submitted at the time, shows that individual members put in a total of thirty nine days, amounting in the aggregate to \$228.00, and the settlement should be made on this basis.

Eliminating the additional assessments from the accounts, the settlement should, in my judgment, be upon the following basis:

CAPITOL HILL.

To amount from sale of lots	\$1,378.50
By am't paid for publishing notice of sale	\$37.34
" " notary fees	7.75
" " clerk hire	5.44
" " J. B. O. Landrum, trustee, 9 days at \$7 per day	63.00
" " John T. Taylor, trustee, 17 days at \$5 per day	85.00
" " amount of original ass't on lots sold	149.00
	<hr/>
	347.53
Balance due the city	1,030.97

WEST GUTHRIE.

To amount rec'd from sale of lots.....		\$188.25
By am't paid notary fees	\$1.25	
" " clerk hire56	
" " J. B. O. Landrum, trustee, 3 days at \$7 per day	21.00	
" amount of original ass't on lots sold	19.50	
		<u>42.31</u>
Balance due the city		145.94

EAST GUTHRIE.

To amount rec'd from sale.....		\$811.00
By am't paid publishing notice of sale.....	\$36.75	
" " notary public and clerk.....	7.75	
" " Hugh McCurdie, trustee, 1 day at \$5 per day	5.00	
" " John T. Taylor, trustee, 8 days, at \$5 per day	40.00	
" " J. B. O. Landrum, trustee, 2 days at \$7 per day	14.00	
" amount of original ass't on lots sold.....	29.50	
		<u>133.00</u>
Amount due the city		678.00

This makes a total due the city of \$1,854.91.

The action of your office approving the accounts of board No. 6, in the sale here under consideration, is reversed, and the settlement will be made in accord with this decision.

RAILROAD GRANT-INDEMNITY SELECTION-SPECIFICATION OF LOSS.

BROWN v. NORTHERN PACIFIC R. R. Co.

Railroad indemnity selections, made under the departmental order waiving specification of loss, are valid, and while of record a bar to the allowance of adverse claims. A subsequent designation of losses in bulk in support of such selections, and rearrangement of the losses so designated, tract for tract, to correspond with the selections, can not be regarded as an abandonment of the company's right under the selections as originally made.

Indemnity selections, regular and legal under the existing construction of the grant at the time when made, should be protected under a changed construction of the grant.

Secretary Bliss to the Commissioner of the General Land Office, April 29, (W. V. D.) 1897. (J. L. McC.)

Philander N. Brown has appealed from the decision of your office, dated December 28, 1895, holding for cancellation his homestead entry for the SW. $\frac{1}{4}$ of Sec. 31, T. 132, R. 55, Fargo land district, North Dakota.

The tract lies within the indemnity limits of the Northern Pacific Railroad. It was selected by the company per list No. 7, on April 9, 1883; re-arranged October 12, 1887; February 23, 1892; and November 26, 1895.

On October 14, 1895, Brown made homestead entry for the tract in controversy.

The list filed on April 9, 1883, was not accompanied by a list of the losses within the primary limits which served as bases for the selections. Such a list was in accordance with and (if in other respects proper) recognized as valid by the departmental instructions of May 28, 1883 (12 L. D., 196).

The list filed on October 12, 1887, contained a designation of losses, as required by departmental circular of August 4, 1885 (4 L. D., 90). Such losses were, however, set down "in bulk"—not arranged tract for tract with the corresponding selections.

The list filed February 23, 1892, contained a designation of losses arranged tract for tract, as required by the Department in the case of the Northern Pacific Railroad Company *v.* John O. Miller (11 L. D., 428), and of the Florida Central and Peninsular Railroad Company (15 L. D., 529).

The re-arranged list of November 26, 1895, was rendered necessary by the departmental decision of November 13, 1895 (21 L. D., 412), holding that the grant for the Northern Pacific Railroad Company did not extend east of Superior, Wisconsin.

The appeal contends that Brown's homestead entry (of October 14, 1895, *supra*,) was allowed "prior to any *valid* selection by the company," and that "it was error to hold that a subsequent selection can in any way affect" said entry.

The above is tantamount to an allegation that the several selection lists filed by the company prior to October 14, 1895, were invalid. This contention, however, can not be sustained. The Department has decided, in the case of O'Brien *v.* Northern Pacific Railroad Company (22 L. D., 135), as correctly summed up in the syllabus:

Indemnity selections made under the departmental order waiving specification of loss are valid, and while of record a bar to the allowance of adverse claims. A list in bulk of lost lands filed thereafter in support of such selections does not invalidate the same; nor can a subsequent re-arrangement of said list, tract for tract, to correspond with the selections, be regarded as an abandonment of the company's right under its original action.

It is not alleged, and it does not appear from the record, that the company has ever done anything that can be construed as an abandonment of its selection of the tract in controversy in 1883; and said selection has since that date remained of record, a notice and a bar to the allowance of any adverse claim.

The appellant contends that the selection of 1883,

having been voided by the decision of the Honorable Secretary, dated November 13, 1895, it was error to hold that such alleged selections are a bar to appellant's entry.

This language undoubtedly refers to the decision in the case of the Northern Pacific Railroad Company (21 L. D., 412, *supra*), holding that said company had no grant east of Superior City, and that losses

alleged to have occurred east of Superior City could not be made the basis for indemnity selections in North Dakota.

The allegation that the selection of 1883 was voided by said decision is incorrect. It expressly directed "that the company be allowed sixty days for notice of" said "decision within which to specify a new basis for any of its indemnity selections voided" thereby. In the case of list No. 7, here under consideration, notice was given to the company, as above directed; and within much less than the sixty days prescribed by the Department, the company specified new bases for its selections. Said selections, having been regular and legal under the existing construction of the grant at the time when made, should be protected under the changed construction. (See *Gamble v. Northern Pacific Railroad Company*, 23 L. D., 351.)

The company's selection of the tract in controversy therefore appears to be in all respects valid; Brown's entry for the land covered thereby was improperly allowed; and the decision of your office holding said entry for cancellation is hereby affirmed.

STATE BOUNDARY—RIVER—CHANGE OF CHANNEL.

OPINION.

The boundary between the Indian Territory and the State of Texas is the line of the middle of the main channel of Red river as it existed when Texas was annexed to the United States, and subsequent sudden changes in the current or main channel of said river will not in any way affect the location or position of said boundary line as it lay upon the earth's surface when established.

Assistant Attorney-General Van Devanter to the Secretary of the Interior.
(J. L.)

I have received by reference from your office, certain letters referred to you by the Director of the United States Geological Survey, as follows, to wit:

Four letters from C. H. Fitch, topographer in charge, dated respectively, February 24, March 27, April 3, and April 5, 1897:

A letter from the Commissioner of Indian Affairs dated March 16, 1897:

Two letters from Oscar Jones, United States surveyor, dated respectively March 7, and March 29, 1897:

A letter from W. S. Post, topographer, dated April 1, 1897:

Also two diagrams, showing "cut-offs" in the course of the Red river, which is the boundary between the Indian Territory and the State of Texas:

And I am requested to answer the following question: "Where the Red river, which constitutes a boundary of the State of Texas, has changed its course, will the old bed of the stream remain the boundary, or must the present channel be regarded as such?"

The diagrams show the locations of four cut-offs within a distance of less than forty miles west of the boundary of the State of Arkansas. The most easterly (marked C) is in T. 11 S., R. 27 E.; and it transferred in the year 1895, from the Territorial to the Texan side of the river, a very considerable body of Indian land, in the shape of a pear with a narrow neck or stem. The most westerly (called the "Watson cut-off"), is in T. 7 S., R. 21 E.; and it transferred, probably in the year 1890, from the Texan to the Territorial side of the river a body of Texan land of similar shape. The other two cut-offs (marked A. and B. respectively), are situated in T. 8 S., R. 22 E., and T. 10 S., R. 25 E.; and both transferred in the year 1866, Texan land to the Territorial side of the river. The letters before me show, that all of the cut-offs were caused suddenly by floods and overflows of the waters of Red River; aided probably in one instance by a ditch which the occupants of the land had cut across the narrow neck of the peninsula.

Texas was admitted into the Union by joint resolution of Congress approved December 29, 1845 (9 Statutes 108), in accordance with a joint resolution approved March 1, 1845, (5 Statutes 797). At that time the boundary between Texas and the United States was defined as follows:

The boundary line between the two countries, west of the Mississippi, shall begin on the gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the *western bank* of that river, to the 32nd degree of latitude; thence, by a line due north, to the degree of latitude where it *strikes* the Rio Roxo of Natchitoches or Red river; then *following the course* of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington; then *crossing* the said Red river, and running thence by a line due north to the river Arkansas; thence following the *course of the southern bank* of the Arkansas, to its source in latitude 42 north; and thence by that parallel of latitude to the South Sea. . . .

All the islands in the Sabine, and the said Red and Arkansas rivers, throughout the course thus described to belong to the United States. See treaty with Spain of February 22, 1819 (8 Statutes 254-256), treaty with Mexico of April 5, 1832 (8 Statutes 374), the convention with Mexico of April 21, 1836 (8 Statutes 461), and the convention with Texas of October 13, 1838 (8 Statutes 511).

By the act of July 5, 1848, (9 Statutes 245), Congress voluntarily ceded to Texas one half of Sabine Pass, one half of Sabine lake, and one half of Sabine river from its mouth as far north as the thirty second degree of north latitude. And in the year 1850, by agreement between the United States and the State of Texas (9 Statutes 446, and 1005), the boundaries west of the 100th meridian were changed. But no change has been made in the boundary extending from the 94th to the 100th meridian following the course of Red river. I therefore assume that the boundary between the Indian Territory and the State of Texas, is the line of the middle of the main channel of Red river as it meandered in 1845, when Texas was annexed.

I am respectfully of opinion that a change in the current or main channel of the river does not change or in any way affect the location or position of the boundary line, as it lay upon the earth's surface

when established by the treaties. The river was only a land-mark. The removal of a land mark will not change the line.

On November 11, 1856, Attorney General Caleb Cushing furnished the Secretary of the Interior with his official opinion and advice respecting the question now under consideration (8 Opinions of Attorney General 175). After discussing the legal effect of changes happening by accretion—by gradual and insensible accession and abstraction of mere particles—Mr. Cushing on page 177, said:

But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory the river thus breaks a way, suffers injury by the loss of territory, greater than the benefit of retaining the natural river boundary, and that *boundary remains in the middle of the deserted river bed.*

In the case of *Missouri v. Kentucky*, (11 Wallace 395-401), decided in December 1870, the supreme court of the United States, after reciting that the middle of the bed of the main channel of the Mississippi river was the ancient boundary between Kentucky and Missouri as established by treaties, said:

If the river has subsequently turned its course, and *now* runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States, and the island does not, in consequence of this action of the water, change its owner.

The forty first Congress recognized this rule of law, and legislated accordingly. The boundaries of the States of Iowa and Nebraska and the Territory of Dakota cornered, at the junction of the Big Sioux river with the Missouri river. The middle of the Missouri was the boundary line between Nebraska and Dakota. The river made a bend or loop southward enclosing a peninsula, which was about $2\frac{1}{2}$ miles long and 23 chains and 60 links wide across its neck, and contained 890.12 acres. This peninsula belonged to Dakota. Sometime between 1867 and 1869, the river cut for itself across the neck, a new and main channel, and thus added (so to speak) to the Nebraska side, not only the acres contained in the peninsula, but many more acres contained in the abandoned bed, which soon became dry and arable. In order to end controversies and prevent litigation, Congress by the act of April 28, 1870, (16 Statutes 93) ceded to the State of Nebraska jurisdiction over all the land which the river had cut off from the territory, and established the middle of the new channel as the boundary between the State and the Territory. (See *Phillips v. Sioux City and Pacific Railroad Company*, 22 L. D. 341.

There is no occasion for the Secretary of the Interior to pronounce at this time a formal decision of the question propounded to me. Out of the condition stated, many classes of questions will arise as the settlement of the country progresses; questions concerning the political jurisdiction of the authorities of the State and of the Territory respectively; questions affecting the rights of inhabitants of the Territory

who owned land which abutted upon the river as it formerly ran; questions affecting the rights of citizens of Texas similarly situated; and questions affecting the rights of those citizens of Texas or inhabitants of the Territory, whose lands have been washed away, and either totally or partially destroyed, by the new channel. All these questions can be best determined as they arise, and after hearing the persons interested in them.

I respectfully advise that the surveyors in the field should be instructed to trace, survey, meander and mark with appropriate monuments, (1) the line of the middle of the main channel of the river as it formerly ran; (2) the left bank of the old channel; and (3) the left bank of the new channel; so that township maps may be made showing the fractional subdivisions which will be made necessary by the closing of the surveys on each one of said meandered lines, respectively: They should also be instructed to find out, as far as practicable, the names of all persons claiming lands abutting upon either channel, and the size, location and shape of their respective claims; and to procure, by the affidavits of intelligent and reliable persons or otherwise, other information as to facts and dates likely to be useful in determining any of the questions that may hereafter arise for consideration by the Secretary.

The Director of the Geological Survey, will give all necessary and proper instructions to his subordinates.

Approved April 29, 1897.

C. N. BLISS, *Secretary*.

RAILROAD GRANT—INDEMNITY SELECTION SPECIFICATION OF LOSS.

NORTHERN PACIFIC R. R. CO. *v.* FIEBIGER.

On the rearrangement, tract for tract, of indemnity selection lists, where the losses were originally designated in bulk, the assignment of a loss not included in the original designation works an abandonment of the original selection, to the extent of the tracts selected on account of the new basis.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (F. W. C.)

The Northern Pacific Railroad Company has appealed from your office decision of January 4, 1895, holding for cancellation its indemnity selections covering lots 1 and 4 and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 29, T. 54 N., R. 19 W., Duluth land district, Minnesota, and permitting the homestead entry of Edward Fiebiger, covering said land, made November 4, 1887, to stand.

This tract is within the forty mile or second indemnity belt of the grant for said company. Lots 1 and 4 and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 29, were included in the company's list of selections made

April 23, 1883; and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 29 was included in the list of selections made October 17, 1883.

Both the company's lists were accompanied by a designation of losses, in bulk, equalling the selections, but were not arranged tract for tract with the selected lands.

On June 19, 1891, the company filed a re-arrangement of its list 8, in which the same losses were used as those contained in the original list of April 23, 1883, and arranged tract for tract with the selected lands.

On April 11, 1893, the company filed a re-arrangement of its list of October 17, 1883; and in this re-arranged list the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 19, T. 52 N., R. 13 W., is made the basis for the selection of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 29. This loss was not contained in the original list of October 17, 1883, and must therefore be treated as a new selection as of the date of its presentation (April 11, 1893).

So far as the same losses were used in the re-arranged lists as were contained in the original lists, the original selection is not invalidated, and the company's rights date as of the filing of the original lists. See *O'Brien v. Northern Pacific R. R. Co.* (22 L. D., 135); *St. P., M. & M. Ry. Co. v. Lambeck* (Id., 202).

Fiebiger's entry having been made November 4, 1887, the same might be permitted to stand as to the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 29, included in the selection of October 17, 1883, which was abandoned by the company's re-arranged list of April 11, 1893. As to the balance of the land covered by his entry, the company's selection of April 23, 1883, takes precedence. His entry will therefore be canceled, unless, after due notice, he elects to retain the said SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$.

Your office decision is accordingly modified.

TIMBER LANDS—SETTLEMENT CLAIM.

FERST *v.* SOLBERG.

Land covered by the bona fide settlement claim of a pre-emptor is not subject to timber land purchase; and the applicant for the right of purchase cannot take advantage of irregularities in the assertion of the pre-emption claim.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (C. J. W.)

September 11, 1893, Felix Ferst filed timber and stone statement No. 1316 for NE. $\frac{1}{4}$ of Sec. 23, T. 67 N., R. 20 W., Duluth, Minnesota.

June 20, 1893, Hans Solberg filed declaratory statement No. 5908, and on January 11, 1894 filed a new declaratory statement, No. 6072, for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of same section. Notice of intention to take final proof issued to both parties, August 10, 1894.

August 10-20, and 22, 1894, the proofs of both parties were submitted, and hearing had before the local officers. March 8, 1895, the

receiver filed his decision, rejecting the proof of Felix Ferst, and approving the proof of Hans Solberg. On March 22, 1895, the register filed his decision, rejecting the proof of Hans Solberg, and approving the proof of Felix Ferst. Ferst appealed from the decision of the receiver, and Solberg from that of the register. Ferst also filed a motion to dismiss Solberg's appeal.

October 21, 1895, your office overruled the motion to dismiss Solberg's appeal, and passed upon the case, affirming the decision of the receiver, approved the final proof of Solberg and rejected the final proof of Ferst, for the land covered by the filing of Solberg.

From this decision Ferst has appealed, upon the following grounds—

I. Error in finding that "the evidence of the timber claimant and his witnesses is very unsatisfactory indefinite and uncertain."

II. In holding that the timber claimant and his witnesses did not find all the improvements claimed by the pre-emption claimant, and in not finding that a considerable portion of said improvements if on the land, were made subsequent to the inspection of timber claimant and his witnesses and subsequent to the initiation of the contest.

III. In finding that the testimony does not show that the pre-emptor voted in Duluth twice after he established his alleged residence on the land; and in not finding that the circumstances of his having voted once in said city was evidence which, taken in connection with other proven laches of said claimant and contradictions in his testimony, was sufficient to impeach his residence and good faith.

IV. In finding that "the evidence establishes the good faith of the pre-emptor."

V. In finding that the land is chiefly valuable for agricultural purposes.

VI. In not affirming the decision of the register in rejecting the final proof of the pre-emptor and awarding the land to the timber claimant and appellant herein.

The local officers having filed disagreeing opinions in the case, under Rules 48 and 49 of Practice, your office properly overruled the motion to dismiss the appeal of Solberg and considered the whole case.

The land in question became subject to entry by the filing of the plat of survey at 9 o'clock on June 20, 1893. Solberg's application and affidavit were received by mail on that day, previous to 9 o'clock, and placed of record. Your office by letter "G" of November 3, 1893, directed the local officers to notify Solberg that his filing was illegal, but that he would be permitted to make a second filing and that he would not be affected by the requirement that his claim should be placed of record within three months after the filing of the plat of survey, where the failure resulted from the erroneous action of the local officers. Solberg was accordingly notified that he would be allowed until January 15, 1894 to legalize his filing by making a new declaratory statement, which was filed January 11, 1894. No new affidavit of form (4 102b) was then filed, and on August 20, 1894, at the time his final proof was taken he was allowed to make and file said affidavit. Your office held that the affidavit filed by Solberg with the illegal declaratory statement, followed within a short time after notice of its illegality by the second filing, was sufficient evidence of Solberg's qualification to make the filing. The issue is not between settlers or between

rival applicants to enter for homestead purposes, but between a pre-emption claimant who makes settlement on the land for homestead and agricultural purposes, and an applicant to purchase the land, as land unfit for agriculture and chiefly valuable for its timber, under the act of June 3, 1878 (20 Stat., 89). A proviso to the act subordinates it to any *bona fide* claim under any law of the United States, and to the improvements of any *bona fide* settler. The land subject to sale as timber land must be uninhabited and without improvements. The proof in this case shows that at the time of Ferst's application to purchase, it was settled upon by Solberg, and was improved by him, and was not subject to sale under the law. While the evidence is somewhat confused as to the precise date of Solberg's settlement, there is no doubt but the settlement antedated Ferst's application to purchase, and that the land was at that time improved. That it had some improvements on it is apparent from Ferst's own testimony. I have caused an examination of the field notes of the survey of the township embracing the land in question to be made. In the report of the surveyor, made July 5, 1892 (nearly a year prior to the date of the opening of those lands to entry and settlement), at the end of his field notes, he gives a list of the settlers whom he found in the township, and amongst others is the name of Hans Solberg. He adds the memorandum: "These settlers have good improvements." This circumstance is entitled to consideration, with the evidence of the pre-emptor.

The evidence furnished by Solberg shows his improvements to be worth about \$300, and it indicates that his settlement was made with the intention of making the land his permanent home. The defect in the declaratory statement filing of Solberg is not available to Ferst. He is not a settler, and can take no benefit from Solberg's failure to file in three months after the filing of the plat of survey. It was permissible for Solberg to perfect his filing at the time he offered his final proof. (Ellen Barker, 4 L. D., 514). It is insisted that Solberg's residence on the land is contradicted and overcome by his admission that he voted in Duluth in 1892. This is not a conclusive presumption as was held in the case of the State of California *v.* Sevoy (9 L. D., 139). This case is also authority for perfecting the filing by amendment. There is in the record sufficient support for your office decision, and it is affirmed.

REPORT OF SPECIAL AGENT-ATTORNEY.

ALBERT H. HORTON.

An attorney in good standing before the Land Department is entitled to inspect reports of a special agent on which final action has been taken by the General Land Office adverse to the interests of his client.

Assistant Attorney-General Van Devanter to the Secretary of the Interior. (P. J. C.)

I am in receipt, by reference from the Hon. First Assistant Secretary of the Interior, of a request from Albert H. Horton, asking that a former order of the Commissioner of the General Land Office, refusing to communicate to him, as attorney for J. P. Pomeroy, the specific grounds of alleged frauds and irregularities of one W. R. Hill in making homestead entries in Kansas be modified.

Briefly stated, it appears that Hill, acting as guardian for minor heirs of deceased soldiers, made quite a number of homestead entries for said heirs, and, as made, transferred the land to Pomeroy. The entries went to patent.

Upon an investigation by a special agent of the land office, the several entries were reported to be fraudulent in their inception, for reasons which are immaterial to this opinion.

It is ascertained from inquiry in the office of the Commissioner that on this report his office was in the act of recommending the institution of an action against Pomeroy to cancel these patents, when a request was made that action be suspended to allow Pomeroy to investigate the matter, and by letter of February 24, 1897, to Hon. Charles Curtis, member of Congress from Kansas, action on the reports was "suspended thirty days within which Mr. Pomeroy may surrender the patents in the cases," and, if no action was taken within that time, suit would be instituted.

It appears that Mr. Horton, as attorney for Pomeroy, sent a request to the Commissioner, asking that he "be advised of the specific grounds of irregularities and fraud in each case," and by letter of March 23, 1897, the Commissioner declined to furnish the information. He then addressed a letter to the Hon. First Assistant Secretary of the Interior, referring to the former correspondence, and asked that the Commissioner's order be "changed or modified, so that, as attorney for Mr. Pomeroy, I may have the information requested, and may also have sixty days additional time for further examination." This was referred to the Commissioner for report, and by his letter of April 21, 1897, his report was transmitted to the First Assistant Secretary, and by him referred to me for an opinion, as before stated.

The question submitted to me is, whether the Commissioner should furnish the information on file in his office in regard to these entries.

The matter of allowing attorneys before the Department to inspect the records of the Commissioner's office was fully discussed in the case of W. H. Lamar (5 L. D., 400). It appears that Mr. Lamar applied for permission to examine a record for the purpose of determining whether he would accept a retainer in the case, and the privilege was denied him by the Commissioner; whereupon he appealed to the Department, and it was decided that he had the right to do so. In discussing the matter, Mr. First Assistant Secretary Muldrow said:

Attorneys have always been allowed by the courts to enter a special or limited appearance, and it would seem that attorneys practicing before this Department, in good standing, ought to be allowed to inspect the records of your office, including all papers upon which action has been taken affecting the rights of parties. The mere fact that a case is pending in one division of your office rather than in another can make no difference in the principle. It ought not to be presumed that attorneys of good standing in this Department will disregard their obligations to be faithful to the Department as well as to their clients.

No good reason is shown why an attorney practicing before this Department should have any less privileges than would be accorded to any other reputable person seeking to inspect the records of your office. While it must be conceded that a large discretion should be given to your office, yet that discretion is a legal one and should be exercised in accordance with the regulations of the Department. When, therefore, any attorney practicing before this Department represents that he has been applied to by a party in interest to appear for such party in any case pending in your office, and that he desires to inspect the record of such case to learn the nature thereof and ascertain the amount of fee to be charged for his services in appearing for such party, such attorney should be allowed to inspect the record and all papers upon which action has been taken by your office adverse to the interest of such party.

It seems to me that this ruling can with propriety be applied to the case at bar, so soon as it reaches the proper stage. It is evident in the Lamar case that action had been taken against his client that was adverse to his interest. After action has been taken by the Commissioner's office, such as ordering a hearing with the view of canceling an entry, or recommending a suit to be brought to annul a patent, there seems to be no substantial objection to allowing an inspection of the records of the Commissioner's office. Before such final action has been taken, the manifest impropriety of permitting the records to be examined is clearly apparent, because until that time the record is confidential, which may or may not on examination result in final action adverse to the party, but thereafter the reports cease to be privileged and confidential, so far as the interests of the parties affected thereby are concerned.

Applying this test to the case at bar, it would seem as if such final action had not yet been taken by the Commissioner's office as to warrant the granting of the request of Mr. Horton. It is true the Commissioner had prepared a letter recommending the Secretary of the Interior to request the Hon. Attorney General to bring suit to cancel the patents, but that letter has not been formally transmitted to the

Secretary of the Interior for consideration, and until that is done, in my judgment, such final action has not been taken as contemplated.

I am therefore of the opinion that, if the Commissioner of the General Land Office is still of the opinion that suit should be brought and formally recommends it, then the matter would be in such condition as would permit "an attorney in good standing before the Land Department" to inspect the record, but until that is done, the records should be regarded as confidential.

Approved, April 30, 1897:

C. N. BLISS,

Secretary.

RAILROAD GRANT—INDEMNITY—ACT OF JUNE 22, 1874.

OREGON AND CALIFORNIA R. R. CO.

An indemnity selection under the act of June 22, 1874, based on a relinquishment, necessary for the protection of entrymen, under the rulings then in force as to the date when the rights of the company attached, should not be defeated by a changed ruling as to the attachment of rights under the grant, where the lands so selected have been sold by the company, and the grant is not enlarged by the approval of the selection.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (F. W. C.)

The Oregon and California Railroad Company has appealed from your office decision of January 17, 1896, holding for cancellation a certain list of selections made March 14, 1877, under the provisions of the act of June 22, 1874 (18 Stat., 194), covering lands to the amount of 1081.74 acres within the Oregon City land district, Oregon.

On October 29, 1869, this company filed in your office a map showing the definite location of its line of road from Portland to Jefferson, in T. 10 S., R. 3 W.; the distance covered by said location being about sixty-one miles. Said map was transmitted to this Department November 4, 1869, and returned with the approval of Secretary Cox January 29, 1870.

Section 2 of the act of July 25, 1866 (14 Stat., 239), making the grant under which the company claims, after describing the extent of the grant, provides, that upon filing

in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located, and within the limits before specified.

It appears that in the case of *Swift v. California and Oregon Railroad Company* (2 Copps Land Laws 733), involving a consideration of the grant in question, it was held that the right of the land grant company attaches to the granted land "upon the filing of the map of survey of its road;" it having then done all within its power to identify the land.

Under this ruling the right of the company opposite the lands in question attached October 29, 1869, at which date, it appears from an abstract furnished by your office, that five of the tracts relinquished and made the bases for selections under the act of 1874, were free from adverse claims, to wit, the NE. $\frac{1}{4}$ of Sec. 1, T. 4 S., R. 1 E.; the NE. $\frac{1}{4}$ of Sec. 3, T. 4 S., R. 1 E.; the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 2, 3 and 4, Sec. 7, T. 4 S., R. 4 E.; the NW. $\frac{1}{4}$ of Sec. 7, T. 4 S., R. 2 E.; and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 27, T. 2 S., R. 4 E. Subsequently, and prior to January 29, 1870, entries were allowed upon these lands, and upon the request of your office the company relinquished in favor of those entries under the provisions of the act of June 22, 1874 (*supra*), and on March 14, 1877, as before stated, made its selections now under consideration.

In the case of California and Oregon Railroad Company v. Pickard (12 L. D., 133) it was held that the right of the company under the grant of July 25, 1866 (*supra*), does not attach until the map of definite location has been accepted by the Secretary of the Interior, which in the case under consideration was on January 29, 1870. At that date the lands relinquished by the company were embraced in entries of record, and for that reason your office decision appealed from holds the lands relinquished were excepted from the company's grant; that its relinquishment was unnecessary, and that no right was gained by its selection under the act of June 22, 1874 (*supra*).

This act provides—

That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided*, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes: *And provided further*, That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a pre-emption or homestead settler after the location of the line of the road and prior to the notice to the local land office of the withdrawal of such lands from market.

From the recital above made it is apparent that under the ruling in force at the time the company relinquished upon the request of your office, its rights were held to have attached on October 29, 1869; consequently its rights were superior to those who entered after that date, and following its relinquishment it made due selection under the act above quoted.

This selection was made, as before stated, in 1877, and remained unacted upon until considered in the decision of your office appealed from. In the mean time the company reports that it has sold part of the lands selected, and the ruling as to the time of the attachment of rights has been changed. Under these circumstances it would seem that the company's selection should be approved; especially as the grant is not enlarged thereby. Should these selections fail, the company would nevertheless be entitled to select other lands within its indemnity limits.

This might not now be possible, for the indemnity withdrawal, which was recognized in 1877 at the time of these selections, has been revoked since 1887 and the lands within said limits disposed of as other public lands.

As to the tracts selected in lieu of those before described, your office decision is therefore reversed.

The remainder of the tracts relinquished and made the bases for the selections under consideration, the abstract shows, were covered by homestead entries both on October 29, 1869, and July 29, 1870, so that the tracts were clearly excepted from the company's grant under either ruling, and its relinquishment, as to said tracts, was unnecessary and conferred no right of selection upon the company.

As to the tracts selected in lieu of these tracts, your office decision is affirmed.

PRACTICE—NOTICE—AFFIDAVIT OF CONTEST—CORROBORATION.

VINCENT *v.* GIBBS.

The Rules of Practice do not require that the notice of a hearing should be served within the jurisdiction of the local office from which it is issued.

A notice of contest is sufficient if it substantially follows the affidavit of contest.

A motion to dismiss a contest for informality in the affidavit of contest, and the want of a corroboratory affidavit, may be properly overruled by the local office, as its jurisdiction is not dependent upon the affidavit of contest, but upon the service of notice.

Secretary Bliss to the Commissioner of the General Land Office, April 29, 1897. (W. V. D.) (C. W. P.)

October 23, 1893, Ira L. Gibbs made homestead entry No. 2070 of the SE. $\frac{1}{4}$ of Sec. 25, T. 27 N., R. 13 W., Alva land district, Oklahoma.

On November 2, 1893, Thomas H. Vincent filed affidavit of contest, alleging, in substance, that he is qualified to make entry for said tract; that at one o'clock and twelve minutes after noon of September 16, 1893, he settled on the land for the purpose of making it a home; and that he was the first settler thereon.

On October 15, 1894, a hearing was had, at which both parties were present, in person and by counsel.

Before the testimony was submitted Gibbs' counsel appeared specially, and filed a motion to quash the notice of contest, for the reasons: (1) that the same was not served on Gibbs within the jurisdiction of the land office, at Alva, Oklahoma Territory; (2) does not correspond with the allegations in the affidavit of contest; and (3) fails to show that Vincent is entitled to enter the land.

This motion the local officers overruled, and Gibbs excepted.

Gibbs' counsel then filed a motion to dismiss the contest, for the reasons (1) that the notice was not properly served, and (2) does not correspond with the affidavit of contest; (3) that the affidavit of contest does not show that Vincent is qualified to make entry; (4) that said affidavit is not properly corroborated, in this, that the corroborating affidavit does not show the date when signed, or that an oath had been administered to the witness; and (5) because no return or service of notice had been made to the local office.

Vincent then asked to have the officer before whom the affidavit was made affix his signature to the jurat, which the local officers granted, overruling Gibbs' objection thereto, and to which he excepted.

The local officers then overruled the motion to dismiss, and Gibbs excepted.

On April 3, 1895, the local officers rendered a decision, finding that Vincent's right to the land is superior to that of Gibbs, and recommending that Gibbs' homestead entry be held subject to said right. Gibbs appealed.

Your office affirmed the judgment of the local officers. Gibbs appeals to the Department.

The motions to quash and to dismiss the contest were properly overruled.

1. The rules of practice do not require that the notice of hearing should be served within the jurisdiction of the register and receiver.

2. The objection that the notice of contest does not correspond with the contest affidavit, and does not show that the contestant is qualified to enter the land, if successful, is without force. The qualification of the contestant is sufficiently set forth in his affidavit of contest, and the allegation of priority of settlement in the notice of contest is substantially the same as the allegation in the affidavit of contest. Rule 8 of practice, paragraph 6, only requires that the notice shall give the name of the contestant, and *briefly* state the grounds and purpose of the contest.

3. The objection to the affidavit of contest that it was not properly corroborated, and to the action of the local officers in allowing the notary to insert the date and affix his signature to the affidavit of contest, affords no ground for reversal of the decision of the local officers, for the reason that an affidavit of contest, while provided for in the rules of practice, is not essential; jurisdiction is obtained by service of notice. Consequently, it is not necessary to consider the action of

the local officers in allowing the notary to insert the date and affix his signature to the jurat.

The last objection, that no return of service of notice had been made to the local officers, is contradicted by the record.

There being no error in the proceedings, and the evidence supporting the concurring decisions of your office and the local officers in favor of the contestant, your office decision is affirmed.

PRACTICE—CERTIORARI—ADVERSE RIGHT.

BUTLER v. ROBINSON.

Rule 85 of Practice operates as a supersedeas for the time specified therein, but is not a limitation upon the power of the Secretary of the Interior to grant an application for certiorari even though not filed within that time.

Delay in the application for a writ of certiorari, and the allowance of an adverse entry under the Commissioner's decision complained of, will not defeat the right of the applicant to a decision on the merits of the case, where the rights of third parties are not affected thereby, and the status of the adverse party is not due to any neglect or delay on the part of the applicant, and where the entry of such party is made with full notice of the applicant's rights in the premises.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (E. B., Jr.)

On September 12, 1890, J. M. Robinson made timber culture entry No. 2912 for lots 1, 2, 3, 4, 5 and 6, of Sec. 8, T. 16, S., R. 1 W., S. B. M., Los Angeles, California, land district. On April 24, 1893, William J. Butler initiated a contest against said entry, wherein non-compliance with the timber culture law generally, and specifically as to plowing and cultivating during the first and second years after entry, were charged. After hearing, the local office, on January 15, 1894, decided the case in favor of the contestant. On March 5, 1895, your office, finding among the papers transmitted by the local office no appeal filed within the time allowed by the rules of practice, declared the decision of the local office final as to the facts, under Rule 48 of Practice, canceled the entry and closed the case.

Your office, having on June 12, 1895, denied Robinson the right of appeal from its previous decision, Robinson, on December 12, 1895, filed an application for certiorari; which was granted by the Department January 25, 1896 (22 L. D., 67). In allowing the application for certiorari, the Department held that Robinson had filed an appeal in time from the decision of the local office, and that the same had been duly served upon Butler's attorney; and further, that—

it is plain upon the face of their decision that the local officers, in densest ignorance of the demands of the timber culture law, found bad faith on the part of the defendant, and recommended the cancellation of his entry, for not having done what the law does not require him to do.

Under such circumstances, the contingency having arisen which is contemplated in the first clause of Rule 48 of Practice—gross irregularity being suggested on the face of the papers—the decision of the local officers ought not to have been considered final as to the facts, even if the defendants had not appealed.

On June 9, 1896, when the case came before the Department under the writ, the only question considered was this;—

Does the evidence show non-compliance on the part of the entryman with the timber culture law as to plowing and cultivating during the first and second years after entry, that is, during the years ended September 12, 1891, and 1892, respectively? reviewing the evidence the Department said—

In reviewing the evidence the Department said—

The good faith of the entryman is not successfully impeached by the evidence. On the contrary it is manifested by the quadruple quantity of land plowed the first year, and by planting trees two years earlier than the law requires, thrice the acreage required for the third year and five acres more than the law requires during the entire four years ordinarily to be spent, according to the law, in the preparation of the ground and the planting of trees. That the soil was in condition for the planting of trees at once upon plowing, is explained by the fact that the tract had previously been in possession of other parties and cultivated by them.

And thereupon the decision of your office was reversed and you were directed to cancel Butler's homestead entry, made March 23, 1895, under your office decision, and to reinstate Robinson's entry.

The case now comes again before the Department under an order, dated December 16, 1896, entertaining a motion by Butler for a review of the decision of June 9, 1896, upon his contention that Robinson's application for certiorari was not only filed out of time, but that, in the meantime, the former had made homestead entry of the tract involved in the exercise of his right as successful contestant under your office decision, and that therefore certiorari ought not to have been allowed nor the Department have considered the case thereunder, regardless of alleged laches by Robinson in the matter of his said application.

The appeal by Robinson from the decision of the local office, which the Department, as before stated, held to have been duly served and to have been filed in time (March 1, 1894), was not received by your office from the local office until May 2, 1895. Between March 1, and April 25, 1894, inclusive, several motions for review and re-hearing were filed by Robinson and denied by the local office, as set out—except the denial of April 25, 1894,—in the decision of January 25, 1896 (*supra*).

On March 18, 1895, there was filed in the local office by Robinson the following paper—

UNITED STATES LAND OFFICE,
Los Angeles, Calif.

WILLIAM J. BUTLER }
vs. } Motion for Review & Appeal.
J. M. ROBINSON, }

To the Hon. COMMISSIONER OF THE GENERAL LAND OFFICE,
Washington, D. C.

Comes now the defendant J. M. Robinson and moves the Hon. Commissioner of the Gen'l Land Office for review and appeal from the decision of the Hon. Commissioner

of the Gen'l Land Office of March 5th, 1895, dismissing said cause and demands investigation and review of same on the following grounds:

1st. That Commissioner erred by reason of the law and the facts & the whole thereof.

2nd. That appeal was duly filed in time as shown by the records and files of office.

3rd. That if records do not show appeal in due form and in time, claimant charges loss or abstraction of the same.

4th. Claimant avers the fact to be that appeal was written, copied and attached to papers and forwarded to local land office and the same was forwarded within the 40 days allowed in such cases, affiant believes they were forwarded to the local office about the last of February, 1894.

That this application is not made for delay but in good faith that justice may be done claimant.

J. M. ROBINSON.

Subscribed and sworn to before me this day of March, 1895.

(SEAL)

P. P. BRUNER,

Notary Public in and for San Diego Co., Calif.

A copy of this paper was duly served on S. S. Knowles, the local attorney of Butler. On March 18, 1895, Robinson also filed in the local office final proof in the matter of his entry under the fifth proviso of section 1 of the act of March 3, 1891 (26 Stat., 1095). On May 11, 1895, the resident attorney of Robinson filed, and duly served on Butler's said attorney, an appeal from your office decision of March 5, 1895. In said decision of June 12, 1895, your office, treating said paper as a motion for review of its previous decision, considered the entire record and held the notice of Robinson's appeal of March 1, 1894, from the decision of the local office, not to have been duly served, denied what it regarded as the motion for review, and declined to forward said appeal of May 11, 1895, on the ground that the case had been closed "under Rule 48 of Practice." On June 13, 1895, your office notified Mr. Keigwin, the resident attorney of Robinson, that the motion for review had been denied, but made no allusion to its action concerning the appeal from its previous decision. Under date of July 27, 1895, the local office reported that Robinson was duly notified, "by registered mail on the 21st ultimo," of your office decision of June 12, 1895, and had since taken no action. On September 11, 1895, your office, having discovered that it had failed to notify Mr. Keigwin of its refusal to forward the appeal filed by him, in a letter (H) to the local office, after briefly reviewing the history of the case, said—

In view of your report, and as no further action has been taken before this office, said decisions of this office are considered final and the case is finally closed and timber culture entry No. 2912 remains canceled.

Of this letter finally closing the case, and of its refusal on June 12, 1895, to forward to the Department the appeal filed by him May 11, 1895, your office notified Mr. Keigwin on the day of its date.

Robinson's only explanation of his delay in applying for certiorari is that it was due to his surprise at the action of your office, to sickness, and to inability to raise money to pay Mr. Keigwin to further prosecute the

case and to communicate with the latter, by reason of his absence from this city when the money had been raised, until about the middle of November 1895.

The foregoing is the somewhat remarkable history of this case. It appears therefrom that Robinson duly appealed from the local officers' adverse decision of January 15, 1894, and that the paper filed by him on March 18, 1895, whether regarded as a motion for review of your office decision of March 5, 1895, or as an appeal therefrom, was filed in time. Regarded as a motion for review, while pending said paper stopped the running of time against the filing of an appeal (Rule 79) from the decision last mentioned, and so brought the appeal filed May 11, 1895, within the time allowed for appeal. Or, regarded as an appeal, said paper was sufficient for the protection of the rights of Robinson. It further appears that, as the Department held in its decision of June 9, 1896, Robinson had duly complied with the requirements of the timber culture law during the period covered by Butler's contest.

Had the appeal of Robinson, whether as of March 18, or May 11, 1895, come before the Department, as it should regularly have done, a decision thereon, in the light of the events, must surely have been in his favor, resulting in the cancellation of Butler's entry and the reinstatement of Robinson's entry, which is the action the Department has actually directed. Should Robinson be now deprived of the fruits of his years of faithful compliance with the timber culture law, by means of a wrongful judgment by your office and the entry based thereupon, simply because, when he had repeatedly failed to secure justice in the regular and ordinary way, he delayed for the considerable period shown by the record to invoke the somewhat extraordinary and only remaining remedy of certiorari? Or will the ends of justice be more nearly attained by adhering to the action heretofore directed by the Department? These are the general questions which now confront the Department.

The contention of Butler's motion, hereinbefore stated, was urged by him in a motion filed by him December 31, 1895, to dismiss Robinson's petition for certiorari, and was therefore before the Department when certiorari was allowed, but it is not discussed in the decision of January 25, 1896 (*supra*), which granted the petition. Rule 85 of Practice is invoked by Butler in support of the proposition that only twenty days after the denial of the right of appeal by your office are allowed within which to apply for certiorari. It is well settled that said rule merely operates as a supersedeas for the time above indicated, and is not a limitation upon the power of the Secretary to grant an application for certiorari, even though not filed within that time (*Denman v. Domenigoni*, 18 L. D., 41; *Henry D. Emerson*, 20 L. D., 287).

The other branch of Butler's contention, namely, that his homestead entry as successful contestant under your office decision of March 5, 1895, and the alleged laches of Robinson in delaying to apply for certiorari, should have constituted a bar to the relief afforded Robinson by

the Department, is also not well grounded. In *Denman v. Domenigoni, supra*, in construing Rule 85 of Practice, the Department, in connection with the holding therein, as hereinbefore indicated, said:

Rule 85 is a limitation on the time within which the Commissioner of the General Land Office is required to suspend action on the case at issue, and after the expiration of that time, if writ of certiorari has not been applied for, your office might take such action as would preclude the granting of the writ, but where there is no evidence that such action has been taken, I find no authority in the Rules of Practice to deny the application.

And in *Henry D. Emerson, supra*, it was likewise said, that the rule does not bar a party

from the right to invoke the supervisory authority of the Secretary at any time prior to the execution of the judgment of the Commissioner.

The judgment of cancellation of Robinson's entry, and the allowance of Butler's entry, were in no way brought about by Robinson, nor are they connected with any laches on his part. This judgment and entry both long antedated the denial of Robinson's right of appeal. They were executed before neglect or omission of any kind in connection with the application for certiorari is chargeable against Robinson. If such judgment and entry could operate as a bar to certiorari in any such case, or to the invoking of the supervisory power of the Secretary, the injured party would be absolutely without remedy. This would be a case of a wrong without a remedy, contrary to one of the fundamental principles of jurisprudence. No action was taken by your office nor by Butler after the denial of Robinson's right of appeal which in any way changed the relation of the parties or the legal aspect of the case. No right of an innocent third party is involved. The case is still between the original parties litigant. Butler's only standing here at this time is due to advantage he has taken of the unfortunate judgment of your office, which upon an incomplete record and in ignorance of the true status of the case, applied a rule which would not otherwise have been applied. Butler, however, was not in ignorance of the true state of the case. He knew of serious objections which might be urged to the judgment of your office and against his entry. He had notice of Robinson's appeal of March 1, 1894, and the appeal or motion for review of March 18, 1895, before he made his entry. He took large chances against the maintenance of the integrity of his entry. If he thereafter made improvements upon the land, as he alleges, it was in full view of the risk he had taken, and he can not now complain if he is the losing party. Robinson's appeal or motion for review of March 18, 1895, alone, should have been sufficient to cause the local offices to deny an entry of the land by Butler until the same had been finally disposed of.

The only foundation for the charge of laches against Robinson is the allegation of Butler that he has brought under cultivation a few acres of the land since the denial of Robinson's right of appeal. The house and stable, or at any rate the house, which he alleges he has built

thereon, was erected before the time of such denial. The value of all the improvements made by Butler on the land, he does not attempt to show. Several parties make affidavit in behalf of Robinson that said house is not worth to exceed \$100, and that the new lands plowed or cleared by Butler amount only to about two and one half acres. Be this as it may, however, I do not think Butler's improvements, in connection with the delay of Robinson in applying for certiorari, warrant a judgment in favor of the former.

In view of the foregoing, and after very careful consideration of the entire case, I am clearly of opinion that the ends of justice between these parties require that the motion for review should be denied; and it is so ordered.

CERTIFICATES OF LOCATION—SPECIAL ACT OF JUNE 6, 1894.

WESLEY MONTGOMERY.

An application for the issuance of certificates of location under a special act of Congress authorizing and requiring the Commissioner of the General Land Office to permit the person named therein "to enter one hundred and sixty acres of public land subject to entry under the homestead law," must be denied, where the act contains no provision in terms authorizing such action, and furnishes no basis for the exercise of discretionary power in that respect.

Secretary Bliss to the Commissioner of the General Land Office, April 30,
(W. V. D.) 1897. (C. J. G.)

The act of Congress approved June 6, 1894 (28 Stat., 987), entitled "An Act for the relief of Wesley Montgomery," is as follows:

That the Commissioner of the General Land Office be, and he is hereby, authorized and required to permit Wesley Montgomery, of Adams County, State of Nebraska, to enter one hundred and sixty acres of public land subject to entry under the homestead law, not mineral nor in the actual occupation of any settler, in lieu of the northeast quarter of section twenty-three, of township twenty-eight north, of range fourteen west, in Iroquois county, Illinois, which land was entered by said Wesley Montgomery on February twentieth, eighteen hundred and seventy-four, under the homestead laws, in accordance with instructions of the Commissioner of the General Land Office to the register and the receiver of the date of August ninth, eighteen hundred and seventy-three, the title to which land failed because of a prior disposition of the same, which did not then appear upon the records of the Land Office: *Provided, however,* That the said Wesley Montgomery shall not have made any other entry of land of the United States under the homestead laws: *And provided further,* That a final certificate and patent shall issue to the said Wesley Montgomery upon such entry as he may make hereunder without proof of residence and cultivation.

Under date of January 4, 1896, the said Montgomery filed in your office an affidavit wherein he requests, after stating his qualifications under said act of Congress, that he be permitted, for the sake of greater convenience and to avoid expense, to select and enter the land to which he is entitled under the act, by a duly appointed agent or attorney. He further requests, in order that he may have the full benefit of the

provisions of said act, that he be permitted to enter the said land in separate forty acre tracts, and that certificates be issued by your office authorizing him to make such entries in person or by a duly appointed agent or attorney.

In the attorney's letter accompanying said affidavit it was contended that, in view of the remedial nature of the said act of Congress it is entitled to the broadest and most liberal application, "to the end that the beneficiary may in a measure at least receive compensation for the rights and property he was forced to relinquish through the acts of the government agents." It was likewise contended that the Commissioner of the General Land Office is vested with discretionary authority to determine the manner in which the said act may be carried into effect.

In alleged support of the above contentions a number of grants made under Indian treaties, or by acts of Congress, are cited as being substantially analogous to that made to Montgomery, and under which grants certificates or scrip were issued. Reference is also made to a number of departmental decisions authorizing the cancellation of scrip of larger denomination and the reissue of same for smaller tracts.

In a letter dated March 20, 1896, your office declined to comply with the petitioner's request. A motion for review of this decision was filed, which was denied by your office on April 13, 1896.

An appeal has been filed in this Department.

In your office decision of March 20, 1896, it was held that the act of June 6, 1894, *supra*, contemplated an entry by Montgomery under the homestead law; that it was not the intention of the act to give him any broader right to the land to be selected and entered thereunder, than he had to the land on which he had settled and resided, with the exception that he was relieved from the conditions of said homestead law in the matter of residence and cultivation.

On the other hand it is contended by the appellant that the words employed in the act, "subject to entry under the homestead law," refer to the *land* to be entered, not to the *right* of entry, and were used simply to designate the *character* of the land granted; that they do not refer to the *manner* of entry. Attention is also called to the fact that the bill as at first presented contained the words, "to enter, under the homestead law." From this it is argued that the object of amending the bill was to permit Montgomery to take one hundred and sixty acres of land without any qualification as to how said land was to be entered.

While, as contended by the appellant, the only condition or restriction contained in the act for his relief against the exercise by him of the right granted, is that he "shall not have made any other entry of land of the United States under the homestead laws," yet, at the same time, the only privilege granted or exception made in his case from the regular homestead entryman, is that "a final certificate and patent shall issue to said Montgomery upon such entry as he may make hereunder without proof of residence or cultivation." To accord the appel-

lant privileges not specifically granted by the act, simply because they are not specifically forbidden, would be as unwarranted as to impose certain requirements upon him simply because the said act does not specifically except him therefrom. No authority can be derived from the act of relief for the issuance of certificates of location or scrip, and the language of said act furnishes no basis for the exercise of discretionary power in that regard. The act in my opinion provides for the entry of one hundred and sixty acres of public land subject to entry under the homestead law, the entryman only being excepted from certain conditions enumerated in the provisos to said act. This view would seem to be substantiated in one of the said provisos wherein the words "such entry" are employed, those words evidently having reference to the prospective entry provided for in the granting clause, and thus contemplating only one entry thereunder.

In view of the conclusion herein reached it is unnecessary to consider the cases cited by appellant, they not being deemed particularly applicable to the case under consideration.

The real question involved in Montgomery's application is as to the authority of your office, under the act, to issue certificates at all, regardless of whether they are for forty acres or one hundred and sixty acres. Hence, the request in the said appeal for the issuance of *one* certificate must also be denied. There is no authority in the act of relief for the issuance of certificates as requested, the party being entitled according to the language of the act to land only, unless the operation of said act is to be extended beyond its words, which, in view of the fact that such construction is not necessary to render effective the provisions of the act, would seem to be unwarranted.

Your office decision, to the extent of matters herein considered, is hereby affirmed.

APPLICATION FOR SURVEY ERRONEOUS MEANDER.

N. F. KELLY.

An order may properly issue for the survey of a tract of land omitted from the original survey through the erroneous meander of a slough instead of a river proper.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (W. A. E.)

By your office letter of March 16, 1897, was transmitted for departmental action the application of N. F. Kelly for the survey of a tract of land on the St. Francis river, in section 11, T. 18 N., R. 8 E., 5th P. M., Missouri.

It appears from the application and the accompanying affidavits that there is a tract of unsurveyed land containing about fifty-three acres in the southeast quarter of said section 11, not subject to overflow, and fit for agricultural purposes; that there are trees thereon about one or two

hundred years old; and that the configuration of either shore of the main-land has not materially changed since the original survey of the water front on the main-land in 1848. The affidavit of F. Kinsolving, surveyor, shows that he has surveyed this land; that it lies wholly on the Missouri side of the river and is separated from the main-land by a narrow slough, which, at the time of his survey, contained no water; that the channel of the river is northwest of this land and is from thirty to seventy-five yards wide and four to eight feet deep; and that the United States deputy surveyor meandered the slough, instead of the eastern shore of the river proper, thus omitting the land in question from the official survey.

The land immediately adjoining said tract on the south and east is owned by Kelly, the applicant, who alleges that until recently he thought he owned the tract in question.

This case is similar to that of *Horne v. Smith* (159 U. S., 40). In that case it appeared that Horne had received a patent for lot 7 of section 23, and lots 1 and 2 of section 26, T. 29 S., R. 38 E., Tallahassee meridian, Florida, containing 170.42 acres according to the official plat of survey. The official plat showed that sections 23 and 26 were fractional sections bordering on the Indian river. On the plat a meander line ran through the sections from north to south, the Indian river being on the west thereof. It was shown, however, that a bayou had been meandered instead of the river proper, and that between the bayou and the river was a tract of unsurveyed land containing about six hundred acres.

It was held that notwithstanding the fact that the official plat showed the Indian river to be the western boundary of the land patented to Horne, the bayou was the actual boundary and the unsurveyed land between the bayou and the river proper did not pass to him under his patent.

I am of the opinion, under the showing made by Kelly and the ruling of the supreme court in the above cited case, that the tract here involved should be surveyed and disposed of as government lands, and it is so ordered.

SURVEYOR GENERAL—MINING CLAIM—SECTION 452 R. S.

JOHN S. M. NEILL.

A surveyor-general, who orders and approves the survey of a mining claim, is disqualified as an applicant therefor under the provisions of section 452 R. S., and the departmental regulations thereunder, while holding such office.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (E. B., Jr.)

By its decision of February 25, 1896, your office affirmed the decision of the local office rejecting the application of John S. M. Neill offered

October 31, 1895, for patent to the Gold Mountain lode claim, survey No. 4653, Helena, Montana, land district, on the ground that it had not been satisfactorily shown that the land embraced in said claim was known to contain a valuable mineral bearing vein or lode at date of the application for patent to either the Cutler or the Samuel S. Richards placer mining claims, mineral entries Nos. 130 and 791, respectively, which were patented January 25, 1875, and January 31, 1883, respectively, and conflicted with said lode claim throughout nearly its entire area.

Your office further found from the record in this case "that the order of the survey No. 4653, the approval thereof, and the application for patent thereon, were made by John S. M. Neill," and that such order, approval, and application, were made by him while he was United States surveyor-general of Montana; and thereupon held that as such surveyor-general he could not "legally order or approve the survey of his own mining claim, nor be allowed to file an application for patent therefor," citing section 452 of the Revised Statutes, and case of Herbert McMicken *et al.* (11 L. D., 96) and circular instructions of September 15, 1890 (11 L. D., 348). From the decision of your office said Neill appeals, assigning error as follows:

First. It was error to hold that the lode claim did not contain a valuable mineral bearing vein at date of application for patent to placers without giving applicant an opportunity by hearing or otherwise, to demonstrate that fact.

Second. It was error to hold that a surveyor-general (the applicant in this case) could not legally order or approve the survey of this mining claim from the record presented in the abstract of title, and the additional evidence on file in the Department relative thereto.

Third. It was error to hold that the inhibition of Sec. 452 of the Revised Statutes is applicable to mineral lands.

The records of the Department show that John S. M. Neill was appointed U. S. surveyor-general of Montana May 28, 1894, and that he still holds that office. Appellant admits that he is and has been since the date last above mentioned, such surveyor-general. The record in the case shows that the order for said survey was made by him May 7, 1895, that the survey was commenced thereunder May 20, and completed May 22, 1895, by U. S. deputy mineral surveyor George K. Reeder, and was approved by said Neill as said surveyor-general on August 10, 1895.

Section 452 Revised Statutes reads—

The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office.

In construing this section in the case of Herbert McMicken *et al.* (10 L. D., 97), involving certain timber land entries made by McMicken and others while employees of the United States surveyor-general's

office of the then Territory of Washington, and therefore held for cancellation by your office, the Department held (syllabus):

The disqualification to enter public lands contained in section 452 R. S., extends to officers, clerks, and employees in any of the branches of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of the public lands.

A timber land entry made by an employe in the office of the surveyor general of the district in which the land is situated is illegal and must be canceled.

This decision the Department affirmed on review (11 L. D., 96), and directed the formulation of a circular in accordance with the construction of law therein. Such circular, dated September 15, 1890, as approved by the Department, is found at page 348 of 11 L. D. After setting out the section of the Revised Statutes (452) under consideration and referring to the decisions above cited, the circular concludes:

In accordance with said decision, all officers, clerks, and employes in the offices of the surveyors-general, the local land offices, and the General Land Office, or any persons, wherever located, employed under the supervision of the Commissioner of the General Land Office, are, during such employment, prohibited from entering, or becoming interested, directly or indirectly, in any of the public lands of the United States.

It was clearly intended that the surveyors-general themselves should come within the prohibition declared by said circular. The reasons which bring the clerks and employes of the offices of the surveyors-general under such prohibition operate with stronger force to include the surveyor-general. For demonstration see sections 2223 to 2234, inclusive, and section 2325, Revised Statutes.

It is unnecessary to consider the question sought to be raised by the first assignment of error. Section 452, as heretofore construed by the Department, which construction I approve and reaffirm, required that Neill's said application for patent should be rejected. The decision of your office is affirmed in accordance with the foregoing.

FRANCIS ADKINSON.

Motion for review of departmental decision of December 26, 1896, 23 L. D., 590, denied by Secretary Bliss, May 3, 1897.

CERTIFICATION OF LANDS—ACT OF AUGUST 3, 1854.

STOKES v. PENSACOLA AND GEORGIA R. R. CO.

Under the act of August 3, 1854, a certification of lands to a State, on account of a railroad grant is no bar to the subsequent disposition of said lands, if they in fact lie wholly outside of said grant, and hence are not of the character granted.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (J. L. McC.)

Peter Y. Stokes has appealed from the decision of your office, dated July 10, 1895, refusing to recommend that suit be instituted to set aside the certification of fractional section 29, T. 6 N., R. 22 W., Montgomery land district, Alabama, to the State of Florida for the benefit of the Pensacola and Atlantic (now Pensacola and Georgia) Railroad Company.

How it came to pass that a tract in Alabama was certified to the State of Florida is fully explained in your office decision appealed from, and a recital of the facts relative thereto is not at this time necessary.

Stokes made homestead entry of the tract (together with the W. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of Sec. 20, adjoining) on June 13, 1892. How it came about that the local officers allowed him to make entry of a tract that had long before been certified for the benefit of a railroad company does not clearly appear from the record before me.

There seems to be no doubt from the statements contained in your decision appealed from, that the land in controversy was improvidently and erroneously certified. But your office holds that, inasmuch as said certification was made more than thirty years ago, and as the grant has been adjusted by your office (in 1888), it is not proper to make demand upon the grantees for a reconveyance of the land, or to recommend that suit be instituted for its recovery.

Stokes has appealed, setting forth the fact that the local officers at Montgomery allowed him to make homestead entry of the land; that he has resided upon the same in good faith; that he has spent nearly all he possessed in money, personal property and labor, together with the labor of his family, in improving said lands; and that to dispossess him would reduce him to destitution. A copy of the appeal was duly served upon the proper officer of the railroad company, who endorsed the same as follows:

Service of this is hereby acknowledged this 30th day of November A. D. 1895; but for the information of the applicant I state that the Pensacola and Atlantic Railroad Company sold this land on the 30th day of August, 1883, to Milligan Chaffee & Co. (prior to the applicant's homestead entry), who should be notified.

Your office bases its refusal to recommend the institution of suit upon the departmental decision in the matter of the Hannibal and St. Joseph Railroad Company (10 L. D., 610). I observe, however, what appears to be a distinction between that case and the one now under consideration.

In that case the Department held (see syllabus):

Proceedings under the act of March 3, 1887, for the recovery of title to lands erroneously certified are not authorized where, long prior to the passage of said act, the grant had been declared by competent authority to be adjusted.

Such is not the fact in the case at bar, where, as stated in said decision of your office appealed from: "It appears that the grant in question was adjusted by this" (your) "office in 1888." Another difference not without weight between the Hannibal and St. Joseph case and the case at bar is that in the former (see page 111,) "No one is setting up claim to any of the lands now discovered to have been erroneously certified."

Your office decision cites also the departmental decision in the case of *Houlton v. The Chicago, St. Paul, Minneapolis and Omaha Railway Company* (17 L. D., 437). In that case, however, the adjustment had been formally declared by the Department to be closed. Moreover, Houlton was merely an applicant to enter, and his application was rejected by the local officers; while in the case at bar the local officers allowed Stokes to make entry of the land.

Under these circumstances, I am not inclined to accept the view expressed by your office, that the Hannibal and St. Joseph case and the Houlton case (*supra*) constitute precedents that should control the action of the Department in the case now under consideration. In my opinion, the grant for the benefit of the Pensacola and Georgia Railroad Company can not properly be considered as having been finally adjusted, and this Department still has jurisdiction to dispose of the question here in issue.

The case at bar would appear to be one in which the act of Congress approved August 3, 1854 (10 Stat., 346), may properly be applied. Said act provides:

That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of the several States and Territories; and where said law does not convey the fee simple title of such lands, or require patents to be issued therefor; the lists of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of said office, either as originals, or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest, shall be conveyed thereby.

In the case at bar, fractional section 29, embraced in the list certified to the State of Florida for the benefit of the Pensacola and Atlantic Railroad Company, being wholly outside the limits of the grant for the benefit of said road, and not of the character intended to be granted by Congress, said certification was perfectly null and void, and no right, title, claim, or interest was conveyed thereby, and the action of

the land department in including it within the lists certified was ineffectual. (*Weeks v. Bridgman*, 159 U. S., 541.)

In view of the said act of 1854, and of the decision of the supreme court in the case cited, there would appear to be no necessity for suit to set aside the certification in question for the reason that the same was and is a void act, wholly ineffectual to prevent the proper disposition of the land by this Department; and I am of the opinion that upon the showing made patent should issue to Stokes for the same. The recommendation for suit as requested by him is therefore unnecessary, and you will issue patent to him for the land upon proper showing as to compliance with the law.

HOMESTEAD CONTEST—ABANDONMENT—FINAL PROOF.

WILSON v. LEFREINER.

After the expiration of five years under a homestead entry a charge of abandonment and change of residence will not be entertained against the same, in the absence of an allegation that the entryman failed to comply with the law as to residence and cultivation during the statutory period.

A charge of failure to submit final proof within the statutory period of seven years from the date of the entry states no cause of action against an entryman that is entitled to the additional year conferred by the act of July 26, 1894.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (C. J. W.)

July 31, 1888, Edward Lefreiner made homestead entry No. 11372 for SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 26, W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 35, T. 163 N., R. 56 W., Grand Forks, North Dakota.

On May 19, 1894, David Wilson filed contest charging that the entryman had abandoned the tract and changed his residence therefrom for more than six months next prior to the date herein; that said tract is not settled upon and cultivated by said party as required by law; that he sold his improvements on said land some time in November, 1893, to one C. W. Andrews for a valuable consideration and Andrews has no homestead entry right to use on said land, having already exhausted the same, but is holding said improvements for the sole purpose of speculation.

Hearing was had and the local officers found that the entryman had abandoned the tract.

Your office by letter "H" of February 2, 1895, advised the local officers that said decision could not become final, for the reason that the allegations in the contest affidavit were insufficient, and their decision was reversed. On October 15, 1895, Wilson offered a second affidavit of contest, which was refused by the local officers, for the reason that the same failed to state a cause of action, there being no allegation that the abandonment occurred before the expiration of five

years from date of entry, and for the reason that the allegation that the entryman had failed to offer final proof within seven years, from date of entry was premature, the time within which final proof could be offered not having expired.

From this decision Wilson appealed, and on January 9, 1896, your office affirmed the local officers. Wilson has made further appeal to the Department. The only question presented is whether or not the last affidavit offered states a cause of action. It charges that—

The entryman has wholly abandoned said tract and changed his residence therefrom for more than the past six months. Has sold his improvements he had upon the above land to one C. W. Andrews, who has had them removed from the land, and that said Edward Lefreiner has failed to offer final proof for above land within the statutory period of seven years from date of his original homestead entry as required by law.

There is no allegation that the entryman had not complied with the law as to residence and cultivation for the period of five years as provided in section 2291 R. S. Compliance with this section authorizes final proof after removal from the land. *Lawrence v. Phillips* (6 L. D., 140). *Thomason v. Patterson* (18 L. D., 241). As to the time in which final proof must be offered, under the act of July 26, 1894 (28 Stat., 123), he had eight years instead of seven within which to offer final proof, and it is not alleged that the eight years have expired. The affidavit states no cause of action, and your office decision is affirmed.

PRACTICE—MOTION FOR REVIEW—NEW CONTEST.

CALLICOTTE v. GEER (ON REVIEW).

A cause of action arising after the hearing before the local office, and during the pendency of appeal therefrom, cannot be made the basis of a motion for the review of the departmental decision rendered on the appealed case.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (C. J. W.)

September 23, 1893, defendant M. W. Geer made homestead entry, No. 607, at Perry, Oklahoma, and on same day, J. W. Callicotte filed affidavit of contest against said entry, alleging prior settlement.

A hearing was had on September 23, 1895 and a decision rendered by the local officers, in which the cancellation of the entry was recommended.

Defendant appealed, and on September 18, 1895, your office affirmed the decision of the local officers and held said entry for cancellation. Defendant made further appeal, and on January 18, 1897 (24 L. D., 135), your office decision was affirmed. Geer files a motion to reopen the case, based on the alleged abandonment of the land by plaintiff since the trial of the case in the local office. The case was considered

by your office on appeal from the decision of the local officers, on the basis of the record of facts presented with the appeal. On appeal to the Department, it was considered here under the same record of facts.

The motion is based on facts alleged to have occurred since the hearing, and which if they constitute a cause of action, constitute a cause separate and distinct from the one tried. A cause of action arising after the hearing before the local officers and pending an appeal, cannot be made the basis of a motion for review of the decision rendered here on the appealed case. This is a necessary rule, and well settled. Under it, the motion for review must be and is denied.

In this case, however, the decision itself provides for the protection of defendant's rights in the event the plaintiff fails to exercise his right of entry. Your office decision, which was affirmed and is of force, provides that plaintiff be allowed thirty days within which to show his present qualifications and make entry of the land; and in the event he does this, the entry will be canceled, but if he fails to do so, defendant's entry will remain intact.

This affords him all the protection to which he is entitled as the next settler, in order of time, on the tract involved.

PRACTICE—MOTION FOR REVIEW—INTERLOCUTORY ORDER.

LEE *v.* KUHLMAN.

There is no authority in the rules of practice for the review of an order of the Secretary of the Interior directing a hearing. A revocation of such order should be sought through an application to the supervisory authority of the Secretary. The conviction of a person on a charge of perjury committed in a case where another party is an applicant for land, and the issue is "soonerism," and such person testifies that neither he, nor such applicant, were in the territory within the prohibited period, is not necessarily conclusive as to such person's qualification, though affecting his credibility as a witness.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (A. E.) (G. B. G.)

On February 20, 1897, H. George Kuhlman, one of the parties to the above entitled cause, filed in this Department a petition for re-review of departmental decision, dated November 12, 1896, ordering a hearing to determine whether Lee was a settler upon the land in controversy on May 25, 1893. The land involved is the SE. $\frac{1}{4}$ of Sec. 4, T. 11 N., R. 3 W., Guthrie, Oklahoma.

A motion for review of said decision of November 12, 1896, was denied by the Department on December 26, 1896, on the ground that said decision was interlocutory in character and therefore not reviewable.

It is now urged that this was error and it is further contended by

the petitioner that Robert J. Lee was convicted of perjury in the district court in and for Oklahoma county, Oklahoma Territory, for swearing to facts necessary to make him a qualified entryman for land in the Territory of Oklahoma: That therefore the Department should accept such conclusion as a final finding that Lee was a "sooner" and not qualified to make entry of the land in controversy, even should the evidence at the hearing to be held show that he was a settler upon the land when Kuhlman filed the relinquishment of Couch.

To the first proposition the Department after further and full consideration of the matter adheres. There is no authority in the rules of practice for review of an order of the Secretary of the Interior directing a hearing. It is true that by virtue of the supervisory authority with which that officer is clothed by law, such showing might be made as would induce him to revoke such an order, but no such showing is here made.

The second contention may be treated as alleged reasons why the ruling of the Department in the matter of the aforesaid interlocutory order was erroneous.

These reasons have been carefully considered and they do not afford a proper basis for the intervention of supervisory authority.

The copy of indictment filed by the petitioner, Kuhlman, shows that Lee was charged with having committed perjury at a hearing before the local office, held July 1, 1892, in the case of Aaron B. Jones *v.* Ernest L. Lawrence. The indictment substantially charged that Lee falsely swore that Lawrence and he (Lee) were not in the Territory during the prohibited period. On this indictment Lee was convicted. At the hearing at the local office, at which the perjury was alleged to have been committed, the qualifications of Lawrence, and not Lee, were in issue.

As to whether a person claiming land has entered the Territory during the period prohibited so as to disqualify him from making entry, is a question which is properly determinable by the Department, and even though Lee were convicted in that case, such conviction would not necessarily disqualify him from making entry in this case.

The judgment of the court in this matter is not conclusive, and being persuasive merely would go to Lee's credibility as a witness and can be brought to the notice of the local officers at the hearing.

It may be that Lee has not exhausted his remedy in the criminal court on the indictment against him for perjury. Or it may be that he has been confined in the penitentiary in execution of the conviction and judgment, and in this latter event a question of abandonment as a matter of law would arise which can not now be discussed in view of the uncertainty of the record.

The petition is denied and the order contained in the decision of November 12, 1896, together with the instructions contained in the decision, will be carried out.

PRACTICE—CONSOLIDATED CASES—REVIEW—APPEAL.

BULLARD *v.* PRESCOTT.

Where two or more cases, involving the same tract of land, have been consolidated and considered together, notice of appeals from, or motions for review of, the decision rendered must be served upon all parties in interest.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (R. W. H.)

I have considered the appeal of Ormsbee W. Bullard from your office decision of January 27, 1896. This decision rests upon the cases of *R. D. Prescott v. The Heirs of George S. Bidwell, deceased*, and *Ormsbee W. Bullard v. R. D. Prescott and The Heirs of George S. Bidwell, deceased*, which came up to your office separately, but were consolidated and considered together. Said decision sustained the contest of Prescott, dismissed that of Bullard; and held for cancellation George S. Bidwell's timber-culture entry, No. 1334, for the NW. $\frac{1}{4}$ of Sec. 9, Tp. 101, R. 61 W., Mitchell, South Dakota.

Bullard and the heirs of Bidwell were notified of said decision and of their right of appeal.

Notwithstanding the consolidation of the cases by your office decision, the parties whose interests were adversely affected failed to take notice of such consolidation in their subsequent proceedings.

Frank A. Bidwell, a son of George S. Bidwell, one of the heirs, assuming to act for said heirs, filed a motion for a review of your said office decision, but served no notice of said motion upon Bullard.

Bullard appealed from your said decision, but served no notice of his appeal upon the heirs of George S. Bidwell.

It further appears that, before Bullard's appeal came before the Department for consideration, your office—acting upon Bidwell's motion for review—by its decision of April 22, 1896, had reviewed, reversed and vacated its said decision of January 27, 1896.

In the case of *Gray v. Ward et al.* (5 L. D., 410), it is held:

Where there are several parties to a suit pending in your office, and a final decision has been rendered adverse to the rights of two or more of the parties to the suit, the filing of an appeal by one of the parties will not preclude the hearing of a motion for a review by another party to the record asking a reconsideration of the decision so far as the same may affect his rights.

But in the case just cited there was no failure on the part of the party appealing or the party asking a review to serve the proper notice upon all parties to the suit.

Our Rules of Practice require "due notice" to the opposite party of motions for review, as well as of appeals. (Rules 76 and 93.) Where two or more cases, involving the same tract of land, have been consolidated and considered together, notice of appeals from, or motions for review of, the decision rendered must be served upon all parties in interest.

Your office was without jurisdiction to act upon F. A. Bidwell's motion for review of its decision of January 27, 1896, in the absence of notice to Bullard, a party in interest; and your subsequent decision of April 22, 1896, is hereby declared void and of no effect.

The appeal of Bullard—notice of which was not served upon the heirs of Bidwell, the entryman—is dismissed.

The parties whose interests are adversely affected by your office decision of January 27, 1896, will be allowed to proceed by motion for review, appeal, or otherwise, as they may elect, upon due notice to all parties in interest, as if your said decision of April 22, 1896, had never been rendered.

STONE LAND—PLACER LOCATION—APPLICATION.

HAYDEN v. JAMISON.

Prior to the passage of the act of August 4, 1892, there was no authority to locate and purchase lands chiefly valuable for building stone under the placer mining laws.

Secretary Bliss to the Commissioner of the General Land Office, May 5,
(W. V. D.) 1897. (C. J. W.)

This case involves the SW. $\frac{1}{4}$ of Sec. 6, T. 3 N., R. 70 W., Denver land district, Colorado.

The record shows that on the 24th day of September, 1889, Thomas Jamison made homestead entry for the above described tract.

On the 18th of September, 1889, Benjamin Hayden, the contestant-appellant, with others, made a placer mining location for one hundred and twenty acres of the land afterwards entered by Jamison, and on the 10th of January, 1890, having purchased the interest of the other locators, he applied to file his mineral application therefor. This application was rejected on account of the prior allowance of the homestead entry of Jamison; whereupon the mineral claimant filed a protest against the entry of the defendant-respondent, alleging that the land was more valuable for mining than for agricultural purposes and that the entryman had failed to comply with the law as to settlement and improvements.

A hearing having been had on the issues thus joined, the local officers dismissed the contest; upon appeal your office decision of November 4, 1890, was rendered wherein you reversed the action of the local officers and, after going into the merits of the case, found as a fact that the land was more valuable for its minerals, and held the homestead entry for cancellation.

September 8, 1892, the Department, on appeal by Jamison, affirmed the action of your office (15 L. D., 276).

March 7, 1893, on review, the former decision was adhered to, but on June 21, 1893 (16 L. D., 537), the case then being before the Depart-

ment upon motion for re-review, reversed its former action and ordered a hearing to determine

the character of the land, its capacity for agriculture and the nature, value and extent of all deposits of a stone or mineral character found thereon, and re-adjudicate the question in the light of the evidence thus obtained.

This course was pursued because of the allegation of the presence of valuable deposits other than building stone, as gypsum and fire clay, and on account of the value of the land (\$300,000) as shown in the last mentioned decision of the Department.

A new hearing having been had in pursuance of the above order of the Department on the 21st of April, 1894, the local officers rendered their decision wherein they recommended the dismissal of the contest.

On the 8th of October, 1894, your office decision affirmed the action of the local officers and further appeal by the contestant-appellant brings the case before the Department.

An examination has been made of the voluminous record in this case. It is shown that the chief value of the land is for red sand stone suitable for building purposes, paving, and curb stones. The attempt to show gypsum, limestone, or a deposit of fire clay, is not supported by the evidence.

It appears that Jamison, the entryman, has built a frame house and stone barn on the land. He has ploughed some, but not much, owing to the character of the land, and has done some fencing and dug two wells. It is further shown by the evidence that the land has some value for grazing purposes and some timber.

The various applications for this tract were made prior to the passage of the act of August 4, 1892, providing for the disposition of lands chiefly valuable for building stone under the placer mining law, and therefore, the mineral claimant can secure no rights by reason of that act, but his rights must be adjudicated by the law as it stood at the time these claims were initiated.

In the case of Simon Randolph (23 L. D., 329), it was held that prior to the passage of the act of August 4, 1892 (27 Stat., 348), there was no authority to locate and purchase lands chiefly valuable for building stone under the placer mining laws, and that under the provisions of section one of said act, no rights are secured prior to application to enter, and if at such time the lands are not subject to entry the claim under said act must be rejected. On review (23 L. D., 516) this decision was vacated, and another decision substituted therefor, based on a changed status of the facts, but the legal principles announced in the first decision were not reversed. Randolph had discovered, located and surveyed a valuable quarry of building stone, and after location, made application to purchase, and tendered the purchase money. This application to purchase and tender of the purchase money was made June 29, 1893, and therefore after the act of August 4, 1892, was operative. His claim was rejected in the decision of October 3, 1896, for

the reason that the land was in reservation and not subject to entry at the time of his application. The application of Randolph was still pending when the reservation ceased, and the question being between Randolph and the government alone, it was held in said last decision that Randolph should be allowed to perfect his title by purchase and entry under the provisions of said act of August 4, 1892. The rule was adhered to, as announced in letter of instructions (23 L. D., 322), that under the act of August 4, 1892, no right attaches in favor of the entryman until he makes application to enter. In the present case Jamison had a homestead entry of record on the 24th of September, 1889, before Hayden filed his mineral application and his priority of right is unaffected, by the subsequent application of Hayden—he having failed to show that the land was in fact mineral in character. Hayden initiated no right under the act of August 4, 1892, by filing his mineral application January 10, 1890.

The decision appealed from is therefore affirmed.

TOWN LOTS—SALE AT THE TOWNSITE.

BASIN CITY.

In the interest of the government, and intending purchasers, a sale of town lots may properly take place at the townsite, under the personal charge of the local officers.

Secretary Bliss to the Commissioner of the General Land Office, May 5,
(W. V. D.) 1897. (P. J. C.)

I am in receipt of your letter ("G") of May 4, 1897, in relation to the public sale of lots in the town of Basin City, Wyoming.

It appears from your said letter that the residents of Basin City have complied with the requirements of the statute in regard to securing a townsite on the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 21, Tp. 51 N., R. 93 W., 6th P. M., and notice has been published of a public sale of lots in said townsite, to take place at the local office at Buffalo, Wyoming, July 24, 1897.

It appears that your office is in receipt of a petition from the residents and lot claimants in Basin City, representing that it will be of material benefit to the government and a great accommodation to the people interested to have the sale take place in Basin City, and their prayer is that this may be done. The register and receiver forwarded the petition with the recommendation that the request be granted.

In your said office letter it is said:

I believe that the interests of the government and of the people of Basin City would be best protected and subserved by holding the sale at the townsite as petitioned for; but I think the authority of law for ordering the local officers away from their office to make such a sale is doubtful, and I have concluded to submit the matter for your instructions.

It has been the practice of this office to order registers and receivers to hold public sales of lots within townsites at the townsites when in its discretion it was found best to subserve the interests of the parties concerned. In the case of Pagosa Springs townsite, in Colorado, made under sections 2380-81 of the Revised Statutes, by letter of November 19, 1884, Assistant Commissioner Harrison directed the local officers at Durango, Colorado, to proceed to the townsite to hold a sale of the lots; also, on July 27, 1893, Commissioner Lamoreux, with the approval of Acting Secretary Sims, gave like directions to the local officers at Seattle, Washington, in the case of the townsite of Port Angeles, Washington, made under said sections 2380-81 of the Revised Statutes.

I concur in the opinion that the interests of all concerned in this sale will be best subserved by having the sale on the townsite, and that it would be a matter of great expense and inconvenience to intending purchasers to be compelled to go to the local office, with no corresponding benefit to either them or the government.

You are therefore directed to instruct the local officers to have the sale of these lots take place at the townsite, and for this purpose they will be permitted to go to Basin City and personally conduct the same. For the purpose of complying with the law in regard to the published notice of the sale, you will take such action as may be deemed advisable in contemplation of this order.

RAILROAD LANDS—CONTESTANT—SECTION 3, ACT OF SEPTEMBER 29,
1890.

PATTON v. CLAUSSEN.

No right is acquired by a contest against an entry of lands reserved on account of a railroad grant, that will defeat the right of the entryman, who is in possession as a licensee, to purchase the land under the provisions of section 3, act of September 29, 1890, and the amendatory act of January 23, 1896.

Secretary Bliss to the Commissioner of the General Land Office, May 5,
(W. V. D.) 1897. (F. W. C.)

Cuna A. Claussen has appealed from your office decision of October 12, 1896, sustaining the action of the local officers in rejecting his application to purchase, under the provisions of the acts of September 29, 1890 (26 Stat., 496), and January 23, 1896 (29 Stat., 4), the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 1, T. 3 N., R. 17 E., Vancouver land district, Washington.

It appears that this tract is within the limits of the withdrawal of August 13, 1870, upon the filing of the map of general route of the main line of the Northern Pacific Railroad, opposite the unconstructed portion of the road between Wallula, Washington, and Portland, Oregon. It is also within the fifty-mile or indemnity limits as adjusted to the line of definite location of the branch line of said road across the Cascade mountains.

Although the portion of the road between Wallula and Portland was not constructed, the reservation made on account of the grant continued until the passage of the forfeiture act of September 29, 1890

(*supra*). Notwithstanding this reservation, it appears that the local officers, on November 25, 1887, permitted Claussen to make homestead entry of the land, and, on October 19, 1889, Elwood F. Patton initiated a contest against said entry, alleging that Claussen had never established a residence upon the land.

It must be apparent from what has been said that the allowance of the entry by Claussen was in violation of law, and that the contest by Patton should never have been permitted to proceed to hearing; but hearing was had upon said contest and the case prosecuted by appeal to this Department, resulting in departmental decision of June 13, 1896 (not reported), in which your office decision holding for cancellation Claussen's entry upon said contest was affirmed.

Upon the promulgation of said decision Claussen tendered his application to purchase the land under the provisions of the act of September 29, 1890 (*supra*), and of January 23, 1896 (*supra*), and in support thereof alleged that he was in possession of the land and had been since 1879, under a contract or a license from the Northern Pacific Railroad Company, and that the entire tract was under fence and otherwise improved.

Your office decision appealed from holds that this application comes too late, the right of Patton as successful contestant having intervened. The application to purchase was therefore held subject to the exercise of the preference right by Patton; from which action Claussen has appealed to this Department.

After a careful review of the matter I must reverse your office decision. As before stated, on the showing made Claussen has been in the possession of this tract since 1879 under a license or contract from the railroad company. The action of the local officers in holding the tract subject to entry, as it did in 1887, evidently induced Claussen to assert a homestead right in order to protect himself in his possession. It appears that as early as February, 1890, he inquired of your office as to the status of his entry and was informed, by your office letter ("F") of March 11, 1890, that his entry had been improperly allowed and was held suspended awaiting congressional action in the matter of the forfeiture of the company's grant for failure to build its road.

The entry having been allowed in violation of the reservation on account of the grant, was not subject to the contest of Patton instituted in 1889, and he did not succeed to any right by reason of the prosecution of that contest. He has, therefore, no such right as would bar the assertion of the right to purchase under the provisions of the acts before referred to.

The act of January 23, 1896 (*supra*), amended the act of September 29, 1890, and extended the time of purchase to January 1, 1897. It provided also

that actual residence upon the land by persons claiming the right to purchase the same shall not be required where such lands have been fenced, cultivated, or otherwise improved by such claimant, etc.

Your office seems to have considered the showing made in support of Claussen's application as sufficient, in the absence of an adverse right that might bar the purchase, because it is held in said decision that "in the event that said Patton fails to enter the land you will allow Claussen to perfect his application."

Having disposed of the alleged superior right of Patton, the record is herewith returned with direction that Claussen be allowed to complete purchase of this land as applied for.

APPLICATION TO ENTER—PREFERENCE RIGHT.

JOHN W. KORBA.

An application of a third party to enter land embraced within a judgment of cancellation, rendered by the Department, should be received and held to await action on the part of the successful contestant; and if the preferred right of the said contestant is subsequently waived, the application to enter, so held in abeyance, is entitled to precedence as against other claims arising subsequently thereto.

Secretary Bliss to the Commissioner of the General Land Office, May 5,
(W. V. D.) 1897. (C. J. G.)

The land involved in this case is the NE. $\frac{1}{4}$ of Sec. 32, T. 43 N., R. 3 E., Wausau land district, Wisconsin.

On October 11, 1895, the Department affirmed a decision of your office holding for cancellation the homestead entry of Marye Korba for the above described land. This action was taken upon a contest brought by one Lewis F. Larson, charging abandonment, that case being closed by your office on February 15, 1896.

On November 26, 1895, John W. Korba filed an application to make homestead entry of said land, which was rejected by the local office for the reason that said land was already covered by the entry of Marye Korba, and for the further reason that according to the evidence the applicant had already had the benefit of the homestead law.

Korba appealed, and under date of February 27, 1896, your office dismissed the said appeal because of failure to serve the same on the "opposite party."

On February 21, 1896, Lewis F. Larson relinquished his preference right of entry, and on February 24, 1896, John Rasmusson filed homestead application for the land in question.

John W. Korba has appealed to this Department, contending that it was not necessary to serve his appeal upon any one; that

when his homestead application was presented, to wit: on November 26, 1895, the previous entry of Marye Korba had, on April 18, 1894, been held for cancellation, which decision had been affirmed by the Secretary on October 11, 1895, so that at date of appellant's application his mother's entry had been already canceled in contemplation of law;

and that it was error not to hold that appellant was entitled to enter at least forty acres under section six of the act of March 2, 1889, his first entry having been made prior to that date and for only three legal subdivisions.

In support of the second specification above set out, the appellant cites the case of Henry Gauger (10 L. D., 221), and numerous others in line with that case.

In the case of McDonald *et al. v. Hartman et al.* (19 L. D., 547) it was held that—

A judgment of cancellation takes effect as of the date rendered, and the land released thereby from appropriation becomes subject to entry as of such date, without regard to the time when such judgment is noted of record in the local office.

Under date of January 30, 1897, in the case of Cowles *v. Huff et al.* (24 L. D., 81), the Department overruled the doctrine announced in the case of Henry Gauger (*supra*). It is now held—

If during the time accorded a successful contestant to make entry of the land involved an application or applications to enter should be made by a stranger to the record, such application or applications will be received and the time of presentation noted thereon, but held to await the action of the contestant, and should such contestant fail to exercise his preference right, or duly waive it, then such application or applications must be acted upon and disposed of in accordance with law and the rulings of the Department.

As the application of John W. Korba was filed after the judgment of cancellation was rendered by the Department in the case of Lewis F. Larson *v. Marye Korba*, his said application, under the above rulings, should have been received by the local office and held to await the action of the successful contestant in that case. When Larson relinquished his preference right of entry John W. Korba was then entitled to have his application acted upon in accordance with law.

Your office decision is accordingly reversed and John W. Korba will be allowed to make entry of the land in question, unless upon further investigation by your office he is found to be otherwise disqualified.

Among the papers transmitted with this case is an appeal by Marye Korba to your office from a decision of the local office rejecting her application to make homestead entry of the land in controversy. The said appeal and the papers accompanying the same are herewith returned to your office for appropriate action thereon.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

ANDERSON *v.* WING.

The status of an applicant to perfect title under section 5, act of March 3, 1887, as a "bona fide purchaser," is not affected by the fact that he holds under a quit-claim deed, or that said deed was executed in the consummation of an agreement for the exchange of property, nor by the further fact that prior to his purchase from the company he had been receiver of the land district within which the land is situated.

A "bona fide purchaser" from a railroad company of less than a legal sub-division is entitled to purchase such tract from the government under said section 5, and receive patent therefor; but if a survey of said tract is necessary, prior to the issuance of patent, the expense thereof should be borne by the applicant.

Secretary Bliss to the Commissioner of the General Land Office, May 5,
(W. V. D.) 1897. (C. W. P.)

This case involves lots 1 and 2, of Sec. 33, T. 49 N., R. 4. W., Ashland land district, Wisconsin.

The land lies within the fifteen miles indemnity limits of the grant to the State of Wisconsin to aid in the construction of the Bayfield branch of the Chicago, St. Paul, Minneapolis and Omaha road (acts of June 3, 1856, and May 5, 1864), and was selected by the Omaha company July 12, 1887.

The record shows that on March 24, 1856, Francis E. Geveroux filed pre-emption declaratory statement for said tracts. On May 29, 1856, your office ordered all land in Wisconsin withdrawn until further order. Said order was revoked shortly afterwards; but on December 18, 1856, under directions of the Secretary of the Interior, an order was issued, forbidding the allowance of any pre-emption claim predicated upon a settlement made after receipt of said letter. From that date the lands remained reserved until November 2, 1891.

On September 23, 1890, Isaac H. Wing applied to purchase said lots under the 5th section of the act of March 3, 1887, and gave notice of his intention to make final proof on November 6, 1890, when John J. Anderson appeared and protested against the allowance of said proof.

This proof having been prematurely made, Wing was required to give a new notice, which he did, for March 30, 1891. Meanwhile, on February 19, 1891, Anderson had applied to file pre-emption declaratory statement for said lots and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 33, T. 49 N., R. 4 W. This application was rejected by the local officers because of the existing withdrawal. Anderson appealed, and your office reversed the decision of the local officers for the reason that the land was not within the withdrawal. Subsequently, on July 13, 1891, your office withdrew said decision, and left the right of Wing and Anderson to be determined on consideration of the contest which had arisen between them.

On March 30, 1891, Wing submitted his proof, and Anderson protested. The local officers recommended that Wing be allowed to purchase lots 1 and 2. Anderson appealed. Your office held that Wing's application for lot 1 should be rejected, because his purchase from the railroad company only covered a portion of said lot, and that his application to purchase lot 2 should be allowed; and that Anderson should be permitted to complete his filing as to lot 1 and the other tracts filed for, with the exception of lot 2.

Both parties appealed to the Department.

The Department, by decision of January 18, 1896, held that the pre-emption filing of Geveroux excepted the lots in controversy both from the withdrawal and grant for said railroad, and that the land, filed on by Anderson, was open to settlement, when he applied to file, subject to a purchase in good faith under the act of March 3, 1887. But held that "the facts appear to raise a question as to Wing's good faith in this matter," and remanded the case that a hearing be had "on that point."

Pursuant to the directions of the Department, a hearing was had before the local officers, who held that "the *bona fides* of Wing, as an innocent purchaser seems to be clearly established," and recommended the dismissal of Anderson's protest. Anderson appealed. Your office held that, so far as you were able to perceive, there was nothing in the record and facts shown relating to the transaction between Wing and the company inconsistent with, or that would preclude the presumption of good faith, and affirmed the judgment of the local officers.

Anderson appeals to the Department.

The facts, as found by the Department in departmental decision of January 18, 1896, are as follows:

That Wing was receiver of the land office for the district, within which the land lies, from January 29, 1880, until January 24, 1883, when he resigned; that on October 21, 1884, he conveyed, by quit claim deed, to Edwin W. Winter and John C. Spooner, an undivided one-third interest in the land, and on October 28, following, the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, by quit claim deed, conveyed the land to Wing; that the last mentioned deed was recorded May 15, 1885, and the deed to Winter and Spooner, on October 12, 1886; that on April 24, 1890, the said Spooner, by warranty deed, in which his wife joined, conveyed the land to Wing; that all these deeds recite a consideration of \$1; that the deed from Spooner and wife to Wing was made through William H. Phipps, as attorney in fact; that at the time of the execution of the deed Phipps was land commissioner of the railroad company, and Winter, one of the grantees in the deed first mentioned, was general manager, and Spooner, the other grantee, was then, or shortly before, general solicitor of the company; that Phipps, in explanation of the consideration recited in the company's deed to Wing, testified that it did not represent all the consideration, but that Wing had conveyed to the company ninety-five acres outside of the village of Washburn for terminal uses; that this statement, however, was not substantiated by any copy of the conveyance referred to; that Phipps also swore that there was no arrangement by which the railroad company was to receive any of the land conveyed, nor that it was to be held in trust for the company; and that Spooner had been solicitor of the company, but he was not sure whether he was such at the time of the conveyance to Wing.

Upon this finding of facts, the Department, not being satisfied that Wing had shown himself to be a *bona fide* purchaser as contemplated by the statute, ordered a hearing.

By the evidence taken upon the rehearing, it is shown that on March 27, 1883, Wing conveyed to the railroad company by warranty deed (a copy of which is now in evidence in the case) a tract of land containing ninety or ninety-five acres, in the town of Washburn, Wisconsin, for railroad purposes. Wing, Phipps and Winter testify that, as part of

the consideration for said tract, conveyed by Wing to the company, the company conveyed to Wing the land in controversy. The deed from the company is a quitclaim deed, and no satisfactory reason is given why the company did not give a warranty deed. In explanation of the lapse of time between the execution of Wing's deed to the company and the company's deed to Wing, it is said by Phipps, in his testimony, that the delay on the part of the company probably arose from the company not having received from the State its title to the land. The transactions between Wing and Winter and Spooner are thoroughly cleared up and the circumstances surrounding the case when it was before the Department previous to the rehearing, appear to be sufficiently explained.

That the company conveyed the land to Wing by quitclaim deed does not of itself show that Wing was not a *bona fide* purchaser. *Stebbins v. Croke*, 14 L. D., 498; *Osborn v. Knight* (on review), 23 L. D., 216; *Moelle v. Sherwood*, 148 U. S., 21; *United States v. California, etc., Land Co., Id.*, 31. It is claimed, however, that, even if the evidence of the parol agreement, between Wing and the railroad company, was admissible, which is denied, it shows a past consideration from Wing to the company, which is not sufficient to entitle Wing to be considered a *bona fide* purchaser.

That evidence may be given of a consideration not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it, is accepted law (*Greenleaf Ev.*, Secs. 286 & 304; *Richardson v. Traver*, 112 U. S., 423); and the evidence establishing Wing's purchase does not show a past consideration, but that the deed from the company to Wing was the consummation of an agreement for the exchange of property, which is held, in *Grandin v. La Bar*, 23 L. D., 301, to be within the remedy of the statute. Then it is said that Wing at and prior to the time of his purchase from the company had actual or presumptive knowledge of the existence of the pre-emption declaratory statement of Geveroux, filed March 24, 1856, which it is claimed constituted a fatal defect in his title. There is no evidence that Wing had actual knowledge of the filing of Geveroux, and his good faith is not impugned by the fact that prior to his purchase from the company he had been receiver of the land district within which the land lies. *Osborn v. Knight* (on review), 23 L. D., 216.

One question remains. It is assumed in the decision appealed from, that it was decided by the Department, when the case was before it on Anderson's and Wing's appeals, that Wing was entitled to lot 1 as well as lot 2, thus reversing your office decision of December 2, 1892, on that point. But an examination of the decision of the Department does not show such reversal. Its decision was simply that, "as the facts appear to raise a question of Wing's good faith in the matter," a hearing should be had "on that point." If his good faith should be established, he should be allowed to purchase the land; but whether both lots or one,

is not determined. In his application to purchase, Wing applies for the entire area of lots 1 and 2. But the conveyance from the company to Wing only covers lot 2 and "so much of lot 1 as lies east of and adjoining lot 2." Lot 1 contains 49.50 acres, and the portion purchased by Wing appears to cover about ten acres. Wing has no claim to purchase under section 5 the remaining thirty-nine acres, which he did not purchase from the company. But it is held by the Department in the case of *Union Colony v. Fulmele* (16 L. D., 273), that a *bona fide* purchaser from a railroad company of less than a legal subdivision is entitled to purchase from the United States, under the fifth section of the act of March 3, 1887, the land purchased from the company and receive patent therefor upon making the proof required by said section; but that the patent in such case should contain a recital that it is issued under the provisions of said section.

In accordance with this decision Wing will be allowed to purchase lot 2 and "so much of lot 1 as lies east of and adjoining lot 2," and Anderson permitted to complete his filing as to the residue of lot 1. But before patents can issue, a survey of that part of lot 1 which is embraced in Wing's claim must be made, the necessary survey to be at the expense of Wing, and the plat thereof duly approved.

Your office decision is modified accordingly.

O'BRIEN v. NORTHERN PACIFIC R. R. Co.

Motion for review of departmental decision of February 10, 1896, 22 L. D., 135, denied by Secretary Bliss, May 6, 1897.

INDIAN LANDS—CONTEST—ALLOTMENT.

NORSTRUM v. HEAD.

Under the regulations of the Department, land included within the occupancy of an Indian is not subject to entry, and a contest against an entry of land, so excluded from disposition, will confer no right upon the contestant that will prevent the Department from subsequently holding the land in reservation, with a view to its allotment to the Indian.

Secretary Bliss to the Commissioner of the General Land Office, May 6,
(W. V. D.) 1897. (F. W. C.)

With your office letter of April 3, 1897, was forwarded a motion, filed on behalf of Alfred Norstrum, for review of departmental decision of October 3, 1896 (not reported), in which the action of your office in dismissing his contest against the homestead entry of Henry C. Head, covering lot 5, Sec. 17, and lot 1, Sec. 18, T. 42 N., R. 26 W., St. Cloud land district, Minnesota, was affirmed.

Head's entry was made September 22, 1891, and on October 15, 1894, Norstrum filed an affidavit of contest against said entry, alleging that Head had never resided upon said tract since making his entry and that he had wholly abandoned the same. In support of his claim Head offered testimony tending to show that he was prevented from taking up his residence upon this land by an Indian named Chinorton, alias Big Pete, who had been living upon a part of the land, and that he had only been able to secure the consent of said Indian to build a house upon the land a short time prior to the filing of said contest.

Upon this showing your office decision held, in view of the departmental circulars of May 31, 1884 (3 L. D., 71), and October 26, 1887 (6 L. D., 541), that it was error to allow Head to make entry of the land while the Indian was in possession thereof, living upon and claiming the same. Head's entry was therefore held for cancellation and Nostrum's contest dismissed; from which action both parties appealed to this Department.

In order that the Department might be advised of the extent of the Indian's claim, an investigation was made thereof by a special agent of the Indian Office, at the request of this Department, and as a result of the investigation the Commissioner of Indian Affairs recommended that the Commissioner of the General Land Office be instructed to withhold said lot 5 of Sec. 17 from entry.

The motion for review seems to be based upon the ground that no formal claim has been made to this land on behalf of the Indian and that the reservation of the tract occupied by him is not at his own request or desire.

There can be no question, however, but that under the circulars before referred to the allowance of Head's entry, whether inadvertent or otherwise, was clearly an error, and this Department having before it facts which it deemed sufficient to warrant a reservation of the land occupied by the Indian, affirmed the action of your office and directed that said lot 5 be held in reservation with a view to its allotment to the Indian under the provisions of the act of January 14, 1889 (25 Stat., 642).

This action of course disposed of the contest, under which Nostrum secured no such rights as would prevent the reservation of the land, and his motion is accordingly denied.

HENSLEY *v.* WANER.

Motion for review of departmental decision of January 30, 1897, 24 L. D., 92, denied by Secretary Bliss, May 6, 1897.

EXEMPLIFICATION OF RECORD—PRELIMINARY INFORMATION.

F. M. CARRYL.

A request for information as to the cost of certified copies of specified papers, or records, in the General Land Office, is entitled to a response with such information as may of necessity be required to form the basis for a request for an exemplification of the record.

Secretary Bliss to the Commissioner of the General Land Office, May 5,
(W. V. D.) 1897. (G. B. G.)

I have your favor of the 3rd instant transmitting a copy of a letter from F. M. Carryl of Newark, New Jersey, addressed to myself and referred to your office by the Department on April 27, 1897.

It appears that Mr. Carryl desires certified copies of certain papers relating to fractional section 10, T. 39 N., R. 14 E., 3 P. M., Illinois, now in the city of Chicago, among other things,—

Copy (dated) of any map or maps showing any resurvey or changes from map of original survey of this tract.

It is submitted by your office that this would appear to include a copy of the plat approved October 16, 1896, of the survey of the lake front, executed by Frank Flynt and Walter T. Paine, U. S. surveyors, in pursuance of instructions from the Commissioner of the General Land Office, dated September 24, 1896, and you ask for instructions as to whether there can be furnished at this time a copy of the plat of this last survey, the same to be certified as a true and literal exemplification of the official plat of said survey on file in your office.

Sections 460 and 461 of the Revised Statutes provide that—

Whenever any person claiming to be interested in or entitled to land, under any grant or patent from the United States, applies to the Department of the Interior for copies of papers filed and remaining therein, in anywise affecting the title to such land, it shall be the duty of the Secretary of the Interior to cause such copies to be made out and authenticated, under his hand and the seal of the General Land Office, for the person so applying.

All exemplifications of patents, or papers on file or of record in the General Land Office, which may be required by parties interested, shall be furnished by the Commissioner upon the payment by such parties at the rate of fifteen cents per hundred words, and two dollars for copies of township plats or diagrams, with an additional sum of one dollar for the Commissioner's certificate of verification with the General Land Office seal; and one of the employees of the office shall be designated by the Commissioner as the receiving clerk, and the amount so received shall, under the direction of the Commissioner, be paid into the Treasury; but fees shall not be demanded for such authenticated copies as may be required by the officers of any branch of the government, nor for such unverified copies as the Commissioner in his discretion may deem proper to furnish.

It does not appear from the letter of Mr. Carryl that he claims to be interested either for himself or as the representative of another, or that he is entitled to or claims to be entitled to the land to which the papers desired relate, under any grant or patent from the United States, nor

can his letter be treated as an application to the Department for certified copies of any papers or exemplifications of any records of your office.

It is a request for information as to the cost, by items, of certified copies of certain papers and records therein specified.

A due regard for property rights and private interests within the jurisdiction of this branch of the executive department of the government, the supervisory control of which is cast upon the Secretary of the Interior by law, would seem to require that inquiries of this sort should be answered, and such information furnished as may of necessity be required to form the basis of a request of or demand on the proper officer for the application of a statute in any case alleged to come within its provisions.

I have therefore to direct that the information desired be furnished, and that on a proper demand being made under the sections of the revised statutes above quoted, by a party or parties coming within the letter or spirit thereof, that such copies and exemplifications be furnished as is therein provided, due regard being had for the public interest.

The cost of the copies desired should be approximated and a deposit of money required to cover the cost of their preparation.

BENSON v. STATE OF IDAHO.

Motion for review of departmental decision of January 8, 1897, 24 L. D., 272, denied by Secretary Bliss, May 6, 1897.

RAILROAD SELECTIONS—NON-MINERAL AFFIDAVIT.

INSTRUCTIONS.

Secretary Bliss to the Commissioner of the General Land Office, May 10, 1897.

I am in receipt of your letter "N" of the 5th instant, relative to the departmental order of the 9th ultimo, 24 L. D., 321, amending the last paragraph of the circular of July 9, 1894 (19 L. D., 21), providing for the examination of selections by railroad companies of lands in mineral belts.

In your letter you call attention to the fact said order in addition to making the amendment referred to, also directs a modification of the form of the mineral affidavit now in use in your office; and that "a strict construction" of said order "must be held to apply to all cases of whatever character in which a non-mineral affidavit is now required, for it directs that the form of the non-mineral affidavit *now in use in this office* be amended;" and you suggest that if the purpose of said

amendment was intended to apply only to state and railroad selections, then the departmental order of the 9th ultimo be amended as follows:

That in lieu of the words "now in use in this office," the words "in state and railroad selections," be inserted.

The purpose of the amendment to the instructions of July 9, 1894, by the order of April 9, 1897, was intended to apply to state and railroad selections only, and in order to avoid the complications that may arise by the construction placed upon it by your office, said order is amended as follows:

In the second line of the last paragraph on page two of said order the words "now in use in this office" are stricken out and in lieu thereof the words "in state and railroad selections" are substituted, so that said paragraph will read as follows:

"It is also hereby ordered that the form of the non-mineral affidavit in state and railroad selections be amended as follows," etc.

RAILROAD GRANT—INDEMNITY SELECTION—SPECIFICATION OF LOSS.

NORTHERN PACIFIC R. R. CO. v. SHEPHERDSON.

The departmental order of May 28, 1883, waiving specification of loss, was made at a time when the indemnity withdrawals for the Northern Pacific were held valid, and that fact must be taken into consideration, and given effect, in the disposition of selections made thereunder.

Under the grant to the Northern Pacific indemnity selections may be made within the first indemnity belt irrespective of the State or Territorial lines within which the loss occurs.

Secretary Bliss to the Commissioner of the General Land Office, May 10, (W. V. D.) 1897. (F. W. C.)

The Northern Pacific Railroad Company has appealed from your office decision of December 22, 1894, holding for cancellation its indemnity selection covering the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 33 N., R. 40 E., Spokane land district, Washington, and permitting the homestead entry made of said land by William Shepherdson May 12, 1890, to remain intact.

This tract is within the indemnity limits of the grant to said company and was included in its list of selections filed May 25, 1885. This list was presented under departmental circular of May 28, 1883 (12 L. D., 196), and was not accompanied by a designation of losses as a basis therefor.

On October 31, 1887, a supplemental list was filed, in which losses were designated in bulk in amount equal to the selected lands. These losses, it appears from your office decision, were of lands within the Yakima and Coeur d'Alene Indian reservations, in the States of Washington and Idaho, respectively.

On September 2, 1892, the company filed a rearranged list of its losses so as to specify the same tract for tract with the selected lands.

As before stated, Shepherdson made homestead entry May 12, 1890, and in his affidavit alleged settlement upon the land April 16, 1890. Your office decision holds that the company's selection of 1885 was not protected by the order of 1883, for the reason that the lands were not withdrawn, the indemnity withdrawal being in violation of law, and in support thereof referred to the case of *John O. Miller v. Northern Pacific R. R. Co.* (11 L. D., 428).

In the case of the *Northern Pacific Railroad Company v. Holtz* (22 L. D., 309) it was held (syllabus):

The order of May 28, 1883, waiving specification of loss in support of indemnity selections, was made at a time when the indemnity withdrawals for the benefit of the Northern Pacific were held valid, and that fact must be considered and given effect in determining the scope and purpose of said order, although such withdrawals are now held invalid.

It is further held that the designation made in 1887 was not sufficient, for the reason that selections can not be made in Washington for lands lost in Idaho until it is shown that such losses can not be satisfied in the latter State, and in support thereof reference is made to the case of *Northern Pacific R. R. Co.* (17 L. D., 404).

In reviewing the case cited, this Department held (20 L. D., 187), "that indemnity selections may be made within the first indemnity belt, irrespective of State or Territorial lines."

The objection stated in your office decision, to the company's selection, is therefore not sufficient, and it must be held, unless other good and sufficient reason appears upon further examination of the company's selection by your office, that its rights under its selection dated back as of the time of the presentation of the list of May 25, 1885, and as this is long prior to Shepherdson's entry, the same must therefore be canceled.

Your office decision is accordingly reversed.

DESERT LAND ENTRY—MORTGAGE—ASSIGNEE.

THOMAS E. JEREMY.

A mortgage of land covered by a desert land entry cannot be regarded as entitling the mortgagee to the status of an assignee of the entry, until after foreclosure of the mortgage, if, under the laws of the State in which the land is situated, a mortgage of real property is not a conveyance thereof.

Secretary Bliss to the Commissioner of the General Land Office, May 10,
(W. V. D.) 1897. (J. L.)

This case involves the N. $\frac{1}{2}$ of section 29, T. 1 N., R. 2 W., Salt Lake City land district, Utah.

On September 16, 1893, William C. Dyer made desert land entry No. 3843 of said tract, containing three hundred and twenty acres. On

September 16, 1895, Thomas E. Jeremy filed his affidavit in the following words:

IN THE U. S. LAND OFFICE,
Salt Lake City, Utah, September 16th, 1895.

Thomas E. Jeremy being duly sworn on oath says he is a citizen of the United States of lawful age, and the assignee of William C. Dyer, who made desert land entry No. 3843, September 16, 1893, for the north half of section 29 in township 1 north of range 2 west, S. L. M. containing 320 acres. That said land was assigned to him by mortgage on the 9th day of October 1893. That since then, said Dyer has died leaving no heir, and affiant has taken possession of said land and reclaimed the same as shown by attached proof.

THOS. E. JEREMY.

Subscribed and sworn to before me this 16th day of September A. D. 1895.

BYRON GROO, *Register.*

With said affidavit, Jeremy filed (1) a certificate, dated September 16, 1895, and signed by one Arthur Parsons, Secretary, N. P. C. I. Co., stating

that Thomas E. Jeremy is the owner of two certificates of stock one No. 196 for 74 shares, and one No. 253 for two shares of the capital stock of the North Point Consolidated Irrigation Company of this city and county, Utah Territory. Each share is of the par value of ten dollars, and each share is estimated to be sufficient to irrigate nine acres of land;

(2) the affidavits of himself and Thomas L. Irvine and Levi A. Reed, all dated September 16, 1895, and stating

that there was expended by Thomas E. Jeremy, assignee of William C. Dyer, during the second year after the date of said entry, that is after the 16th day of September 1894 and before the 16th day of September 1895, the sum of \$487, being not less than one dollar per acre of the area thereof, and that the said sum was expended in the following manner viz: In purchasing water stock for irrigating said land the sum of \$327, and in clearing a portion of said land \$160; total \$487;

and (3) a copy of a mortgage dated October 9, 1893, purporting to have been executed by William C. Dyer, and conveying the N. $\frac{1}{2}$ of section 29 aforesaid to Thomas E. Jeremy, as a mortgage to secure the payment of \$1500 of money, loaned to improve said land, and evidenced by Wm. C. Dyer's promissory note for \$1500 made payable to the order of Thomas E. Jeremy on or before three years after date, which is copied in the mortgage.

On December 6, 1895, your office, considering said affidavit of Jeremy as an application for recognition as assignee of William C. Dyer, decided (among other things)

that until after foreclosure upon the mortgage he (Jeremy) can not be recognized as the assignee of the entry; and that then he could not be so recognized, nor could any other vendee under the sale by decree of court, unless he should show the qualifications exacted of an assignee of a desert land entry.

From said decision Jeremy has appealed to this Department.

The Statutes of Utah provide that—

A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale. (Compiled Laws of Utah, Vol. 2, p. 324.)

Such being the law of the State where the property in question is situated, the Department cannot, in view thereof, recognize the appellant Jeremy as the assignee of Dyer until he has foreclosed his mortgage and become the purchaser thereunder; and the decision of your office must therefore be affirmed.

The fact however, if true as alleged, that Jeremy took possession of the property after the death of Dyer, and has since kept up the necessary expenditures and improvements thereon with a view to preserving, as far as possible, the security for his debt, no heirs of Dyer having appeared to claim the land, would seem to present strong equities in his favor, and if he shall by the foreclosure of his mortgage under the laws of Utah, as suggested, place himself in a position to be recognized as the assignee of Dyer, I see no just reason why he may not be allowed to submit proof under the former's entry, and if so submitted the same will be duly considered.

Your said office decision is accordingly affirmed.

OKLAHOMA LANDS—QUALIFICATIONS OF SETTLER.

HUYCK ET AL. *v.* HARDING.

An applicant for the right of entry in Oklahoma is not disqualified by reason of his knowledge of the country, gained through residence therein prior to the prohibited period.

Secretary Bliss to the Commissioner of the General Land Office, May 10,
(W. V. D.) 1897. (W. C. P.)

B. E. Smith and Allen R. Harding have both appealed from your office decision of November 26, 1895 in the case of Charles M. Huyck, B. E. Smith and Allen B. Donaldson *v.* Allen R. Harding involving the SE. $\frac{1}{4}$ of Sec. 21, Tp. 21 N., R. 1 W., Perry, Oklahoma land district.

This tract is a part of the body of lands known as the "Cherokee Outlet" opened to settlement at noon on Saturday September 16, 1893. Harding made homestead entry for said tract on September 18, 1893. On September 20, Huyck filed affidavit of contest against said entry; on September 22, Smith filed his affidavit of contest, and on October 28, Donaldson filed his affidavit, each one claiming to be the first settler upon said tract. After a hearing at which all parties appeared and submitted testimony, the local officers found that Huyck was the first settler and awarded the land to him. Notice of this decision was acknowledged by the attorneys of the respective parties on March 12, 1895, and appeals therefrom were filed, by Harding on April 5, by Smith on April 11, and by Donaldson on April 13, following. Your office found that Donaldson's appeal was filed too late, declared the local officers' decision final as to him, and affirmed said decision, awarding the land to Huyck as the first settler. Appeals by Harding and Smith bring the case here.

These appeals agree in urging that Huyck was disqualified as a claimant for this land because of the advantage he had over other claimants owing to his knowledge of the country obtained by a residence there prior to the opening of said lands to settlement. The act of Congress approved March 3, 1893 (27 Stat. 612-640) authorizes the opening of these lands to settlement by proclamation of the President and contains the following provision:

No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquiring any of said lands.

The proclamation of the President dated August 19, 1893 (17 L. D., 230) declared that said lands would be opened to settlement at 12 o'clock noon on Saturday September 16, 1893, prescribed rules and regulations for the occupation and settlement of said lands, and as to premature occupation thereof repeated the words of the statute quoted above.

The facts as to Huyck's knowledge of these lands and the manner in which it was acquired are to be found in his own testimony. When asked to state how he became acquainted with that country he replied:

I have lived in this country ten years, have worked for cattle men right on this range all around where Wharton, Perry stand. I know every divide, every creek, and all crooks and turns there is in this locality.

He further says that he knew very near where all the lines of this tract ran, that he did not enter the Cherokee Strip between August 19, and September 16, 1893, that he was last in the Strip prior to September 16, 1893 on July 7, when he went to Wharton to get money due him from the railroad company for which he had been working, that during the winter of 1892-3 he worked for a hack line company up to about the last of March and then for the railroad company until about the first of June, living during that time in a dug out built by the hack line company near Wharton and in the vicinity of this tract. He further states that he knew the country as well three years before as he did the day he made the run, that he knew other tracts better than the one he selected and admits that his knowledge of the country possibly gave him some advantage in selecting a route to travel over, to reach any particular tract. He says he expected to take land in section 27, but finding some one there he passed on and located on the first tract he found unoccupied. No other witness testified upon this point in the case and the above statement gives the substance of all the testimony as to Huyck's presence in that country prior to the opening.

It is contended that the facts in this case bring it within the rule laid down in *Faull v. Lexington Townsite* (15 L. D. 389). The facts testified to in that case are not set forth in the decision but it is said:

I think it is clear from the evidence, that not only, the townsite company, but that Faull, made an examination and selection of the tract in dispute, subsequent to the passage of the act of March 2, 1889, and prior to the time fixed by the President's

proclamation for the opening of said lands to settlement, hence Faull is disqualified from appropriating the same as a homestead.

It has been held in regard to the lands in the Cherokee Outlet, that the inhibition against entering upon and occupying them runs from the date of the President's proclamation, August 19, 1893, opening said lands to settlement. *Townsite v. Morgan et al.*, 21 L. D., 496.

In the case at bar the evidence shows that Huyck did not make any examination of this tract during the prohibited period, and that he was not, in fact, within the boundaries of these lands during that period. The rule in the Faull case does not therefore apply here. Neither can the fact that Huyck had a knowledge of the country gained prior to the prohibited period be held to disqualify him from taking land therein. In *Golden v. Cole's Heirs* (16 L. D., 375) it was said:

It was impossible to deprive people who had been over the Territory of the knowledge they had thus acquired, but it was the intention of Congress that persons should stay out of the Territory after it had been secured as a part of the public domain until a certain hour.

In *Curnutt v. Jones* (21 L. D. 40) it was shown that Jones was well acquainted with the particular tract claimed by him at the date of the act authorizing the opening of the lands to settlement, that he had in fact selected it prior to that time and that he frequently passed through that section of country after the President's proclamation fixing the date at which the land would be opened for settlement. It was held that Jones was not disqualified to take the tract in dispute, it being said:

Jones, the defendant in this case, had lived for some time on the border of the territory, within less than a mile from the line, and almost from the necessity of his situation was familiar with the lands in the immediate vicinity. His information respecting them, and particularly respecting the tract subsequently entered by him, is shown to have been acquired long prior to March 2, 1889, and as was well said in the case of *Golden v. Cole's heirs*, *supra*, "It was impossible to deprive people who had been over the Territory of the knowledge they had thus acquired." His periodical visits to Oklahoma city, which was at once his post office, his most convenient and accessible railway station, and his market town, do not appear to have brought him any advantage over other persons seeking lands in the Territory, and his entrance therein upon the missions and for the purposes indicated by the evidence, it having been made affirmatively to appear that he reaped no advantage therefrom, should not, in my opinion, be held to disqualify him.

In *Monroe et al. v. Taylor* (21 L. D. 284) it was shown that one of the claimants, Jordan, went into the Territory in 1888, prior to the act of March 2, 1889, and selected a tract adjacent to the one there in controversy, that he went out on the order given to vacate the Territory, and that after the passage of said act he was three times within the prohibited territory, to visit in his professional capacity a sick patient, and that during those visits he did not seek to obtain any information in reference to land. In view of these facts it was said:

No knowledge of this particular tract of land, or of adjacent lands, obtained prior to the passage of the act of March 2, 1889, however advantageous such information

might be, could have the effect of disqualifying him for subsequent entry, and the presence of Jordan inside the Territory during the prohibited period, under the circumstances detailed, would not disqualify him unless it should appear that he acquired some advantage over others by reason of such visits. The conclusion that he did or could obtain such advantage seems to be clearly negated by the evidence.

In the case of *Hensley v. Waner* (24 L. D., 92) the doctrine laid down in *Monroe et al. v. Taylor* is reaffirmed.

In the case under consideration Huyck like the various claimants in the cases cited, acquired a knowledge of the country by a long acquaintance therewith prior to the prohibition against entry thereon and added nothing to his information in respect thereto after the beginning of the prohibited period. The conclusion of your office upon this point in the case, that Huyck was not disqualified as an entryman by reason of his knowledge of the country gained by a residence therein prior to the prohibition against entry upon said lands is in accord with the rulings of this Department as laid down in the cases herein cited and is concurred in.

The only other question presented by the record for consideration is as to the priority of settlement upon the tract in dispute. The testimony is voluminous, and, as is to be expected in view of the conditions under which the claims are asserted and the fact that there were four different claimants, it is contradictory. The substance of the testimony submitted in support of the respective claims is set forth in the decision appealed from and it is not necessary to repeat it here. An examination of that testimony leads to a concurrence with the conclusion reached by the local officers and in your office that Huyck was the prior settler upon this tract. He followed up that settlement by residence which has been continuously maintained and by such improvements as indicate his intention to make the place his home. He also showed himself duly qualified to make homestead entry.

The decision appealed from is therefore hereby affirmed.

SCHOOL LANDS—INDEMNITY SELECTION.

WILLIAM WILEY.

A school indemnity selection not made within the land district in which the loss occurred, as required by section 2276, R. S., may be held valid, in the absence of any intervening adverse right, under the amendatory act of February 28, 1891, which removed said restriction.

Secretary Bliss to the Commissioner of the General Land Office, May 10,
(W. V. D.) 1897. (C. W. P.)

From the record in the case of William Wiley, it appears that on September 26, 1895, Wiley made desert land entry of lot 1 and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 31, T. 22 S., R. 59 W., Pueblo land district, Colorado.

Said entry was held for cancellation, as invalid, by your office decision of December 19, 1895, upon the ground that the land entered had been selected by the State of Colorado as school indemnity, in list No. 3, filed in the local office January 6, 1890.

From this decision Wiley has appealed to the Department, contending that the indemnity school selection made by the State of Colorado is controlled by section 2276 of the Revised Statutes, which provides that such indemnity "shall be selected within the same land district" in which the losses occur, and not by the act of February 28, 1891, which provides:

That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur. (26 Stat., 796.)

It is true that, when the State made the selection in question, its right of selection was restricted to lands within the same district in which the loss occurred. But the act of February 28, 1891, *supra*, removed that restriction long before Wiley made his desert land entry, and I can see no reason why, the restriction being removed before Wiley applied to enter the land, the selection should not be held to be valid. (See State of Dakota, 13 L. D., 708.)

Your office decision is therefore affirmed. The motion to dismiss Wiley's appeal, filed by the attorney for the Bent-Otero Improvement Company, as intervenor, is dismissed.

INDIAN ALLOTMENT—CONTEST.

ADAMS v. GEORGE.

The action of the Office of Indian Affairs on allotments is conclusive, so far as the General Land Office is concerned, as to whether the Indian was a settler on the land, and whether he was entitled as an Indian to receive an allotment.

Secretary Bliss to the Commissioner of the General Land Office, May 10,
(W. V. D.) 1897. (J. L.)

This case involves lot 7 of section 19, T. 17 N., R. 2 E., Humboldt meridian, in Humboldt land district, California, containing 39.59 acres.

On September 8, 1892, John B. George, a half-blood Indian of the Klamath tribe, filed in the district land office, his application No. 29 to have allotted to him under the act of February 8, 1887 (24 Stat., 388) as amended by the act of February 28, 1891 (26 Stat., 794), lot 7 of section 19 and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 30, T. 17 N., R. 2 E., Humboldt meridian, containing 159.59 acres of surveyed lands, valuable only for grazing purposes. And the allotment was duly made.

On October 15, 1892, Mary A. Adams filed her affidavit of contest, corroborated by Horace Gasquet, against said allotment so far as it embraced the lot 7 of section 19 aforesaid, in which affidavit she

alleged: (1) That on September 25, 1892, she made actual settlement on lots 6 and 7 in section "19" and lots 7, 8 and 9 of section 20, in the township aforesaid, containing 139.40 acres; (2) that George had never made any settlement on any portion of the lands embraced in the allotment to him; and (3) that George's application was not sworn to before an authorized officer, and is therefore void.

The local officers rejected said affidavit of contest, "because the land had been allotted to the claimant before the alleged settlement of the contestant" was made.

Adams appealed. And on September 14, 1895, your office (by letter "G") affirmed the action of the local officers, refused to order a hearing, and dismissed the affidavit of contest.

On December 24, 1895, Adams filed an appeal, which was transmitted to this Department by your office on March 3, 1896.

By letter "G" of June 12, 1896, your office transmitted to this Department (1) a paper purporting to be John B. George's relinquishment of lot 7 of section 19 as aforesaid, (2) a homestead application of Mary A. Adams embracing said lot, and (3) certain correspondence in regard to a survey affecting said lot. All of said papers were filed in the local land office on May 23, 1895, while the appeal was pending here. Upon the recommendation of the Commissioner of Indian Affairs the Secretary declines to accept and will not recognize the said relinquishment.

Your office decision of September 14, 1895, rejecting Adams' affidavit of contest and refusing to order a hearing was clearly right.

The papers show that George's application was sworn to before M. Piggott, a special allotting agent, who was duly authorized to administer oaths in that case. (See section 3 of the act of February 8, 1887, and paragraph 628 of the Regulations of the Indian Office.)

The affidavit of contest shows that Adams made her settlement on September 25, 1892, seventeen days after the allotment to George had been placed on record. So that she was not a prior settler, and had no rights that were violated by the allotment.

The other allegation in the affidavit of contest, to wit: "That George had never made any settlement on any portion of the lands embraced in the allotment to him," presented a question of which your office had not, and even now has not jurisdiction.

The regulations prescribed by the Secretary on June 15, 1896 (22 L. D., 709) provide that

the action of the Office of Indian Affairs on said allotments shall be conclusive, so far as the General Land Office is concerned, as to whether the Indian was a settler upon said land, and whether he was entitled as an Indian to make an allotment.

Your office decision is hereby affirmed.

RESIDENCE—ABANDONMENT—VOTING.

PRATSCH ET AL. v. DOBBINS ET AL.

Registering and voting for several successive years in a precinct in which the land is not situated, on an oath as to actual residence in such precinct, raises a conclusive presumption against a claim of residence for the same period on the land.

Secretary Bliss to the Commissioner of the General Land Office, May 10,
(W. V. D.) 1897. (R. W. H.)

The plat of township 21, range 9 W., Olympia district. Washington, was filed in the local land office, March 8, 1895.

On the same day, Thomas Thorpe filed a pre-emption declaratory statement for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 26, of said township and range, alleging settlement in October, 1890, and improvements of the value of \$685; Charles R. Pratsch filed pre-emption declaratory statement for the SW. $\frac{1}{4}$ of said section 26, alleging improvements of the value of \$450; and Hiram E. Hulet made homestead entry for the SE. $\frac{1}{4}$ of said section, alleging settlement prior to January, 1895, and valuable improvements.

On May 7, 1895, Levi Dobbins filed application to enter the SW. $\frac{1}{4}$ of said section, under the timber and stone act of June 3, 1878 (20 Stat., 89), alleging that said land was valuable chiefly for timber and stone, was unfit for cultivation, and was uninhabited, and that it contained no mining or other improvements.

On May 22, 1895, Thorpe gave notice to Hulet, Dobbins and Pratsch that on July 20, 1895, he would make final proof for the land claimed by him before H. M. Sutton, United States Commissioner, at Montesano, Washington. On said day, Thorpe and his witnesses appeared before said commissioner, and submitted their testimony, which was received at the local office on July 22, 1895. On this last named day, Hulet, Pratsch and Dobbins filed protests against the allowance of said proof, and the local office rejected the same because one of Thorpe's two witnesses admitted on cross-examination that he had not seen the land claimed by Thorpe, and had never seen Thorpe on the land, until February, 1895. From this rejection Thorpe appealed to your office.

On May 8, 1895, Dobbins advertised his intention to make proof on his timber land claim, and July 23, 1895, was fixed as the time, due notice being given to Pratsch and Thorpe to show cause why Dobbins's entry should not be allowed.

On the day named Dobbins made his final proof, Pratsch and Thorpe each filing protests and alleging *bona fide* settlement and valuable improvements at the date Dobbins applied to enter the land.

Thorpe's final proof having been rejected, as heretofore stated, the proof of Dobbins was suspended to await the hearing on Pratsch's protest, set for September 10, 1895, and of which Dobbins and Pratsch were notified.

As a result of the hearing, the local office allowed the proof of Dobbins, dismissed Pratsch's protest, and held his pre-emption declaratory statement for cancellation.

The cases came to your office on the appeals of Thorpe and Pratsch, and as the interests of all the claimants of the land were involved therein, they were consolidated and considered together.

The testimony established to your satisfaction the following, among other facts: that Pratsch was not a *bona fide* resident of said land; that, even if he had made actual settlement thereon, he had since abandoned it; that the registration and poll books of Aberdeen precinct in Chiehalis county, Washington, for 1891, 1892, 1893, and 1894, showed that the said Charles R. Pratsch was a legal voter and actual resident of the second ward of said city during each of said years, and that his claim was based upon a mere pretence of settlement. Your office accordingly dismissed his protest, and held his declaratory statement for cancellation.

I find that Pratsch's attempted explanation of his registering and voting in Aberdeen amounts substantially to an admission of the charge.

In the case of *State of California v. Sevoy* (9 L. D., 139), it was held that Sevoy's voting in Crescent City—a different precinct from that in which his claim was located—"indicated an illegal act rather than a change of domicile," and did not raise a conclusive presumption against his claim of residence. But where registering and voting have been done for several successive years, and an oath has been taken each year, by a party, that he was an actual resident of the place at which the registering and voting occurred, the case is entirely different, and, in my opinion, the presumption, either of non-residence on the land or abandonment of such residence, is conclusive.

This last supposed case, I find from the testimony, is exactly Pratsch's case, and there is nothing in his appeal to the Department which raises any doubt, in my mind, as to the correctness of your action in dismissing his protest and holding his declaratory statement for cancellation.

At this stage of the controversy it would be premature, on the part of the Department, to take any action, or express an opinion, with respect to the conflicting claims of Thorpe and Dobbins, in view of your office decision, reversing the action of the local office and suspending their final proofs, until a further hearing can be held to determine the conflict between all the parties in interest. Your order for this hearing, on the ground indicated in your office opinion, is approved.

RELINQUISHMENT—CONTEST—FINAL DECISION.

CURNUTT *v.* LAWRENCE.

A relinquishment can not be held to be the result of a contest which had, prior to the relinquishment, been finally decided in favor of the entryman.

Secretary Bliss to the Commissioner of the General Land Office, May 11,
(W. V. D.) 1897. (U. W. P.)

The record shows that on April 27, 1889, James B. Jones made homestead entry of the NW. $\frac{1}{4}$ of Sec. 35, Tp. 13 N., R. 1 W., Oklahoma land district, Oklahoma; that on January 12, 1891, Adah Curnutt initiated contest against said entry, charging Jones with soonerism; that the local officers sustained the contest; that the entryman having died during the pendency of the case before the local officers, Joab Jones, his father and heir at law, appealed from said decision to your office, and from your office to the Department; that the decision of your office, which was in favor of Jones, was reversed by the Department on July 6, 1895. (Curnutt *v.* Jones, 21 L. D., 40.)

It further appears that on March 13, 1896, the said Joab Jones relinquished said entry, and Edward L. Lawrence made homestead entry of said land; that on the same day the local officers transmitted their report, showing that notice of said departmental decision had been served on Adah Curnutt on November 18, 1895, and that no motion for review had been filed.

On March 24, 1896, Adah Curnutt presented her homestead application for said land, which was rejected by the local officers for conflict with the entry of Lawrence, and on March 30, 1896, Adah Curnutt filed a motion for rehearing in her contest against Jones on the ground of newly discovered evidence, which motion was served on Jones's attorney on May 27, 1896. On April 7, 1896, Adah Curnutt filed an appeal from the decision of the local officers, rejecting her homestead application.

On August 4, 1896, the Department denied Adah Curnutt's motion for rehearing, on the ground that said motion was not served, until subsequently to entry of Lawrence, and said:

In the appeal before your office in the case of Curnutt *v.* Lawrence it is urged that the relinquishment filed by Joab Jones, heir at law as aforesaid, was the result of the contest of Curnutt *v.* Jones, which, if true, would lead to the cancellation of the entry of Lawrence and the awarding of a preference right of entry to Curnutt. The case is therefore remanded to your office for such action upon the allegations of Curnutt in the premises as may be deemed just and proper by you.

And the case was remanded to your office "for such action upon the allegations of Curnutt in the premises as may be deemed just and proper."

On August 22, 1896, your office promulgated the decision of the

Department on the motion for rehearing, and formally closed the case of Curnutt *v.* Jones.

In her appeal from the decision of the local officers rejecting her application to enter said land, Adah Curnutt insists that the local officers erred in rejecting her application for the reason that she

was the successful contestant for the tract applied for, the contest of Adah Curnutt *v.* the heirs of James B. Jones, deceased, for said tract of land being still pending and not finally closed by the Commissioner of the General Land Office, and the relinquishment filed by Joab Jones, heir, was directly caused by the pending contest of this applicant and said relinquishment was the result thereof,

and prays that Lawrence may be required to show cause why his entry should not be canceled for conflict with the prior and superior right of the appellant.

Your office affirmed the decision of the local officers, rejecting Adah Curnutt's application to enter said land, and she appeals to the Department.

Notice of the decision of the Department, dismissing Adah Curnutt's contest was mailed by the local officers to Adah Curnutt on November 18, 1895, and her motion for rehearing was not filed until March 30, 1896. The time allowed for filing a motion for review or for rehearing expired on the 29th of December, 1895, and the decision of the Department then became final. Hence the filing of the relinquishment can not be held to inure to the benefit of the contestant. The fact that your office had not then formally announced that the case of Curnutt *v.* Jones was closed, reserved to the contestant no rights, and the relinquishment can not be held to be the result of a contest which had previously been finally decided by the Department in favor of the entryman. Warn *v.* Field, 6 L. D., 236; Pomeroy *v.* Wright, 2 L. D., 164.

Your office decision is therefore affirmed.

APPLICATION TO AMEND ENTRY—ADVERSE CLAIM.

HUDSON *v.* ORR.

An application to amend a homestead entry, by including therein an additional tract, operates to reserve the land covered thereby, so far as the rights of the applicant are concerned, until final action thereon.

Secretary Bliss to the Commissioner of the General Land Office, May 11,
(W. V. D.) 1897. (J. L.)

This case involves lot 1 of section 13, T. 11 N. R. 4 E., Indian meridian, Oklahoma City land district, Oklahoma, containing 13.55 acres of land.

On March 15, 1892, Joseph C. Orr made homestead entry No. 3267 of lots 1 and 2 of section 18, T. 11 N., R. 5 E., containing 50.85 acres of land. On December 2, 1893, he filed an application to amend said entry so as to include the aforesaid lot 1 of section 13, T. 11 N., R. 4 E., situ-

ated in an adjoining township, but contiguous to the lots entered by him. In support of said application he filed his affidavit, corroborated by two witnesses, in which he alleged:

That at the time he made said entry he applied for lots 1 and 2 of Sec. 18, T. 11 N., R. 5 E., and also for lot 1 of Sec. 13, T. 11 N., R. 4 E., all of said tracts being contiguous; that at the time he presented said application he was informed by the clerk in charge at the U. S. Land Office that lot 1 in Sec. 13, T. 11 N., R. 4 E., was not open to entry but was allotted land, and your affiant was shown a schedule which appeared to indicate that said land was not open to entry. That your affiant was only allowed to make entry of said lots 1 and 2 in Sec. 18; that your affiant established his residence on said lots 1 and 2 of said Sec. 18, T. 11 N., R. 5 E.; has built a house thereon, reduced a portion of said tract to cultivation and has in all respects complied with the homestead law as to residence and improvement; that he has cleared and reduced to cultivation some two or three acres upon said lot 1 in Sec. 13; that a short time ago your affiant was informed by his former attorney, L. P. Hudson, that a mistake had been made in telling him that lot 1 in Sec. 13 was allotted land, and that the same was in truth and in fact, government land and open to entry; that no person other than your affiant has occupied or improved said lot 1 in Sec. 13, and that the same is also clear of any adverse claims of record.

The local officers recommended that the application be allowed. But on December 21, 1893, your office reversed the decision of the local officers, saying:

There appears to be no law or regulation of this department, under which Orr's application to amend may be properly allowed; and the application is therefore rejected subject to the usual right of appeal.

From said decision Orr appealed; and on July 6, 1895, this Department reversed your office decision, saying:

In view of the facts set forth, and especially of the improper restriction through the erroneous action of the local land office, it is my opinion that Orr should be allowed to amend his homestead entry in accordance with his original application. (See *Northern Pacific Railroad Company v. Yantis*, 8 L. D. 58).

And your office proceeded by letter "C" of August 17, 1895, to carry said departmental decision into effect.

In the meantime, while Orr's appeal was pending, to wit: On May 3, 1894, Lewis Hudson had been permitted by the local officers to make homestead entry of the aforesaid lot 1 of section 13, T. 11 N., R. 4 E., containing 13.55 acres of land, which were awarded to Orr by the departmental decision aforesaid. Whereupon your office by letter "C" of October 3, 1895, directed the local officers to advise Lewis Hudson

that he will be allowed thirty days from notice within which to show cause why his said entry should not be cancelled, having been improperly allowed when the tract was reserved by the pending application for amendment of Joseph C. Orr, party to homestead entry 3267, made March 15, 1892, for lots 1 and 2, sec. 18, T. 11 N., R. 5 E.

Within the thirty days prescribed, Hudson filed under his oath, but uncorroborated, an answer to the rule, and a protest against the allowance of Orr's application to amend, in which he alleged:

That at the time he made said homestead entry he was informed by a Mr. Watts a clerk in the said Land Office, that said tract was vacant government land subject to

homestead entry, and that he has since date of said entry settled and resided upon said tract in good faith and made valuable improvements thereon.

That the records of the said Land Office show that said Joseph C. Orr made his homestead entry upon lots 1 and 2 of section 18, in township 11 N. of range 5, east of the I. M. and that on August 17, 1895 he was allowed to have his said homestead entry amended, by direction of the Honorable Secretary of the Interior. That your affiant is informed that said Orr, has represented in his application for said amendment that he went to the U. S. Land Office aforesaid, at the time he made his original entry (No. 3267) and "applied to enter also lot 1 of Sec. 13 in township 11 N. of range 4 east I. M." That this affiant is informed and verily believes that said Joseph C. Orr never applied nor offered to enter said lot 1 of section 13 T. P. 11 N. of range 4 east, until after he made his original entry as aforesaid. That this affiant made settlement upon said tract during the month of August 1894, and about the same time established his residence thereon. That said Orr, has resided upon and improved the tract he originally entered and confined his improvements to the same, except that he has built his fence across the line in one place, so as to enclose about a half or three fourths of an acre of the tract in controversy.

That he has only occupied said tract by cutting and disposing of all the valuable timber thereon, and has at no time disputed the right of this affiant to said tract until after the amendment of his said entry was allowed as aforesaid, and that said Orr has resided within about a quarter of a mile of this affiant during all of the time he (affiant) resided upon and claimed said tract and was fully advised of the fact that your affiant had entered and claimed said tract as his homestead. Wherefore. He protests against the cancellation of his said homestead entry No. 8680, and asks that a hearing be ordered and that this affiant may be allowed to prove the allegations herein set forth, and to show that said Joseph C. Orr did not apply to enter the tract in controversy until after date of his original entry.

On January 13, 1896, your office denied Hudson's application for a hearing and held his entry for cancellation saying:

The application for amendment by Orr, reserved the land until the final disposition thereof, and Hudson could acquire no rights thereto as against Orr. It is therefore unnecessary to order a hearing, and the entry having been improperly allowed, is this day held for cancellation.

Hudson appealed to this Department:

It is a well settled principle that a legal application to enter land, is while pending, equivalent to actual entry, so far as the applicant's rights are concerned, and its effect is to withdraw the land embraced therein from any other disposition, until such time as it may be finally acted upon. The fact that the application of appellant was not an original, but only for amendment of a former entry to embrace the land in dispute, does not alter the case (*Mack Long*, 15 L. D., 579).

Land covered by one entry, or by an application to enter by amendment or otherwise, is not subject to another entry at the same time; and an application to enter land not subject to entry at the time the application is made, confers no rights upon an applicant. (*Rumbley v. Causey*, 16 L. D., 266). A legal application to enter land subject to entry, while pending, is equal to actual entry, so far as the applicant's rights are concerned, and withdraws the land embraced therein from any other disposition, until final action thereon. (*Hamilton v. Harris*, 18 L. D., 45 and *Pfaff v. Williams*, 4 L. D., 455).

Orr's application to enter by amendment the lot of land in controversy, was filed and put on record on December 2, 1893. The lot was

thereby withdrawn from any other disposition. The act of the local officers in permitting Hudson to make entry of the lot on May 3, 1894, was beyond their authority, and Hudson acquired no rights thereby. The fact that Mr. Watts, the clerk, was mistaken and misled Mr. Hudson as to the status of the tract, cannot impair the rights of Mr. Orr. The purpose of this proceeding against Mr. Hudson is to remove from the records his entry which was unlawfully made *pendente lite*, and which is inconsistent with the entry which the Department authorized Orr to make of the same tract. Mr. Hudson, who acquired no interest by his unlawful entry, cannot be permitted in this collateral proceeding to impeach the decision of the Department in Orr's case, to which he, Hudson, was not a party. The facts alleged in his answer and protest are not sufficient to entitle him to a hearing in this case.

Your office decision is hereby affirmed.

SETTLEMENT CLAIM—SUCCESSFUL CONTESTANT.

HINE v. CLIFF.

A settlement on land covered by the entry of another, confers no right as against a successful contestant who secures the cancellation of such entry.

Secretary Bliss to the Commissioner of the General Land Office, May 11,
(W. V. D.) 1897. (J. L. McC.)

On September 19, 1893, David A. Kittleman made homestead entry for the NW. $\frac{1}{4}$ of Sec. 26, T. 28 N., R. 1 W., Perry land district, O. T.

Twenty-seven days afterward—to wit, on October 16, 1893—Meredith A. Tarleton filed affidavit of contest against said entry, alleging prior settlement. No action appears to have been taken on said affidavit.

On June 4, 1894, Frank D. Cliff filed affidavit of contest against said entry on the ground of abandonment; and afterward an additional affidavit of contest, charging that Tarleton had never established residence on the land.

This case was set for a hearing, at which time Cliff appeared, but both Kittleman and Tarleton defaulted.

From the testimony taken it appeared that the entryman, Kittleman, had failed to establish residence on the tract, or to cultivate or improve the same, and had abandoned it for more than six months prior to the filing of the contest affidavit; and that Tarleton had never established residence upon the land, although more than six months had passed since he had filed an affidavit alleging prior settlement. The local officers therefore recommended the cancellation of Kittleman's entry and the dismissal of Tarleton's contest. From their decision no appeal was taken, and on May 20, 1895, your office canceled Kittleman's entry.

On June 13, 1895, Cliff exercised the preference right earned by his successful contest, and made homestead entry of the land.

On July 10, 1895, Lewis P. Hine applied to make homestead entry of the land; but the local officers rejected his application because of conflict with Cliff's homestead entry, made June 13, 1895 (*supra*). Hine appealed to your office, alleging that he was a settler upon the land prior to the settlement of Cliff; and that the local officers should have ordered a hearing to determine the fact as to priority. Your office, by decision of March 13, 1896, held:

Although Hine alleges settlement on the tract on May 30, 1894, he made no attempt to establish a claim to the land until July 10, 1896—fourteen months after the date of settlement; and by failing to assert his claim within three months from such settlement he lost all right he might have acquired thereunder:

Therefore your office refused his application for a hearing.

Hine has appealed to the Department. He contends, in substance, that Cliff filed his contest against Kittleman within a few days after Hine's settlement on the land, and within three months allowed him (Hine) in which to place his application of record; that after the contest had been filed by Cliff, he (Hine) had no way of placing himself on record prior to Cliff; that an application by Hine for said land would have been rejected on account of Kittleman's then existing entry, and a contest for abandonment would have been held in abeyance until the disposition of Cliff's contest for abandonment; that it was not until Cliff made entry under his preference right that he (Hine) had an opportunity under the rules to assert his claim, which he did by applying to make entry of the land, within a month after Cliff's entry; and he asks that a hearing be ordered to determine, as between him and Cliff, which was the prior settler.

It is clear that Hine, for the same reason that he could not have been permitted to make entry of the land at the date when he went upon it (because it was segregated by Kittleman's homestead entry), could not make a legal settlement or establish a legal residence thereon while said entry remained of record. (*Turner v. Robinson*, 3 L. D., 562, and many cases since).

After Cliff had initiated contest against Kittleman, Hine's settlement (whether made before or after the initiation of Cliff's contest) was subject to Cliff's preference right in case such contest should result in the cancellation of the entry. When the entry was canceled as the result of said contest, and Cliff made entry of the land, Hine's settlement (even conceding it to have been made earlier than that of Cliff) conferred upon him no rights in the premises.

The decision of your office denying Hine's application for a hearing is therefore affirmed.

DECISIONS
OF
THE DEPARTMENT OF THE INTERIOR
AND
GENERAL LAND OFFICE
IN
CASES RELATING TO THE PUBLIC LANDS

FROM JANUARY, 1897, TO JUNE, 1897.

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OFFICE OF THE ASSISTANT ATTORNEY-GENERAL.

The decisions of the Secretary of the Interior relating to public lands are prepared in the office of the Assistant Attorney-General for the Interior Department, under the supervision of that officer, and submitted to the Secretary for his adoption.

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

PRIVATE LAND CLAIMS—TREATY RESERVATION.

JOSEPH FARR.

By the terms of the treaties between the United States and the Republic of Mexico, all lands embraced within the boundaries of Mexican or Spanish grants, at the date said treaties were ratified, were placed in a state of reservation for the ascertainment of rights claimed under said grants, and by the act of March 3, 1891, said reservation is continued in force, and will so remain until final action is taken on the respective claims or grants affected thereby.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (W. M. W.)

The case of Joseph Farr has been considered on his appeal from your office decision of August 21, 1895, rejecting his application to enter under the homestead law the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and lots 1 and 2 of Sec. 30, T. 9 N., R. 3 E., Santa Fe, New Mexico, land district.

On September 12, 1894, Farr made an application to enter the land in question under the homestead law.

On September 14, 1894, the register and receiver rejected said application, for the reason—

that the land applied for was withdrawn from entry on June 2, 1886, by the Hon. Commissioner, it being within the limits of the Diego Padilla, or El Tago grant.

Farr appealed. In his appeal he alleged

that the said tract of land is not now within the limits of the said Diego Padilla, or El Tago grant, because the said grant claim was rejected by the United States court of private land claims, on the 8th of September, 1894, prior to the filing of said homestead application.

It appears from a certified statement of the deputy clerk of the court of private land claims that on the 8th day of September, 1894, said private land claim was rejected by that court, and that an appeal from the judgment of said court was taken to the supreme court of the United States, where the case was pending when your office decision was rendered affirming the judgment of the local officers.

Farr appeals.

The appellant alleges that the land applied for is not *now* within the limits of the Diego Padilla or El Tago grant, for the reason that said grant was rejected by the court of private land claims on September 8, 1894.

Your office found that:

The land within the claimed limits of the El Tago grant is in a state of statutory reservation, to satisfy the claim, under the provisions of section 8 of the act of July 22, 1854. (10 Stat., 308.)

Said section 8 provided that:

Until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the provisions of this act.

This was clearly a statutory reservation, covering *all* lands situated in the territory acquired from Mexico, claimed under Mexican or Spanish grants; it was to remain in force "until the final action of Congress on such claims."

By act of March 3, 1891 (26 Stat., 854), Congress established the court of private land claims, with jurisdiction to hear and determine all cases or claims presented by any person or persons or corporation or their legal representatives,

claiming lands within the limits of the Territory derived by the United States from the Republic of Mexico and now embraced within the Territories of New Mexico, Arizona, or Utah, or within the States of Nevada, Colorado, or Wyoming, by virtue of any such Spanish or Mexican grant, concession, warrant, or survey, as the United States are bound to recognize and confirm, by virtue of treaties of cession of said country by Mexico to the United States, which at the date of the passage of this act have not been confirmed by act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect.

The purpose of Congress in passing this act evidently was to provide a special tribunal to pass upon, settle, determine and adjudicate every claim that existed, or could properly be made, under any and all grants made by Spain or Mexico to lands within the territory specified in said act, prior to its acquisition by the United States from Mexico.

By the 7th section of the act it is provided, *inter alia*, that:

The said court shall have full power and authority to hear and determine all questions arising in cases before it relative to the title to the land the subject of such case, the extent, location, and boundaries thereof, and other matters connected therewith fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations, the stipulations of the treaty concluded between the United States and the Republic of Mexico at the city of Guadalupe-Hidalgo, on the second day of February, in the year of our Lord, eighteen hundred and forty-eight, or the treaty concluded between the same powers at the city of Mexico, on the thirtieth day of December, in the year of our Lord, eighteen hundred and fifty-three, and the laws and ordinances of the government from which it is alleged to have been derived, and all other questions properly arising between the claimants or other parties in the case and the United States.

Section 9 of the act provides that the party against whom the court shall decide in any case:

Shall have the right of appeal to the supreme court of the United States, such appeal to be taken within six months from date of such decision, and in all respects to be taken in the same manner and upon the same conditions, except in respect of the amount in controversy as is now provided by law for the taking of appeals from decisions of the circuit courts of the United States. On any such appeal the supreme court shall re-try the cause, as well the issues of fact as of law, and may cause testimony, to be taken in addition to that given in the court below, and may amend the record of the proceedings below as truth and justice may require; and on such re-trial and hearing, every question shall be open, and the decision of the supreme court thereon shall be final and conclusive. Should no appeal be taken as aforesaid, the decree of the court below shall be final and conclusive.

The act contains nineteen sections, in which full and specific provisions are made for determining all the rights of all claimants under Mexican or Spanish grants, in the States and Territories named. The 15th section expressly repeals section 8 of the act of July 22, 1854, referred to in your office decision as reserving the land involved. The repeal of said section is without any qualification and goes to the entire section, "and all acts amendatory or in extension thereof, or supplementary thereto." It follows that your office erred in holding that the land in question is in a state of statutory reservation under the act of 1854, *supra*.

However, it does not necessarily follow that your office decision must be reversed; for, if the conclusion reached was the correct one under the law and record presented, then it should be affirmed.

The question to be determined is, whether the land in question was properly subject to entry under the homestead law at the time Farr made his application.

As long as the 8th section of the act of 1854, *supra*, was in force, there can be no question but what this land was reserved. It should be borne in mind that in enacting said section Congress undertook to provide a manner whereby it was intended to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico. The surveyor-general for New Mexico, under instructions of the Secretary of the Interior, was required to make a full report of all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe-Hidalgo.

By the terms of said treaty the United States bound itself to protect all claimants having such claims in their rights, and it may be that the express reservation made by section 8 of said act was placed therein more in the nature of a precaution than as a necessity. Whatever may have been the purpose of Congress in making said reservation, it is clear that all lands embraced within the claimed limits of grants made by Mexico or Spain prior to said treaty were in a state of reservation under the terms of the treaty itself, independent of any reservation that might be made after such treaty was duly ratified. It follows that

the repeal of the section of the statute containing the reservation would not have the effect of releasing lands reserved under treaty obligations from such reservation.

As has been shown, the act of March 3, 1891, provided for a special tribunal to determine the rights of claimants to lands included within grants claimed to have been obtained from Mexico or Spain prior to the treaty of Guadalupe-Hidalgo. Congress invested said tribunal with full authority to determine every question, subject to the right of appeal to the supreme court of the United States, respecting the validity, extent and scope of all unadjusted claims to lands included in Spanish or Mexican grants. The title, validity and boundaries of such grants or claims were to be adjudicated "according to the law of nations, the stipulations of the treaty concluded between the United States and the Republic of Mexico at the city of Guadalupe-Hidalgo," on February 2, 1848, and the treaty between the same powers on December 30, 1853.

It is, therefore, held that under the above named treaties all lands embraced within the boundaries of Mexican or Spanish grants or claims at the date said treaties were duly ratified were by said treaties placed in a state of reservation; that said reservation has been continued in force by the act of March 3, 1891, *supra*; that such reservation will continue in force until after the judgment of said court becomes final and in all respects complete.

Farr's application to enter the land in question, having been made at a time when said land was in a state of reservation and not subject to entry, was rightfully rejected.

The conclusion of your office in the decision appealed from was correct. The judgment appealed from is accordingly affirmed.

RAILROAD GRANT—LAND EXCEPTED—DONATION CLAIM.

OREGON AND CALIFORNIA R. R. CO. *v.* CROCKER.

A donation claim of a married man embracing more than three hundred and twenty acres is not void, but voidable only, and land included therein, at the time when a railroad grant becomes effective, is excepted from the operation of the grant.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (W. A. E.)

The SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the fractional SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ (or lot 1) of Sec. 7, T. 1 S., R. 2 W., Oregon City, Oregon, land district, are within the primary limits of the grant made by act of July 25, 1866 (14 Stat., 239), to aid in the construction of the Oregon and California Railroad, and lie opposite the portion of said road that was definitely located January 29, 1870.

March 30, 1880, said tracts were listed by the railroad company, per list 13.

March 23, 1885, William L. Crocker made homestead entry for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 7, and this entry was commuted to cash on December 4, 1886.

By your office letter of March 19, 1895, the railroad company's list was held for cancellation in so far as it covered the tracts above described, for the reason that said tracts were included, at the date of the definite location of the road, in the uncanceled donation claim of one Jacob Minter.

From this action the company has appealed.

The records show that on November 30, 1855, Jacob Minter filed notification under section 5 of the Oregon donation act of September 27, 1850 (9 Stat., 486), as amended by the act of February 14, 1853 (10 Stat., 158), for these tracts in section 7, together with adjoining lands in section 18, the whole being estimated at "about 320 acres," the amount of land that a married man and his wife could take under section 5 of said act as amended; that as a matter of fact said donation claim covered more than the legal three hundred and twenty acres, but that it remained intact up to December 17, 1876, when, at the request of the heir of said Minter, the tracts in section 7 were excluded, and patent issued for the remainder.

The railroad company contends:

1. That a donation notification does not except the land covered thereby from the operation of the grant to said company.
2. That section 5 of the donation act confined a married claimant to three hundred and twenty acres, one hundred and sixty for himself and one hundred and sixty for his wife, and as Minter's claim covered more than three hundred and twenty acres, it was invalid as to the excess and the company's grant took effect upon the excess.

It has recently been held by the Department that land embraced within a notification of a donation claim, at the time when a railroad grant becomes effective, is excepted from the operation of said grant, though claims of such character are not specifically named in the excepting clause of the grant. *Oregon and California R. R. Co. v. Kuebel*, 22 L. D., 308; *Oregon and California R. R. Co. v. Bagley*, 23 L. D., 392.

This ruling disposes of the first contention of the railroad company, and renders further comment thereon unnecessary.

In the case of *John J. Elliott*, 1 L. D., 303, it was held that the filing of the original notification was an *ipso facto* segregation of the tract there described from the lands contiguous thereto. A donation notification had the effect, therefore, of an entry in the matter of segregating the land covered thereby.

The Department has held that a homestead entry exceeding one hundred and sixty acres is voidable only, and while of record is an appropriation of the land. *Charles Hoffman*, 4 L. D., 92; *Legan v. Thomas et al.*, *id.*, 441.

It follows that Minter's donation notification, during the time it embraced more than the legal three hundred and twenty acres, was voidable only, and was an appropriation of the entire amount of land covered thereby.

On January 29, 1870, when the grant took effect, these tracts in section 7 were covered by Minter's notification, and consequently were excepted from the operation of the grant.

Your office decision is affirmed.

OSAGE CEDED LANDS—FORFEITURE OF ENTRY.

MARS TAYLOR.

The Department has authority to cancel entries of Osage ceded lands where default exists as to the payment of the purchase price.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897.
(I. H. L.) (W. C. P.)

I am in receipt of your letter of October 10, 1896, asking for instructions as to the proper procedure in the matter of the purchase by Mars Taylor of the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 33, T. 31 S., R. 18 E., Kansas, being a part of the body known as the "Osage ceded lands."

By the treaty of September 29, 1865 (14 Stat., 687), the Osage Indians granted and sold to the United States certain lands in Kansas for which the United States agreed to pay the sum of \$300,000 to be placed to the credit of said Indians in the Treasury and interest to be paid thereon at five per centum per annum. Said treaty further provided:

Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands but no pre-emption claim or homestead settlement shall be recognized; and after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the "civilization fund" to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States.

By the second article of said treaty certain other lands were ceded to the United States to be held in trust for said Osage Indians and surveyed and sold for their benefit.

By joint resolution of April 10, 1869 (16 Stat., 55), it was provided that any *bona fide* settler residing upon any portion of the lands by virtue of the first and second articles of said treaty being a citizen of the United States or having declared his intention to become a citizen should be entitled to purchase the same in quantity not exceeding one hundred and sixty acres, at one dollar and twenty-five cents per acre, within two years from the date of said resolution under such rules and regulations as may be prescribed by the Secretary of the Interior.

The next legislation affecting these lands is found in the act of August 11, 1876 (19 Stat. 27). It was there provided by section one that any *bona fide* settler residing at the time of completing his or her entry, as hereinafter provided, upon any portion of the land sold to the United States, by virtue of the first article" (of said treaty of 1865, who is a citizen of the United States, &c.) "shall be and hereby is, entitled to purchase the same in quantity not to exceed one hundred and sixty acres at the price of one dollar and twenty-five cents per acre within one year from the passage of this act, under such rules and regulations as may be prescribed by the Secretary of the Interior and on the terms hereinafter provided.

The second section of said act makes provision for the protection of persons who had purchased any portion of said lands from railroad companies claiming the same.

Section three prescribes the terms of purchase, and reads as follows:

That the parties desiring to make entries under the provisions of this act who will, within twelve months after the passage of the same make payment at the rate of one dollar and twenty-five cents per acre, for the land claimed by said purchaser, under such rules and regulations as the Commissioner of the General Land Office may prescribe, as follows, that is to say: said purchaser shall pay for the land he or she is entitled to purchase one-fourth the price of the land at the time the entry is made, and the remainder in three annual payments, drawing interest at the rate of five per centum per annum, which payment shall be secured by notes of said purchaser, payable to the United States; and the Secretary of the Interior shall withhold title until the last payment is made; and the Secretary of the Interior shall cause patents to issue to all parties who shall complete their purchases under the provisions of this act, and if any claimant fails to complete his or her entry at the proper land office within twelve months from the passage of this act, he or she shall forfeit all right to the land by him or her so claimed, except in cases where the land is in contest: *Provided further*, That nothing in this act shall be construed to prevent any purchaser of said land from making payment at any time of the whole or any portion of the purchase money.

Section four provides for entries on said lands for townsites. Section five provides for the re-establishment of entries theretofore canceled by the Secretary of the Interior. Section six reads as follows:

That all declaratory statements made by persons desiring to purchase any portion of said land under the provisions of this act, shall be filed with the register of the proper land office within sixty days after the passage of the same: *Provided, however*, That those who may settle on said land after the passage of this act shall file their declaratory statement within twenty days after the settlement, and complete their purchase under the provisions of this act within one year thereafter.

Section seven reads as follows:

That nothing in this act shall be so construed as to prevent said land from being taxed under the laws of the State of Kansas as other lands are or may be taxed in said State from and after the time the first payment is made on said land, according to the provisions of this act.

Section eight, the last of said act, provides for the purchase by certain railroad companies of certain tracts.

On October 26, 1876, instructions were given to the local officers calling attention to the various provisions of said law and telling them of their duties thereunder.

The right given to settlers to purchase these lands is in the nature of a pre-emption right, and by parity of reasoning the authority of this Department to declare and enforce a forfeiture for failure of the purchaser under this law to comply with the provisions thereof would be the same as in pre-emption cases. While the law under consideration contains no express declaration of forfeiture for default in making the deferred payments, it does contain the provision that—"the Secretary of the Interior shall withhold title until the last payment is made." The contract was one of sale, by which the United States agreed to convey the title upon certain conditions, one of which was the payment by the purchaser of the specified price within three years from the date of his entry. The failure of a purchaser to comply with the obligations he had assumed would relieve the United States of all obligations under such contract and would render the claim of the defaulting purchaser liable to a declaration of forfeiture. Furthermore, the authority to declare a forfeiture of such claims, and to enforce it by cancellation of the entries, is necessary to a proper administration of the law directing the sale of these lands.

The provisions of this law are very like those of the law providing for the sale of the Otoe and Missouri lands, of which my predecessor, Secretary Smith, after discussing the question, said (23 L. D., 143):

I am fully persuaded, therefore, of the power of the Secretary of the Interior to cancel the entries of these purchasers of Otoe and Missouri lands who are in default in the deferred payments.

So in the case of Osage ceded lands this Department has authority to cancel entries where default exists as to the payment of the purchase price.

It is, and should be, the policy to allow the purchaser of public lands opportunity to cure his default before final action is taken upon his claim, and in these cases notice should be given the purchaser, by service upon him personally if he can be reached in that way, and, if not, then by publication in such manner as will most likely reach him, that his entry will be canceled unless he shall, within some reasonable time, to be specified, complete his purchase.

Your attention is also called to the fact that said law specifically provides that nothing therein "shall be so construed as to prevent said land from being taxed under the laws of the State of Kansas." In view of this provision, you should ascertain whether the land has been sold for taxes, and at the same time, whether any transfer of any kind has been made. The present claimant of the land should be served with notice of the contemplated cancellation of the entry.

REPAYMENT—COMMON GRANTED LIMITS.

THOMAS HAWLEY.

An even numbered section lying within the common granted limits of two railroad grants remains at double minimum though one of such grants may have been forfeited, and an application for repayment on the ground of double minimum excess must be accordingly denied.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (E. M. R.)

This is an application by Thomas Hawley for the repayment of the double minimum excess paid in the Ashland, Wisconsin, land district, on cash entry No. 5037, for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 14, T. 49 N., R. 7 W., and is before the Department on appeal from your office decision of October 31, 1895, denying said application.

This land is within the common ten mile limits of the Omaha railroad and the Wisconsin Central railroad. The appeal is based upon the authority of the case of James McVicar (21 L. D., 128).

On June 3, 1856 (11 Stat., 20), Congress passed an act to aid in the construction of the Chicago, St. Paul, Minneapolis and Omaha railroad. On May 5, 1864 (13 Stat., 56), Congress passed an act by which the grant to the said Omaha railroad company was enlarged from six to ten sections per mile. By the same act a grant was made to aid in the construction of the railroad now known as the Wisconsin Central railroad.

The tract of land upon which re-payment is now asked, as has been stated, is within the common ten mile limits of these two roads.

This Department has held that the grant made by the act of 1864 was of a moiety to each road of the lands so lying within the common limits of both, but held that in view of the fact of the withdrawal for indemnity purposes in behalf of the Omaha railroad in 1856, the grant to the Central company was defeated as to land so situated. (Wisconsin Central R. R. Co., 10 L. D., 63; and Chicago, St. Paul, Minneapolis and Omaha R. R. Co., Id., 147.)

In the decision of the Department in the case of James McVicar (*supra*) it was said—

In the adjustment of the Omaha grant said company was required to make selection of lands within the common limit equal to its moiety, to which it was given full title, the remaining lands being held to apply to the moiety for the Central company's grant, which being defeated by the reservation under the act of 1856, as before stated, were opened to entry. The land in question is a portion of that restored, and in completing entry therefor, McVicar was required to pay at the rate of \$2.50 per acre or the double minimum price.

Section 4 of the act of Congress of May 5, 1864 (13 Stat., 66—page 67 thereof), provides:

And be it further enacted, That the sections and parts of sections of lands which shall remain to the United States within ten miles on each side of said roads shall not be sold for less than double the minimum price of the public lands when sold;

nor shall any of the said reserved lands become subject to private entry until the same have been first offered at public sale at the increased price.

In the case of the Wisconsin Central R. R. Co. *v.* Forsythe (159 U. S., 46), it was held that the withdrawal made for indemnity purposes under the act of 1856 did not serve to defeat the attachment of rights under the grant made by the act of 1864, and consequently that the Wisconsin Central railroad company was entitled to its proportionate share of the land so lying within the ten mile limits of each road. This was a reversal of the holdings of this Department, inasmuch as it was held by the supreme court that the withdrawal did not operate to defeat the grant to the Wisconsin Central railroad company.

Under the act of Congress of September 29, 1890 (26 Stat., 496), being "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and for other purposes," which forfeited unearned lands granted to railroads in various states and provided for the restoration of such lands to the public domain, it was provided that lands so forfeited and restored to the public domain should be entered at the rate of \$1.25 per acre.

It will be noticed that the land in controversy is a part of an even numbered section, to-wit, section 14. By referring to the original act making this grant in behalf of the Wisconsin Central Railroad Company, and in which at the same time is enlarged the grant in behalf of the Omaha Company, it will be seen that the lands increased in price were those which were not granted to these railroad companies. The lands granted to the railroad companies were the odd numbered sections within said limits. They, therefore, were not increased in price. And under the act of September 29, 1890, the lands granted to the railroad were forfeited and were directed to be sold at \$1.25 per acre.

It thus follows that there is no statutory authority for ordering re-payment in this case, and this land being within the ten mile limits of the Omaha railroad, despite the fact that the grant to aid in the construction of the Wisconsin Central railroad has failed and determined, the even sections within said ten mile limits of the Omaha railroad remain at double minimum prices.

While it is unfortunate that Congress should have directed the sale of the odd numbered sections at single minimum rates in this particular instance, and left the even numbered sections at double minimum rates, still this is no hardship to the claimants under the public land laws on the even numbered sections, inasmuch as the reason of increased valuation by proximity to a railroad existed here as in all other instances of increased prices. The law simply relieves claimants upon odd numbered sections similarly situated in reference to a railroad from paying the double minimum price.

The decision of your office is affirmed and the application for re-payment is denied.

COAL LAND ENTRY—PRICE OF LAND.

ALLEN L. BURGESS.

The price of coal land is dependent upon its distance from a completed railroad at the date of entry, and not at the date of the application.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (S. V. P.)

Allen L. Burgess made coal land entry September 14, 1895, of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 14, T. 55 N., R. 85 W., Buffalo land district, Wyoming, and upon examination of the final proof your office held it unsatisfactory with respect to the proof furnished as to the distance of the land from a completed railroad at the time said entry was made, and required further proof on that point, in order that the proper price of the land might be determined. From this action Burgess has appealed.

In the final affidavit made by Burgess, he states:

I made application to purchase said land on or about November 14, 1892, at which time said land was not within fifteen miles from the line of any completed railroad; and that the delay in making payment for said land has been caused through a contest pending on said land between Hermann Timm and myself, which contest has been recently decided.

The price of coal land is fixed by section 2347 of the Revised Statutes, which provides that:

Every person above the age of twenty-one years . . . shall, upon application to the register of the proper land office, have the right to enter by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person . . . upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Under the construction of this statute, adopted and followed by the Department, it is the distance of the land from a completed railroad at the date of entry that determines its price. See paragraph 13, Regulations of July 31, 1882 (1 L. D., 689).

In the case of Edward B. Largent *et al.* (13 L. D., 397), a protest against the allowance of the application to enter was filed, as in the case at bar, and the Department in disposing of the question said:

The filing of the protest against the entry of Strong was a risk that must be assumed by all who apply to enter the public land. The fact that in this particular case it had the effect to postpone the entry until after a railroad was completed within fifteen miles of the tract, which under the law doubled the price of the land, is only incidental, and the government can not be properly held chargeable for the delay, occasioned by Mr. Bagnell's protest.

and it was therefore held that the price of the land was dependent upon its distance from a completed railroad at date of entry, and not at the date of the application.

The decision of your office is affirmed.

SCHOOL LANDS—SETTLEMENT BEFORE SURVEY.

STATE OF WASHINGTON *v.* KUHN.

The act of February 28, 1891, amending sections 2275 and 2276, R. S., protects settlement on school land prior to survey, and said statute in that respect supersedes the provisions of sections 10, and 11, of the act of February 22, 1889.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (C. J. G.)

This case is in relation to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 36, T. 21 N., R. 8 E., Seattle land district, Washington.

On April 18, 1893, Edward A. Kuhn made homestead entry for this tract, alleging settlement thereon September 29, 1890.

On August 13, 1895, the State of Washington, by its Commissioner of Public Lands, entered protest against the allowance of said entry, and requested that a hearing be ordered to determine the rights of the respective parties.

The grounds urged in said protest were, that title to this land, being located in section thirty-six, had passed and become vested in the State of Washington by virtue of sections ten and eleven of the act of February 22, 1889 (25 Stat., 676), admitting the said State into the Union; that the title of the State of Washington in and to said land is not affected or invalidated by reason of the provision of the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes of the United States.

The State of Washington was admitted into the Union on November 11, 1889.

On October 7, 1895, Kuhn submitted his final proof; and on October 10, 1895, the local office dismissed the protest filed by the State of Washington, holding that the claim of said State was in contravention of the act of February 28, 1891 (*supra*). Kuhn's final proof being satisfactory final certificate was duly issued thereon.

The State of Washington filed an appeal from the above decision, and under date of November 29, 1895, your office affirmed the action of the local office. A further appeal on behalf of the State brings the case before this Department, the errors assigned being in line with the specifications contained in the protest against Kuhn's entry.

That portion of sections 2275 and 2276, incorporating the act of February 26, 1859 (11 Stat., 385), which has reference to the point under consideration, is as follows:

Where settlements, with a view to pre-emption, have been made before survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors, etc.

The act of February 22, 1889 (*supra*), has a provision in section 11 thereof as follows:

All lands herein granted for educational purposes . . . shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

The act of February 28, 1891 (*supra*), amended sections 2275 and 2276 of the Revised Statutes to read as follows:

Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers

That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands . . . within the State or Territory where such losses or deficiencies of school sections occur, etc.

It has been decided by the Department that the provisions of sections 10 and 11 of the act of February 22, 1889, and those of sections 2275 and 2276 of the Revised Statutes, being in apparent conflict, the same are superseded by the act of February 28, 1891, and that the grants to these States are to be found in and governed by this later act. The Department, in the instructions to your office dated April 22, 1891 (12 L. D., 400), held,

that the provisions of the prior act of February 22, 1889, in so far as they are in conflict with those of said sections 2275 and 2276 of the Revised Statutes as amended by the later act of February 28, 1891, are superseded by the provisions of said sections as amended, and that the grants of school lands to those States mentioned in said act of February 22, 1889, are to be administered and adjusted under the provisions of this later general law.

It is thus apparent from the foregoing that until survey no rights of the State can attach to sections 16 and 36 under the grant; and that settlements made on said sections before survey shall be subject to the claims of such settlers.

The records of your office show that the plat of survey for the land in question was filed in the Seattle land office, and the said land opened to entry, on February 7, 1893.

As previously set out herein Kuhn alleges settlement on September 29, 1890.

Your office decision is hereby affirmed.

PRACTICE—NOTICE—SCHOOL LANDS—SELECTION.

RICE *v.* STATE OF CALIFORNIA.

Service of notice of contest by registered letter is not personal service within the meaning of Rule 9 of Practice.

The title of the State to school lands vests at the date of the completion of the survey, and if the land is not then known to be mineral in character, the subsequent discovery of mineral thereon will not divest the title that has already passed.

The State by a school indemnity selection in lieu of land alleged to be mineral in character waives its claim to the basis, which may be thereupon disposed of as part of the public domain.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (P. J. C.)

The land involved in this appeal is the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 36, T. 11 N., R. 8 W., M. D. M., San Francisco, California, land district, the plat of which was approved and filed in the local office August 9, 1875.

On March 20, 1895, John C. Rice filed an affidavit of contest, alleging that he has known the land since 1890, that it is mineral in character, and ever since deponent first knew the land it has been known to be mineral, being more valuable for mineral than for agricultural purposes.

A hearing was ordered and a copy of the notice sent by registered mail to the surveyor general of California. There was no appearance for the State at the hearing, or subsequently. The contestant submitted his testimony, and the local officers held the land to be mineral in character, known to be such at the date of the survey. No appeal was taken. Your office, by letter of November 5, 1895, reversed the action of the register and receiver on two grounds; first: that service of notice of a hearing by mail was without "authority of law or warrant in the rules of practice;" and second: that the land being in section 36 was granted to the State as school land, "unless said land was known to be mineral in character at the date when said land was surveyed."

The appeal of Rice brings the case before the Department, and the rulings stated above are alleged to be error.

It is stated by counsel in his brief that your office decision is erroneous on the first proposition because.

the record contains the surveyor general's written acknowledgment of the receipt of notice, which is sufficient to perfect service under the doctrine of *Crowston v. Seal*, 5 L. D., 213; *Canal Co. v. Louisiana*, 5 L. D., 479.

The only "written acknowledgment of the receipt of notice" to be found in the record is the return receipt for a registered letter.

The case of *Crowston v. Seal* is overruled in *Elting v. Terhune* (18 L. D., 586), where it is distinctly held that service of notice of contest by registered letter is not personal service within the meaning of Rule 9 of Practice. The other case cited by counsel does not treat of service of notice of contest, but of service of notice of a decision of your office upon one of the parties to a contest, and is therefore not an authority upon the proposition stated by counsel.

On the second proposition it has been repeatedly held that the State's title to school lands under the act of March 3, 1853 (10 Stat., 244), vests at the date of the completion of the survey,

and if the land, although in reality mineral, was not then *known* to be mineral, the subsequent discovery of its mineral character would not divest the title which had already passed. (Abraham L. Miner, 9 L. D., 408; *Pereira v. Jacks*, 15 L. D., 273.)

There is nothing in the affidavit of contest or the evidence submitted to show anything to defeat the operation of the grant. All that is claimed is that cinnabar exists on the surface of the ground and its presence was sufficient to characterize the land as mineral.

While there was no error in your office judgment as the case was then presented, yet there have been some subsequent developments that render it necessary to further consider the matter.

My attention is called to the fact that the State has, subsequent to the initiation of this proceeding by Rice, made indemnity selections in lieu of the land in controversy, two of which—Stockton lists Nos. 220 and 221—have been approved by your office to the extent of sixty acres, and two others—Stockton list No. 222, and San Francisco list No. 5273, 10 acres each—are now pending. It is stated by counsel that all these selections have been approved, but informal inquiry in your office shows the fact to be as above stated. The reason assigned by the State for making these indemnity selections is that the land in controversy is mineral in character.

By act of Congress of February 28, 1891 (26 Stat., 796), Sec. 2275 R. S., was amended, and among other provisions therein is found this—

And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen and thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections.

Under the terms of this statute it is clear that the State may make indemnity selections whenever any of its granted school lands are found to be mineral in character. In reference to the land in controversy the State has, presumably, satisfied itself that it does not fall within the terms of its grant and has selected other lands in lieu thereof. The Department, in commenting on the proviso above quoted, has said:

Conceding that the school grant attached to the specific sections after they were designated by the survey, the State having selected equivalent land in lieu thereof, the government may hold the State to its waiver of the school sections and dispose of it as part of the public domain. (*Gregg et al. v. Colorado*, 15 L. D., 151.)

It seems to me that this rule may be applied in the case at bar, and that the State by reason of its selection is estopped from making any further claim to the land in controversy.

Notwithstanding the decision of your office was correct on the record

as it then stood, yet by reason of the action of the State since the rendition of your office judgment, it is clear that the land in controversy is now a part of the public domain and may be disposed of as such, and that part of your office judgment that held that the land inured to the State under its grant must be vacated.

It is so ordered.

SECOND HOMESTEAD ENTRY—CORROBORATORY AFFIDAVIT.

BOHUN *v.* BREST.

The right to make a second homestead entry may be recognized where the first through mistake was not made for the land intended, and was accordingly relinquished.

An official certificate of the register as to the truthfulness of the applicant may be accepted in lieu of the corroboratory affidavit required in the case of an application to make second homestead entry, where the failure to furnish such affidavit is satisfactorily explained.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (C. J. W.)

On May 25, 1891, Nicholas Brest made homestead entry No. 255 for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 24, T. 24 N., R. 21 E., and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 22, T. 24 N., R. 22 E., Waterville land district, Washington. S. L. Bohun contested the entry, after due notice served by publication, December 8, 1894. On January 15, 1895, the case came on for hearing, and Brest made default. The evidence disclosed the fact that Brest had never lived on or improved the land. The local officers recommended the cancellation of the entry, and there being no appeal, on April 26, 1895, your office canceled said entry.

On filing his contest Bohun made application to enter the land embraced in Brest's entry, and which he alleged Brest had abandoned, and he also filed an application for the restoration of his homestead rights. It appears from the record that on April 26, 1889, Bohun made homestead entry No. 219 for the NW. $\frac{1}{4}$, Sec. 26, T. 15 N., R. 3 W., Guthrie land district, Oklahoma. The same was canceled by relinquishment on November 21, 1889, when Peter Anderson entered the said tract. On January 14, 1895, the local officers forwarded to your office the application of Bohun to make entry of the land covered by his contest and application for restoration of his homestead rights, with the recommendation that the same be granted. On April 26, 1895, your office rejected said application for the reason, and upon the ground, that Bohun's affidavit, in which he set forth the facts upon which he based his right to second entry, was uncorroborated. From this decision Bohun appealed. The principal ground of his appeal is that he is a qualified homesteader, and under the law is entitled to a homestead of one hundred and sixty acres, and that he has never perfected an entry or exhausted his rights. Bohun, in his affidavit, states

that after making homestead entry No. 219 (at Guthrie) he returned to his home in Nebraska, with the intention of going upon the land entered within six months, but was informed by parties at Guthrie that the surveyor, who was employed to run out the lines, had made a mistake, and that the entry had been made on the wrong tract of land in another township, and that before he could return, other parties had filed and made improvements on the land that he intended to file on, and that at the time he was unable to stand the cost of a contest, and that the land embraced in the entry was not desirable and not fit for farming. That he does not remember the names of the parties who would corroborate this affidavit, and could not get their affidavits without going to Guthrie for that purpose. He further states that after finding the error that had been committed, he relinquished the land back to the government on the 21st day of November, 1889, and that he has never had the benefit of the homestead laws, and that he did not sell his right to the land and did not receive the amount of his filing fees.

It is evident that it is the purpose of the law that every citizen possessing the requisite qualifications should be entitled to a homestead of one hundred and sixty acres of public land subject to entry, and that a second entry may be made in instances where, for some cause unforeseen, the first entry has failed without fault or fraud upon the part of the entryman. If the facts set out in the affidavit of Bohun are true, he has not exhausted his homestead rights, and should be permitted to make a second entry. It was evidently not because of the insufficiency of the facts, that your office rejected his application, but because it was held that they were not sufficiently proven—the objection being that the usual corroborating affidavit was wanting. The party is competent to testify in his own behalf, but lest a door for fraud should be opened by depending entirely upon the testimony of the applicant in this class of cases, it has been the rule of the Department to require some sort of corroboration of the truth of the applicant's statements. Your office doubtless sought to follow this rule in rendering the decision complained of. It is not believed that under the peculiar facts of this case, the rule as properly construed would be violated by granting the applicant's petition. The chief office of corroborative evidence of whatever nature it may be is to give assurance of the good faith and truthfulness of the affiant to be corroborated. The reason for the failure in this case to furnish additional affidavits setting up the same facts stated in the applicant's affidavit is given, and that reason is at least forcible. It is followed by evidence of the general truthfulness of the affiant. The register of the land office at Waterville, in forwarding the application of Bohun for restoration of his homestead right, mentions the fact that his showing is not corroborated, and then adds the following—

The tract of land that he makes application for is now held by Nicholas Brest homestead entry No. 255, and Bohun has filed a contest against said tract which I

presume from what I can learn from other parties will be an *ex parte* contest. The register has known Mr. Bohun for sometime, and believes him to be a truthful man, and we would recommend that his right be restored and that he be allowed to make this entry.

The facts stated in Bohun's affidavit are presumptively true, and this presumption is strengthened by the official report of the register to the effect that he knows and believes him to be a truthful man. This report made by an officer of the government, acting under oath, is equivalent to an affidavit, and may be regarded as a substantial compliance with the rule requiring initiatory affidavits to be corroborated. The land he seeks to enter was restored to the public domain through the instrumentality of a contest initiated by him and proof produced by him. It is believed that the showing made is sufficient under the circumstances to authorize the restoration of his homestead right.

Your office decision is accordingly reversed, and Bohun will be allowed to make second entry for the land applied for.

MINING CLAIM—JUDICIAL PROCEEDINGS—SECTION 2332, R. S.

CAIN ET AL. *v.* ADDENDA MINING CO.

Judicial proceedings are not effective as against an application for mineral patent if not based upon an adverse claim as provided by statute.

Continuous possession of a mining claim, with due compliance of law, for a period equal to the time prescribed by the statute of limitations for mining claims, in the State wherein such claim is situated, entitles the claimant under the provisions of section 2332, R. S., to a patent, in the absence of any adverse claim.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897.
(I. H. L.) (E. B., Jr.)

The record in this case shows that The Addenda Gold and Silver Mining Company, a corporation organized under the laws of California, made application November 11, 1879, for patent to the Addenda lode claim, situated in Bodie, California, land district; that the claim was located May 19, 1877; that the period of publication ended January 17, 1880; that during the period of publication the said application was adversely by the owner of the Concordia lode claim, suit duly commenced thereon, and judgment given April 13, 1882, awarding the ground in conflict to the adverse claimant; that on December 10, 1894, the said company made mineral entry No. 240 for what remained after excluding the conflict with the Concordia lode and the Insurance lode; that on April 27, 1895, James S. Cain, Alexander J. McCone, and John W. Kelly filed a protest against said entry, alleging, in effect,—

1. That the Addenda claim had been abandoned by said company subsequent to application for patent and before entry;

2. That in 1894, and subsequent to the alleged abandonment, the Addenda claim had been re-located, and that protestants were owners of the ground under the re-location; and

3. That in November, 1894, they commenced suit against said company to quiet title, which suit was then pending.

In the course of proceedings fully set out in your office decisions of September 3, 1895, and (on review) January 9, 1896, and not necessary to be recited here in detail, your office by its former decision held that protestants' said suit, not having been instituted under any provision of the mining laws, did not authorize any stay of proceedings under the company's application for patent; that it was shown that the company had in good faith endeavored to comply with the mining laws; that the alleged re-location by one P. Curtis, under which protestants claimed, having been made by him while agent of said company, was in fraud of the company's rights, gave protestant no right against the company, was insufficient to defeat its entry; and therefore dismissed the protest. Upon motion for review by protestants, your office, in its latter decision, basing its action largely upon a judgment in favor of protestants in their said suit, made and entered in the superior court of Mono county, California, August 30, 1895, overruled its former decision and held the company's entry for cancellation. The company thereupon appealed, assigning error as follows:

The Commissioner erred in holding that the said Addenda Gold and Silver Mining Company had not complied in good faith with the laws governing and holding mining claims.

The Commissioner erred in holding that the only remedy in the above entitled matter was by an action in equity to hold the re-locators and their grantees trustees for the Addenda Gold and Silver Mining Company.

The Commissioner erred in holding that the Addenda Gold and Silver Mining Company abandoned its claim by failing to file a notice of its intention to hold the said location in good faith under the act of November 3rd, 1893.

The Commissioner erred in holding that there is a final decree in favor of the plaintiffs in the case of *Cain et al. v. Addenda Gold and Silver Mining Company*.

The Commissioner erred in holding that the application for a patent should be canceled instead of suspended during the pendency of the action of *Cain et al. v. Addenda Gold and Silver Mining Company*.

The Commissioner erred in holding that the patent should be held for cancellation on the ground that the Department of the Interior did not have sufficient equity powers to waive a technical violation of the law, where the applicant was not to blame for such violation.

The Commissioner erred in holding the application for a patent for cancellation under the facts recited in his decision of January 9th, 1896.

It is in evidence and not denied that prior to 1886 said company had expended \$100,000 on said claim; that said Curtis was the superintendent of the company during 1885, in their mining operations thereon; that from 1886 to 1892, inclusive, he was the company's agent to see that the annual assessment work was done thereon, the company having no other agent in the neighborhood; that the company sent him \$100 each year during that period to pay for such work, and that he regularly filed each year during that period his affidavit with the district mining recorder, that he had expended that amount in assessment work upon the claim in behalf of said company.

On November 23, 1893, Congress passed an act (28 Stat., 6), excusing assessment work on a mining claim for that year upon the filing for record in the office where the location certificate was on file a notice that the claimant in good faith intended to hold and work the claim. Such notice was sent by the company to Curtis in November, 1893, to be duly filed. He admits the receipt of this notice, but not that he agreed to file it. John Dixon, a director and former president of the company, swears positively that Curtis did agree to file the notice in a letter to him dated December 5, 1893. He did not file it, but on January 1, 1894, re-located the claim, under the name of the Black Rock Consolidated lode claim, and on May 2, 1894, made a conveyance of the same to said Kelly. Kelly made a location covering the Addenda ground and some additional ground, on June 18th following, which he called the Contention Mine, and subsequently made conveyances of one third interests, each, thereunder, to Cain and McCone.

I am convinced from the evidence that Kelly knew of the relations between Curtis and the Addenda Company, and that Curtis had taken advantage of these in an attempt to surreptitiously gain possession of the company's claim; and am also convinced that the company attempted in good faith to comply with the act last above mentioned, and supposed, until long afterward, that it had duly complied. There was no intention on the part of the company to abandon the claim. It must be conceded, however, that the company did not in fact comply with the said act. But the law, generally speaking, does not look with favor upon a forfeiture of property, and the Department is not, therefore, disposed to extend any aid toward these protestants in their insistence upon a forfeiture, under all the circumstances, but, on the contrary, to construe the law in the case strictly against them.

They are not here as adverse claimants in any sense under the mining laws, but merely as *amici curiæ*—friends of the court. They have a right to protest under section 2325 of the mining laws (Revised Statutes), but no right to contest. They may not assert any claim as against the applicant for patent, but only challenge the applicant's claims under the law (*Wight v. Dubois et al.*, 21 Fed. Rep., 693). The judgment on the suit to quiet title which protestants set up and which appears to have become final on failure of the company to appeal therefrom within a year from the entry thereof (Sec. 939 Cal. Code of Civil Procedure—Deering), is not a judgment on an adverse claim, and not, therefore, effective against the company in their proceedings for patent.

Although Curtis testifies that the assessment work done on the Addenda under his supervision from 1886 to 1892, inclusive, was done perfunctorily, contributed little if at all to the development of the claim, and that only \$95 of the \$100 sent him was applied toward actual labor thereon, the other five dollars going to pay for recording the affidavit of labor, the company is shown to have been in unquestioned possession during all that time, and I think it may be safely held that the work was a sufficient compliance with the mining laws

in the absence of any attempted re-location during that time, or any adverse claim. Under a state of facts analogous to the present case the Department held, in *Stewart et al. v. Rees et al.* (21 L. D., 446), under authority of section 2332 of the Revised Statutes, and the cases cited, that—

If the claimant has been in possession and worked the Jaw Bone [mining claim] for the period prescribed by the statute of limitations for mining claims in Montana, prior to the re-location by the protestants, he is entitled to have the same passed to patent, at least as against these protestants (*Glacier v. Willis*, 127 U. S., 471; 420 Mining Co. v. Bullion Co., 1 Mont. M. R., 114).

The Jaw Bone mining claim was located in Montana, but section 2332 of the Revised Statutes is applicable to mining claims in any "State or Territory." It reads—

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

The "time prescribed by the statute of limitations for mining claims" in California is five years. A mining claim in California is real estate (*John Melton et al. v. Orville D. Lambard*, 51 Cal., 258), and the period of limitation as to actions for the recovery of real estate is five years from seizin or possession of "the plaintiff, his ancestor, predecessor or grantor." (Sec. 318 Cal. Code of Civil Procedure—Deering; and *Morris v. De Celis*, 51 Cal., 55.) The Addenda company having held and worked its claim continuously for more than five years immediately prior to the alleged re-location, it is, under section 2332 of the Revised Statutes, and *Stewart et al. v. Rees et al.* (*supra*), entitled to have the same passed to patent, as against these protestants.

Your office decision of January 9, 1896, herein, is accordingly reversed, and said protest dismissed, and you will pass the Addenda claim to patent, subject, however, to any objections appearing in the record and not herein considered.

RAILROAD GRANT—LANDS EXCEPTED—PRE-EMPTION FILING.

NORTHERN PACIFIC R. R. Co. v. ROGERS.

Land embraced within a pre-emption filing of record at the time when a railroad grant becomes effective is excepted from the operation of the grant, and the company in such case is not entitled to question the legality of the filing or the qualifications of the pre-emptor.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (P. J. C.)

The land involved in this appeal is the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 1 and 2, Sec. 5, Tp. 1 N., R. 4 W., Helena, Montana, land district, and

is within the primary limits of the grant to the Northern Pacific Railroad Company, as shown by its map of definite location filed July 6, 1882. It is also within the limits of the withdrawal on general route, which became effective February 21, 1872, and was listed by the company (list No. 12), July 28, 1886.

It appears that one John Paul filed pre-emption declaratory statement for the tracts, April 24, 1871, alleging settlement March 1, previous. He subsequently offered final proof, which was rejected by the local officers, because he was not qualified to file for or enter the land, for the reason that he had prior thereto completed a pre-emption for land in Colorado, upon which patent had issued. After the rejection of his final proof he entered into a contract to purchase the land of the railroad company. It also appears that one Bennett Degenhart, on December 27, 1883, presented his application to make homestead entry of said tract, alleging settlement in July, 1882, and on the protest of the railroad company against the acceptance of the same a hearing was had, and on final appeal to the Department Degenhart's application was rejected. (*Degenhart v. Northern Pacific*, 15 L. D., 159.) A motion for review of this decision was denied, December 21, 1892, and the case against Degenhart was formally closed on the records of your office.

The present controversy arises on the application of Thomas B. Rogers, filed in the local office August 21, 1895, to make homestead entry of the tract, on the ground that under the decision of Supreme Court in *Whitney v. Taylor* (158 U. S., 85,) the pre-emption filing of John Paul, existing of record on February 21, 1872, the date of the withdrawal of lands within the limits of the grant, excepted the land from the operation thereof.

On consideration of this application your office, by letter of September 23, 1895, decided that, under the doctrine of the *Whitney-Taylor* case, the land was excepted from the grant. The connection of the other parties with the case was stated, substantially, as above, then the following order was made:

Should this decision holding the company's list for cancellation as to the land involved become final, and should it appear upon an investigation that Paul and Degenhart have abandoned their respective interests in said land, Mr. Rogers will be permitted to make homestead entry therefor, in accordance with his original application, but not otherwise. If Mr. Paul is, as he claims, a *bona fide* purchaser of the land from the railroad company, it would appear that he is entitled to relief under act of March 3, 1887, and in any case should the railroad claim be eliminated and other parties set up a claim to the land, a hearing will be necessary in order to determine the respective rights of all adverse claimants.

From this judgment the railroad company has appealed, assigning as error, (1) in holding the expired pre-emption filing of John Paul was sufficient to except this land from the operation of the grant, and (2) for any reason to have rejected the claim of the company.

It is contended by counsel that, inasmuch as the question as to the

right of the company to select this land was decided in its favor in the case of *Degenhart v. Northern Pacific* that this case is *stare decisis*; that the decision in that case

should be conclusive, and inasmuch as it was then affirmatively found that Paul was not a qualified pre-emptor, it necessarily follows that his filing was an absolute nullity, and could have no possible effect upon the operation of the railroad grant.

I do not conceive this position of counsel to be sound. It is shown that Paul's filing was of record and uncanceled at the date of withdrawal on general route, and also of definite location. Under the doctrine of the *Whitney-Taylor* case, as construed by the Department in *Fish v. Northern Pacific* (23 L. D., 15), this filing excepted the land from the grant, and the company can not be heard to question the legality of the filing or the qualifications of the pre-emptor. The test should be: was there a filing on record at the time. If there was, it was then simply a question between the government and entryman, in which the railroad company would not be permitted to be heard.

Your office judgment is therefore affirmed.

ADDITIONAL HOMESTEAD ENTRY—SECTION 6, ACT OF MARCH 2, 1889.

WALLACE H. HERRICK.

The right to make additional homestead entry under section 6, act of March 2, 1889, is limited to cases where the original entry was made prior to the passage of said act.

Secretary Francis to the Commissioner of the General Land Office, January 8, 1897. (I. H. L.) (S. V. P.)

I have examined the record brought up by the appeal of Wallace H. Herrick from the decision of your office rendered October 10, 1895, rejecting his application to make homestead entry of lot 3, NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ Sec. 26, T. 27 N., R. 21 W., Missoula land district, Montana.

It appears that Herrick made said application August 7, 1895, stating in his preliminary affidavit

I have heretofore made homestead entry of the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 26, T. 30 N., R. 21, for which I hold receiver's duplicate receipt No. 745, issued May 2d, 1895, at U. S. local land office, Missoula, Montana.

The local office rejected said application for the reason that "Wallace H. Herrick has exhausted his homestead right as shown by affidavit accompanying the application, and by records of this office. See 15 L. D., 285." This action you affirmed on appeal. The record of the entry referred to in Herrick's preliminary affidavit accompanies the papers sent up with his appeal, and it appears therefrom that said entry was made January 19, 1893, and commuted May 2, 1895.

It is urged on behalf of appellant that he is entitled to make the entry in question under section six, act of March 2, 1889 (25 Stat., 854), which provides—

That every person entitled under the provisions of the homestead laws to enter a

homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land, as added to the quantity previously so entered by him shall not exceed one hundred and sixty acres.

In the departmental circular issued March 8, 1889 (8 L. D., 314), this provision was held applicable only in cases where the original entry was made prior to the passage of said act, and this construction has since been followed; John W. Cooper *et al.* (15 L. D., 285).

The decision of your office is therefore affirmed.

HOMESTEAD—SETTLEMENT—TRADE AND BUSINESS.

NORTHERN PACIFIC R. R. CO. ET AL. v. WALDON.

The homestead law does not contemplate that the right of entry shall be exercised by one who makes settlement primarily and chiefly for trade and business, and not for agricultural purposes.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (C. J. W.)

On April 6, 1886, John S. Waldon made application to make homestead entry for W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 5, T. 130 N., R. 79 W., Bismarck, North Dakota, land district. The local officers rejected his application, and on appeal by him to your office, their decision was reversed, and on June 30, 1886, Waldon made homestead entry, No. 4317, for S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 5, T. 130 N., R. 79 W. Waldon gave notice of his intention to make final proof August 19, 1889. The taking of such proof was adjourned to August 26, 1889, at which time John A. Rea, as attorney for James G. Pitts and James McLaughlin, and F. M. Dudley and William H. Francis, attorneys for the Northern Pacific Railroad Company filed protests against the allowance of Waldon's proof. The land is within the indemnity limits of said railroad company, and was embraced in list 26 of its selection, filed January 8, 1885.

By letter "F" of March 20, 1895, the case was closed adversely to the right of the company to the land. The protestants do not undertake to set up any prior right in themselves but allege that Waldon never settled upon the land in good faith, intending to claim the same under the settlement laws; that at the date of the alleged settlement the land was not legally subject to either homestead or pre-emption settlement; that the entry and alleged settlement were illegal, made in fraud and bad faith and for the purpose of speculation and trade, and that Waldon has failed to meet the requirements of the homestead law, as to residence upon and cultivation of the land claimed by him. A hearing was had August 27, 1889, with all parties present.

December 21, 1889, the local officers rejected Waldon's final proof. Waldon appealed to your office, and on May 18, 1895, your office affirmed the decision of the local officers and held his entry for cancellation. From this decision Waldon appeals, alleging the following errors:

1st. In finding that Waldon went on the land in question for the purpose of engaging in the hotel business.

2d. In finding that at the time he made settlement on the land in controversy the same was used for the purpose of trade and business in the meaning of Sec. 2258 R. S.

3d. In holding that said land was not subject to entry because used for trade and business.

The protestants having alleged no right in themselves to the land in question, the case will be considered only as between the government and Waldon. If it be true that his settlement was made for speculative purposes, and that he went upon the land for the purpose of engaging in the hotel business, his entry nominally for homestead purposes was a fraud and unauthorized. The evidence of other witnesses, together with Waldon's admissions, leave no room for doubt as to the purpose of his settlement made in July, 1884, on a surveyed town lot, the boundaries of which were recognized and conformed to, in the erection of his building, a plat of the town having been filed with the register of deeds for Emmons county on June 3, 1884. In November, 1884, three months after the commencement of his settlement, he had published in the newspaper the following advertisement:

Merchants Hotel, Winona, D. T.

John Waldon, Proprietor.

This house is conducted in a first class manner, and every attention is paid to the comfort and convenience of travelers, the building is twenty-four by fifty, two stories high. The hotel is well furnished and the culinary department is well supplied with everything the market affords. If you have occasion to visit the beautiful and growing city of Winona do not forget to visit the Merchants.

The short interval between Waldon's settlement and the appearance of the advertisement quoted, had been presumably occupied in the building of the twenty-five hundred dollar house described. Any effort to find evidence of a settlement for agricultural and homestead purposes, in the acts performed by Waldon, or the language used by him in proclaiming his business and location, would prove useless. Waldon evidently appears to much better advantage as a stirring enterprising man of business with speculative projects in mind, than as a pioneer agricultural homeseeker, under the homestead laws. This is not said to his discredit, since it is not the policy of the law to discourage enterprise and industry, in any legitimate pursuit. The law, however, does not permit benefits which it confers upon homesteaders, to be appropriated by those who do not contemplate the use of the land for agricultural purposes, but for business and speculative purposes. It is not unlawful to make settlements for business purposes, but where such settlements are made, the rights thereby initiated must be perfected

under the townsite and not under the homestead laws. So far as the record indicates its status, the town of Winona is unincorporated, and no entry of lands has been made for the benefit of its inhabitants. Affidavits which are a part of the record indicate that improvements located on a forty of the SW. $\frac{1}{4}$, including Waldon's hotel, are worth five thousand dollars. As Waldon's improvements are worth \$2,500, if he was permitted to perfect title to the land through his entry, he would thus become possessed of improvements to the value of \$2,500 made by others. While these improvements in the form of business houses continue to be used and occupied for purposes of trade and business, the land is not subject to entry as a homestead, but may be applied for under the townsite laws. It is not decided that if Waldon had made his settlement in advance of any others, and for homestead purposes, that the entertainment of the public at his home for profit, would forfeit his right to perfect his title under his homestead entry, but the evidence shows that not only was the building of a town on this land in contemplation, but that at least three buildings were constructed, or in process of construction on this quarter, before Waldon made his settlement and commenced the erection of his hotel, and under such circumstances he must be held to have made his settlement primarily and chiefly for trade and business, and not for agricultural purposes.

Your office decision is therefore affirmed.

SWAMP LAND—HOMESTEAD—ACT OF JUNE 17, 1892.

HOLCOMB *v.* STATE OF CALIFORNIA.

The preferred right of homestead entry accorded to actual settlers, by the act of June 17, 1892, opening the Klamath River Indian reservation, does not extend to lands returned as swamp and overflowed, and so represented on the approved township surveys and plats.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (C. J. G.)

Phineas D. Holcomb has filed an appeal from your office decision of June 7, 1895, holding for cancellation his homestead entry, made May 22, 1894, for lot 5, Sec. 3, and lots 8 and 9, Sec. 4, T. 13 N., R. 1 E., Humboldt land district, California, to the extent that his said entry conflicts with the claim of the State under the swamp land grant.

The above described land is within what was the Klamath River Indian reservation in the State of California, set apart and reserved under authority of law by an executive order dated November 16, 1855.

The land is also claimed by the State of California under the swamp land grant of September 28, 1850 (9 Stat., 519).

The act of July 23, 1866 (14 Stat., 218), as incorporated in section 2488 of the Revised Statutes, provides as follows:

It shall be the duty of the Commissioner of the General Land Office, to certify over to the State of California as swamp and overflowed lands, all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23d day of July, 1866, under the authority of the United States.

Surveys and plats of the township in which the land in question is situated were made in the years 1878, 1881 and 1886. The lands within these surveys were returned as swamp. The map of survey, conformable to the field notes on file in the Humboldt land office, was approved July 30, 1889, and the tract in question was therein segregated and designated as swamp land.

It was upon the above showing that your office held Holcomb's homestead entry for cancellation, as being in conflict with the claim of the State of California.

Under the act of June 17, 1892 (27 Stat., 52), the lands embraced in what was Klamath River Indian reservation were opened to settlement under the laws of the United States granting homestead rights, and it was stated in the second proviso of the act as follows:

And any person entitled to the benefits of the homestead laws of the United States who has in good faith prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon.

It is under the above act that the appellant herein prefers his claim. In his appeal to this Department he alleges that the land in question is not swamp and overflowed land. In face of the return made by the U. S. surveyor-general for the State of California as to the character of this land, and numerous decisions governing such matters, it would seem that the appellant's allegation is impotent to change the ruling made by your office. In the case of State of California (23 L. D., 230, on review), vacating departmental decision of March 17, 1892 (14 L. D., 253), it was held:

Under the first paragraph of section 2488 R. S., the return of the land as swamp and overflowed, by the U. S. surveyor-general for the State of California, is conclusive evidence as to the character of the land so returned and represented as such on the approved township surveys and plats; and lands thus returned must be certified to the State as inuring thereto under the swamp grant.

In *State of California v. United States* (3 L. D., 521) referring to the first clause of section 4, act of July 23, 1866 (*supra*), it was said—

Under this clause, it is clear that the State has no valid claim to the land in question, unless it is represented upon the approved township survey and plat, as swamp and overflowed land, and, if the tract is so represented, then it matters not what the real character of the land is, whether swamp and overflowed or dry, the State is entitled to the tract. *Central Pacific R. R. Co. v. California* (4 C. L. O., 151).

In *Heath v. Wallace* (138 U. S., 573), referring to the same section, the court said—

As held in *Tubbs v. Wilhoit*, *supra*, this section of the statute established rules or methods for the identification of swamp and overflowed lands in California, which superseded all previous rules or methods for that purpose. The several rules or methods provided for were intended to meet any emergency that might arise, and thus give to the State all the swamp and overflowed lands within her limits. The method provided in the first clause was but one of several specified in the section. But one thing was required to be shown under this clause—only one kind of evidence as to the character of the lands was necessary—in order to give the State the right to demand the certification of them over to her as swamp and overflowed lands; and that evidence the United States furnished in the plat of the survey of the township in which the lands were situated. An inspection of the township plat would show whether or not any lands in the township were returned as swamp and overflowed. If they were, that designation was sufficient and conclusive evidence, under the first clause of section 4 of the act, to establish the title of the State to them.

The swamp land grant to the State of California was a grant *in praesenti* taking effect at the date of the passage of the act (*Wright v. Roseberry*, 121 U. S., 488). In his appeal to this Department Holcomb alleges that he settled on the land in question in the year 1883. He also contends that the terms “all of the lands” and “any lands” employed in the act of June 17, 1892, *supra*, cover his claim. Prior to the passage of said act the land involved herein was embraced in the Klamath River Indian reservation. It is true that the act of June 17, 1892, recognizes the rights of settlers on this reservation, but at the same time it can not be successfully contended that the said act recognized such rights to be superior to those of the State under the swamp land grant. If his said alleged settlement had been made upon any lands within the reservation allotted under the first proviso of the act and reserved for the permanent use and occupation of any village or settlement of Indians, it would readily be conceded that such settlement by the appellant could not avail. The act of June 17, 1892, while not in terms excepting the lands included in the swamp grant to the State, could not at the same time include them without express mention. It is a reasonable presumption that Congress intended by the said act to open to settlement only those lands owned by the United States, and that it had no intention of disposing of lands which had long since passed from government control. When, therefore, the phrase “all of the lands” was employed by Congress it is reasonable to suppose that all of the land not otherwise disposed of within the Klamath River Indian reservation, was meant. No other construction can be put upon the language of the act, unless it be held that Congress intended to repeal the swamp land act. This proposition is entirely too improbable to require serious consideration.

As heretofore set out a survey of the township in which this land is situated was made as early as 1878. All the township lines were completed in 1886. As was stated in the case of *Heath v. Wallace*, *supra*, an inspection of the township plat would have shown whether

or not any lands in the township were returned as swamp and overflowed. The appellant was thus charged with notice.

The appellant claims that he has been discriminated against, in this, that lands in this reservation returned as swamp have in certain cases been allotted to Indians. Provision is made in the act of June 17, 1892, for the allotment of lands within the reservation to the Indians under certain conditions. Without considering why allotments were made of lands returned as swamp in the particular instances cited by appellant, it is sufficient to say that such action could not inure to his benefit, nor justify the Department in allowing his entry on that account. Even though the said allotments were made through inadvertence or mistake, that fact could not avail as a reason why the Department should allow the appellant's claim in face of the prior approval of this land to the State under the swamp land grant.

The appellant likewise requests that action in this case be deferred pending the disposition by the superior court of the State of a suit initiated for the purpose of determining the character of the land in question. It would seem that nothing could be gained by awaiting the decision of said court as suggested. The Department would probably not interfere with the action heretofore taken in face of the decisions cited herein. That action is in harmony with the policy of the Department. Whatever the decision of said court may be, it could not interfere with the suggestion contained in your office decision regarding the procurement of a relinquishment from the State by the entryman.

Your said office decision is hereby affirmed.

RAILROAD GRANT—BENEFICIARY—LANDS EXCEPTED.

PHILLIPS *v.* SIOUX CITY AND PACIFIC R. R. CO. (ON REVIEW).

The effect of section 17, act of July 2, 1864, was not to make a new grant but to provide a new beneficiary under the original grant of July 1, 1862, as to the Sioux City branch, and said beneficiary could only take such lands as were capable of passing under the original grant; and would therefore not acquire title to lands that were a part of the bed of the Missouri river at the date of the original grant.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (J. L.)

This case involves lots 10 and 11 of section 1, and lot 1 of section 2, containing in the aggregate 59.60 acres, in O'Neill land district, Nebraska, in a township and range designated sometimes as T. 88 N., R. 48 W., of "5th" principal meridian, Dakota Territory, and sometimes as T. 29 N., R. 8 E., of "6th" principal meridian, Nebraska.

The facts are stated in the departmental decision of March 24, 1896, published in 22 L. D., 341. The decision was, that by the acts of July 1, 1862 (12 Statutes, 489), and July 2, 1864 (13 Statutes, 356), Congress

did not intend to grant *in presenti*, as public land for railroad purposes, a part of the bed of the Missouri river, which was then and from time immemorial had been covered by the waters of its main channel; and that therefore the lots of land in controversy did not pass under the grant.

The case is now before the Department for reconsideration upon a motion for review of said decision, filed by the "Missouri Valley Land Company, as successors in interest of the Sioux City and Pacific Railroad Company, and present owner of the land grant for the benefit of the latter company;" which motion has been entertained.

The specifications of error filed with the motion and the brief of counsel filed in support thereof allege matters both of law and of fact, and claim, substantially, that under the 17th section of the act of July 2, 1864, amending the 14th section of the act of July 1, 1862, the grant under which the Sioux City and Pacific Railroad Company claimed was not a grant *in presenti*, but was a conditional grant, intended to take effect *in futuro*, upon and after the

happening of certain contingencies, namely, that a company should be found willing to accept the grant and to carry out the purposes of the law; second, that the President should designate such company to that end; third, that a road should be built across Iowa or Minnesota to Sioux City; and fourth, in the absence of the construction of a road to Sioux City as aforesaid, then such road (or company) as should accept the promised grant by the act of 1864, might after the lapse of eighteen months from the enactment thereof proceed to the construction of the road contemplated by said grant.

In specification 5, it is claimed, that

the grant by the said 17th section not being *in presenti*, but rather the promise of the future conveyance of lands, did not become operative, and the title did not vest until the definite location of the road on January 4, 1868.

The facts alleged by counsel, and the facts developed by reference to the records of your office, so far as material, are:

1. That on December 24, 1864, the President by its request designated the Sioux City and Pacific Railroad Company to construct the railroad from Sioux City westwardly under the 17th section of the act of 1864. Said company filed its map of general route on June 27, 1865, and its map of definite location on January 4, 1868.

2. That in the spring of the year 1867; the Missouri river by an extraordinary avulsion cut for itself a new channel, and left its old bed, which includes the lots in controversy. The surveyor general's report, dated May 20, 1868, shows that *at that date*, the greater part of the 59.60 acres in contest was covered with the waters of an oblong lake following in its length the courses of the old bed of the river, and found to be impassable by the surveyor who had been sent out on April 30, 1868, to examine, survey and report upon the changes made by said avulsion. The waters of said lake were evidently waters left by the Missouri river, which had not evaporated or been absorbed enough to uncover the land. It is a fair inference as matter of fact, that on

January 4, 1868, the date of definite location, nearly if not quite all of the land in contest was covered by said lake.

From the standpoint of the railroad company, the foregoing facts suggest for consideration by the Department three questions: Whether under the grant title passed to the company, on December 24, 1864, the date of the President's designation by request; or on June 27, 1865, the date of the filing of the map of general route, which was certainly an acceptance by the company of the Presidential designation; or on January 4, 1868, the date of the definite location?

This Department is of opinion that the acts of July 1, 1862, and July 2, 1864, were laws of the land, as well as grants of public property, and that the grants of certain odd-numbered sections of public land described in the act of 1862 were grants *in presenti*. The Union Pacific Railroad Company, a corporation provided for by said act, and the grantee named therein, was not then in existence, and did not come into existence for several months after the passage of the act, upon compliance with the terms and conditions prescribed by Congress. Whatever may have been the common law rule in respect to the necessity for a grantee *in esse* at the date of a grant, it was so far modified by the act of Congress, that the non-existence of the grantee at the date of the grant did not in this case prevent the grant from taking effect immediately.

In the case of the Missouri, etc., R. R. Co. v. Kansas Pacific R. R. Co. (97 U. S., 497), the court said:

It is always to be borne in mind in construing a congressional grant, that the act by which it is made, is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only as to transfers between private parties.

By the 17th section of the act of 1864, Congress released the Union Pacific Railroad Company from its obligation to build the branch from Sioux City westward, and provided for the substitution of another grantee of the lands previously granted to aid in the construction of said branch, to be thereafter designated and approved by the President. The effect of this legislation was not to make a new grant but to provide a new beneficiary under the original grant of July, 1862, as to said branch. Such new beneficiary was to be entitled, in aid of the construction of said branch, to the lands granted by the said original act. In other words, it was to take and could take such lands only as were in existence at the date of said original act, and of the character described therein, and capable of passing thereunder.

It is therefore held that upon the designation and approval by the President, on the request of the company, as provided, the lands granted by the original act in aid of the Sioux City branch, passed to the designated company; and that the lots of land here in question being, at the date of the original grant of July, 1862, part of the bed of the Missouri river, did not pass to said new beneficiary company.

It is unnecessary to consider and decide any other question presented in connection with the application for review and reconsideration. For the reasons above stated the departmental decision of March 24, 1896, is adhered to.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

BRADFORD ET AL. v. DOTY.

Where there is doubt as to the actual boundary of lands about to be opened to settlement, and a government official, for the purpose of securing equal opportunities to all, designates a line from which the run shall be made, it is incumbent upon one who disregards such designation to show that by such action he gained no advantage over others.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (C. J. W.)

On September 22, 1891, Charles J. Doty made homestead entry No. 7761, for lots 1 and 2 and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 18, T. 17 N., R. 1 E., Guthrie, Oklahoma.

On October 1, 1891, Harry Pulliam filed his affidavit of contest; alleging that Doty entered on and occupied said land before noon of September 22, 1891, and that he (Pulliam) settled on said land immediately after twelve o'clock, noon, of September 22, 1891, before Doty or any one else had made a legal settlement thereon.

On October 5, 1891, Nettie J. Bradford filed her affidavit of contest, alleging that she made settlement on said land immediately after noon of September 22, 1891, and that she has improved the land, and resides on it, and that she made her settlement before either Doty or Pulliam and before Doty made entry.

A hearing was had at the local office at Guthrie on March 29, 1892, at which all the parties appeared and submitted testimony.

On December 17, 1892, the local officers found as follows:

The land embraced in this proceeding lies immediately east of the meridian line in the Iowa country and north of Langston, Oklahoma.

All of the parties, Doty, Pulliam, and Bradford, testify that they were along the meridian line at noon, September 22, 1891, and immediately after twelve o'clock of said day they stepped across the line, claimed and staked said tract of land as a homestead. As shown by the evidence in this case, exactly where the meridian line was, as understood by those congregated along the line at Pulliam's farm, was uncertain and unknown. Some of the people assembled there thought the fence of Pulliam (father of Harry) was on the line, and others were under the impression that the Iowa line was east of the fence. With this uncertainty touching the Iowa or meridian line the hour of twelve o'clock, September 22, 1891, arrived, and at the signal given by the marshal "to go," the respective parties according to their testimony "rushed" on the claim in dispute and set their stakes and claimed the same as a homestead a few seconds after twelve o'clock noon, September 22, 1891. The substance of the testimony of Lillian Hewitt is, that she was "standing right west of the gap cut by Harry Pulliam in his father's wire fence, and that Harry

Pulliam was also standing west of the gap, and when the word was given "to go," Harry Pulliam ran and stuck his stake on the claim in controversy; that Doty stood to the south of the post where the wire was cut, and on the east side of the fence; that Mr. Riggs told Doty that he had better step back inside of the fence or he would be a "sooner;" that Doty paid no attention to the suggestion of Mr. Riggs; that Harry Pulliam stuck his stake before Doty did his on "that corner;" that Pulliam's stake was six or eight feet from the line or wire fence. The testimony of Samuel Dennison discloses that Pulliam has almost 160 acres fenced "lacking a little;" that Doty has about three acres broken; that no corner stone was found, and that witness did not know where the correct corner stones were located.

Nathaniel H. Potter testified that he was on the line of the Iowa country September 22, 1891, and saw Miss Nettie J. Bradford standing near the corner of the land in contest with a board or stake in her hand, and that she has continuously resided on said claim.

The testimony of James Miller discloses that Miss Bradford has been living on the claim in dispute from the 8th of November to April, 1892.

As shown by the testimony of Charles Gandell, Miss Bradford on the opening day was at the corner post of Mr. Pulliam's fence and jumped over and stuck her stake there like the rest of them did.

Miss Nettie J. Bradford testified that she made settlement on the land in controversy directly after twelve o'clock September 22, 1891, and when the signal was given she stepped four or five steps and set her stake. It will be noticed that Miss Bradford was standing near the northwest corner of the land in contest and about half a mile north of Doty and Pulliam, at noon of September 22, 1891. By implication Nettie J. Bradford and Harry Pulliam in their contest affidavits charge Charles J. Doty with having entered upon and occupied said tract of land in violation of law and the President's proclamation. If we are correct in our conclusions to this implied charge on the part of Miss Bradford and Harry Pulliam against said Doty, it necessarily follows, in our judgment, that they admit that Doty made prior settlement upon the land in dispute September 22, 1891. In our opinion Doty located on said tract of land on the opening day as quickly as either of the other parties in this proceeding. Doty, however, testified that he was standing on the east side of the fence with one leg under the wire; that no one spoke to him or said anything about being a "sooner;" that there was no one spoke to him or laid their hands on him outside of Mr. Ballard (the marshal); that the first intimation he received in regard to being a "sooner" was after he had stuck his stakes. As between Doty and Pulliam, Doty testified that he did not know which of them stuck his stake first on the claim in controversy (page 389). The testimony of Harry Pulliam touching the time when he "jumped across the line and stuck a stake the first thing" in substance is, that Doty was standing southeast of Pulliam on the east line of the wire fence and immediately after the run Doty was noticed by Pulliam a little south and a little west distant about eight or ten feet (page 323). According to Pulliam's testimony, Doty being a little south and a little west of Pulliam is evidence that he had not traveled as far as Pulliam from the line, and therefore everything being equal (and there is no evidence to the contrary) stuck his stake first, possibly.

The testimony, however, of Doty on this point controls our judgment, inasmuch as he testified that he did not know whether Pulliam stuck his stake first or not, therefore we accept his testimony and the testimony of Pulliam and Miss Bradford, and find that we do not know from the evidence in this case which one of the parties in this proceeding, Doty, Pulliam, or Miss Bradford, first made settlement on the claim in dispute in the afternoon of September 22, 1891. So far as the meridian line being where the east wire fence was located on Pulliam's claim is concerned, the substance of E. C. Dodd's testimony on this question is, that by using a transit as testified to by F. S. Pulliam, accuracy could not be obtained; and that in order to

secure accuracy, the proper deflection of the needle, the difference of time from the original survey, the proper variations and the solar system would be necessary to secure accuracy.

F. S. Pulliam in his testimony disagrees with Surveyors McCoombs and Dodd, as to the correct method of ascertaining the meridian, standard correction and township lines. Mr. Pulliam testifies that at the time he built his fence the Iowa reservation had not been allotted, and that he put his fence on the east side of his claim in order to take in all of his ground on the east side of the same; that he knew that thirty-three feet on each side of the section line should be left for road purposes; that there was a trail along the east line of his fence, and that a considerable number of the people living north used this trail or road. On page 299 of record, Mr. Pulliam testified that he moved his first fence put along the east side of his claim, west about twenty feet, and that he intended to leave twenty feet "for the road;" that he knew that the law required thirty-three feet on each side of the section line should be left for a road, but did not believe the law applied to the boundary line of the Territory. By an act of Congress it is provided that a space of sixty-six feet shall be left between the sections in Oklahoma for the use of the public as a highway; we know of no law that provides for a different rule along the boundary line of the Territory which constitutes, as claimed by F. S. Pulliam, forty feet instead of sixty-six feet as a public highway along the boundary line of Oklahoma. If our position is correct in the premises, it follows, we think, that Pulliam's fence on the east side of his claim, according to his testimony, was thirteen feet west of the Iowa or meridian line on the opening day, and hence according to the evidence in this case, neither Pulliam nor Doty made their first settlement on the claim in dispute, but settled and staked upon Oklahoma lands homesteaded by F. S. Pulliam, father of contestant Harry Pulliam. However, the uncertainty about where the legal location of the meridian line was at the time and place when the respective parties made settlement on said claim in the afternoon of September 22, 1891, and the unusual circumstances attending their settlement upon said tract of land, creates so many doubts in our judgment, that we cannot arrive at any conclusion in this case different from the findings of the Hon. Commissioner of the General Land Office in the case of Miranda O. Jackson, now Cox, *et al. v. Samuel G. Garrett* (letter "H" June 30, 1894). In the case referred to, the land immediately south of that in controversy was taken on the opening day by the parties mentioned in said decision under similar circumstances as the one in dispute was taken by Doty, Pulliam and Miss Bradford, all of the parties on the opening day stepping across the line and claiming the respective tracts of land as a homestead. We are of the opinion that the rule applied by the Hon. Commissioner of the General Land Office in the case of Miranda O. Jackson *et al. v. Garrett*, so far as division, etc., applies in the case now before us.

Therefore we recommend that Charles J. Doty, the entryman, Harry Pulliam, first contestant, and Nettie J. Bradford be allowed to make a division of the land in contest, having regard for the legal subdivisions, and that if they are unable to come to an agreement that the claim be sold to the highest bidder of the three.

From this decision Doty and Pulliam appealed to your office.

On May 11, 1895, your office found as follows:

So far as the evidence shows the facts, I am of the opinion that Doty violated the law by voluntarily and purposely entering on the land before noon of September 22, 1891, and that he is, therefore, disqualified. Homestead entry No. 7761 is therefore held for cancellation.

As both Miss Bradford and Pulliam have made a reasonable compliance with the law by their improvements and residence on the land, and as Miss Bradford's improvements are on the north half and Pulliam's principal improvements on the south half, it would be but equitable to divide the land between them, and it is so ordered.

From this decision Doty has appealed. The chief grounds of exception to your office decision are, that it was error to hold:

1. That he was a "sooner" and disqualified.
2. That it was error to hold that the east line of Pulliam's fence was exactly on the meridian line.
3. That it was error to hold that

the belief that the Pulliam fence was on the meridian line was acted on by the deputy United States marshal on duty at that place, and who advised the parties there, September 22, 1891, for the purpose of making settlement, to remain on the west of said line until the signal was given, which advice seems to have been followed with very few exceptions.

This last assignment of error presents the vital question in the case. The record sustains your office as to fact that the deputy U. S. marshal acted on the belief that the Pulliam fence was on the meridian line, which was acquiesced in by the bulk of the people present. For the purpose of securing equal chances to all, the officer in charge had the right to locate and point out the line from which all should start. Doty did not acquiesce in this decision and belief, but stayed outside, and made his start from the outside of the fence. Presumably, in so doing he acquired advantage over those who stood inside the fence, and he at least assumed the burden of being able to show that he gained no advantage over Pulliam and Miss Bradford by so remaining outside. This he has failed to do, and it follows that his entry must be canceled.

This disposes of Doty's entry, and leaves the controversy between Pulliam and Miss Bradford. They seem to have made little effort to show any precedence of the one over the other as to the time each staked the claim. They are upon terms of equality in the matter of improvements. Neither the local officers nor your office has undertaken to settle the question of priority in settlement as between them. Miss Bradford has not appeared as an appellant at all. Pulliam has not appealed from your office decision, wherein you award half of the tract by subdivisions, on which her settlement and improvements are located, to Miss Bradford. Their consent to this adjustment is inferred, from their mutual acquiescence, and there being no longer an entry in question, your office decision is affirmed.

SOLDIERS ADDITIONAL HOMESTEAD—CERTIFICATE OF RIGHT.

JOHN H. HOWELL.

Soldiers additional homestead certificates of right, regularly issued, and located by bona fide purchasers thereof, but thereafter canceled for illegality, and so remaining unsatisfied at the passage of the act of August 18, 1894, are by said act validated, and may be reissued for the benefit of a bona fide purchaser thereof.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897.

(I. H. L.)

(F. W. C.)

With your office letter of December 12, 1896, were forwarded the papers in the matter of the appeal of John H. Howell from the action

of your office taken in the decision of October 12, 1896, denying his application for re-certification of the certificates of additional right under section 2306 of the Revised Statutes in the names of Mary Rollins, Richard W. Hunt, and Lorenzo J. Rowland.

This matter has been made special upon the recommendation of your office, it being stated that a decision thereon will form a precedent to be followed in other cases.

The history of the certificates of additional right herein involved, as gathered from your office decision, is as follows:

The certificate in the name of Rollins was located at Fargo, North Dakota, May 5, 1879. By your office letter "C" of June 10, 1884, the entry was adjudged illegal for the reason that the signatures of the witnesses and the entryman are written by one and the same person. Further, that the name of James F. Rollins, on whose account the certificate was issued, is not found upon the rolls of Company "A" Second Arkansas Infantry, as claimed. The party in interest was therefore allowed sixty days within which to show cause why the entry made upon the location of said certificate should not be canceled, or apply to purchase the tract under the provisions of the act of June 15, 1880 (21 Stat., 237).

On September 10, 1884, Stephen E. Randall, who claimed to be the then owner of the land under transfer from the entryman, purchased the tract under the provisions of the act of June 15, 1880, and upon said cash purchase patent issued.

The certificate issued in the name of Hunt was also located at Fargo, North Dakota, May 28, 1879, and by your office letter "C" of April 20, 1882, Hans Larson, who claimed to be the party in interest under said entry, was informed that the papers upon which the entry was based were of doubtful execution and he was therefore allowed sixty days within which to establish the legality of the papers or file proper application to purchase the tract under the provisions of the act of June 15, 1880 (*supra*). He availed himself of the latter privilege, and upon his purchase patent issued.

The certificate issued in the name of Rowland was also located at Fargo, North Dakota, May 5, 1879. After said location Rowland filed an affidavit in which he charged that he never executed the papers upon which the certificate and entry were based, and upon the testimony taken at a hearing ordered on said allegation the certificate was held to have been fraudulently obtained and was canceled together with the entry made thereon.

It appears that all three of the certificates before referred to were held by Charles D. Gilmore under powers of attorney which practically amounted to a sale of the right, in which the power to locate and to sell the land and to appropriate the proceeds thereof was given to Gilmore, the power being made irrevocable in consideration of the sum of one hundred dollars.

Gilmore it appears transferred these rights to William Milliken, whose name was substituted in the powers of attorney before referred to, and by said Milliken, as attorney in fact, the location of the certificates was made.

These certificates it would appear were illegally obtained, but there is nothing in the papers to connect Milliken with the frauds, and your office decision in no wise questions the *bona fides* of his purchase. The certificates issued have never been satisfied: it appearing that two of the parties invoked the provisions of the act of June 15, 1880, to enable them to purchase their lands, because of the "attempted" but ineffectual transfer; and the other party losing the land entirely by cancellation of the entry. From an affidavit executed by Howell, accompanied by a bill of sale executed by Sarah M., and Ida C. Milliken, it would appear that he (Howell) purchased the rights under said certificates from Sarah M. and Ida C. Milliken, the widow and surviving child of William Milliken, deceased, on August 1, 1896.

Howell's application for re certification of the right was made under the act of August 18, 1894 (28 Stat., 397), as construed in the Pillsbury case (22 L. D., 699). Your office denies the application for the reason that two of the tracts covered by the location of the certificates of right, in the names of Rollins and Hunt, were perfected under the act of June 15, 1880,

and it is not shown that the parties who purchased the tracts from the government were reimbursed by Milliken or his heirs for their outlay for a worthless title. (Further) it appears of record that Howell drew the several entries above mentioned from the files for examination at least as early as June 15, 1896; hence, prior to his purchase of these certificates he was aware of their invalidity. It is therefore held that he is not an innocent purchaser in the meaning of the act of August 18, 1894.

These objections I do not deem sufficient ground upon which to deny the right applied for.

As to the reimbursement to the persons who, in order to secure title to the lands covered by the locations of these certificates issued in the name of Rollins and Hunt, were obliged to purchase the lands at the government price, this is purely a matter between the parties in the settlement of which this Department can have no interest, inasmuch as the right to reimbursement, if any exists, cannot be regarded as a lien upon the certificates.

The question remaining for consideration is, therefore, whether these certificates were confirmed by the act of August 18, 1894 (*supra*), for if they were, Howell did not on August 1, 1896, purchase invalid certificates but validated certificates.

In the case of John W. Rankin (on review 21 L. D., 404), it was held:

But in the light of the history of this legislation, I am constrained to believe that the words, "all soldiers' additional homestead certificates heretofore issued," etc., should not be limited to validating the transfer of certificates heretofore issued, and in the hands of *bona fide* holders. This view is strengthened by the fact that the matter of transfers is dealt with by the second section of the act, and the language

"notwithstanding any attempted sale or transfer thereof," at the end of the first section, should not be construed to limit the operation of the act short of the obvious intent of Congress.

There is nothing in the record to question the *bona fides* of Milliken's purchase of these certificates of additional right, and as the same were regularly issued by your office and were never satisfied, under the decision just quoted from, it must be held that said certificates were validated by the act of August 18, 1894 (*supra*).

By his purchase Howell succeeds to the rights of Milliken's heirs, and the action of your office denying his application for recertification of the right under said certificates is reversed.

SOLDIER'S HOMESTEAD—TIME ALLOWED FOR ENTRY.

CARNEY *v.* BYERS.

A soldier who has filed a homestead declaratory statement is entitled to six calendar months after such filing within which to make entry, and commence settlement and improvement; and in the computation of such time the day of filing the declaratory statement should be excluded, and the last day of the specified period included.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (W. M. W.)

The case of David W. Carney *v.* John M. Byers has been considered upon the appeal of the former from your office decision of August 1, 1895, affirming the judgment of the local officers denying said Carney the right to make homestead entry under his soldier's declaratory statement, and dismissing his contest against the entry of Byers for the SW. $\frac{1}{4}$ of Sec. 9, T. 20 N., R. 10 W., Alva, Oklahoma, land district.

The record shows that on April 23, 1894, Carney filed soldier's declaratory statement for the land in question.

On October 23, 1894, Byers made homestead entry for the tract.

On October 24, 1894, Carney made application to make homestead entry of the tract under his soldier's declaratory statement, which was rejected for conflict with Byers's entry.

On the same day Carney filed an affidavit, in which he stated, among other things, after referring to Byers's entry:

That said homestead entry is fraudulent in this: That the said John M. Byers made said entry subject to the right of said David W. Carney, who had filed a soldier's declaratory statement for said tract of land April 23, 1894, and had made a valid settlement upon the same the last of July, 1894, by going upon said land and building him a frame house and digging him a good well for water, and making other valuable improvements upon said land, and remaining upon said land till about the middle of September, 1894, and at which time he went down into the Chickasaw country in the territory to look after a crop he had planted there the season prior to this time. And on the 17th day of September, 1894, he started to the U. S. Land Office at Alva, O. T., to perfect his entry, or place his homestead entry upon said tract of land, distance of about two hundred miles, and was driving over land when one of his horses became sick, and he did not reach the land office till on the morning of the

24th day of October, 1894, and he found out that one John M. Byers, the defendant, had filed said homestead entry on said tract of land the day before. And affiant now claims his right to enter said land on the grounds of prior settlement and improvement, and that he is the only person who ever made any settlement and improvement on said land.

On May 6, 1895, the register and receiver sustained Byers's motion to dismiss Carney's contest.

Carney appealed.

On August 1, 1895, your office, after reciting the facts, found that:

It follows that Carney can claim no rights under his soldier's declaratory statement for more than six months from the date of his filing had elapsed when he attempted to make homestead entry of the land, and the filing of a soldier's declaratory statement exhausts the homestead right.

Thereupon the judgment of the local officers was affirmed.

Carney appeals.

It is claimed in argument on behalf of Carney, that Byers's entry was made before the time had elapsed in which Carney had to appear at the local land office and file his "regular homestead affidavit."

The material question for determination is, whether Carney made his application to enter within the time allowed therefor under the law. If his application to enter was made within the time allowed by law in cases of soldiers' declaratory statements, then it was erroneous for the register and receiver to reject his application, and your office decision affirming their judgment was erroneous. If his application was not filed within the time allowed by law to make entry in such cases, there was no error in the judgments below.

Section 2304 of the Revised Statutes allows every private soldier and officer who has served in the army of the United States during the recent rebellion for ninety days, and who was honorably discharged, and has remained loyal to the government, to enter one hundred and sixty acres, or one quarter section, of certain public lands, of the character therein described, or of

other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead and filing his declaratory statement, within which to make his entry and commence his settlement and improvement.

Section 2309 provides:

That every soldier, sailor, marine, officer, or other person coming within the provisions of section two thousand three hundred and four, may, as well by an agent as in person, enter upon such homestead by filing a declaratory statement, as in pre-emption cases; but such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law.

As a matter of law, it is clear that a soldier who has filed a declaratory statement is entitled to six months time *after filing* such declaratory statement to *make his entry* and commence his settlement and improvement. The term six months, as used in the statute, means calendar months.

When the computation of time is to be made from an act done, the rule is to exclude the day on which the act is done, and include the last day in the specified period.

In *Sheets v. Selden's Lessee* (2 Wallace, 177-190), the supreme court of the United States very clearly and concisely states the rule respecting the computation of time as follows:

The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, is to exclude the day thus designated, and to include the last day of the specified period. "When the period allowed for doing an act," says Mr. Chief Justice Bronson, "is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time; and so be excluded from the computation."

Applying this doctrine to the case at bar, Carney was entitled to full six calendar months' time after the 23d day of April, 1894—the date of filing his soldier's declaratory statement—in which to make his entry thereunder. Excluding the day on which Carney's soldier's declaratory statement was filed, the six calendar months allowed him thereafter in which to make his entry would expire with and including the 24th day of October, 1894. His application to enter being offered on said date was in time, and should have been allowed.

Byers's entry was made before Carney's six months to make entry under his declaratory statement had expired, and for that reason Byers's entry was made subject to Carney's right, under the law and regulations, to make his entry. Instead of rejecting Carney's application to enter under his soldier's declaratory statement for conflict with Byers's entry, Carney's application being made within the time allowed should, as a matter of right, have been allowed, and such allowance would have operated to exclude Byers's claim, and his entry should have been canceled. See General Circular, p. 23.

Your office decision appealed from is therefore reversed, Byers's entry will be canceled, and Carney will be permitted to make entry of the tract under his application of October 24, 1894.

RAILROAD GRANT—INDEMNITY SELECTION.

NORTHERN PACIFIC R. R. Co. v. AYERS.

An indemnity selection of unsurveyed land should be canceled, not suspended to await survey.

Prior to selection the lands within the indemnity limits of the Northern Pacific grant are open to settlement and entry.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (J. L. McC.)

I have considered the case of the Northern Pacific Railroad Company v. Clara M. Ayers, involving her desert land entry for the E. $\frac{1}{2}$ of Sec. 3, T. 8 N., R. 1. E., Bozeman land district, Montana.

The land described is within the indemnity limits of said railroad, and was included in the withdrawal of February 21, 1872, upon general route. Upon the definite location of the line of said road, on July 6, 1882, it was found to be within the indemnity limits, and was ordered withdrawn by your office letter of June 9, 1883. Said indemnity withdrawal, however, has been held to be without validity or effect, and consequently no bar to settlement and entry under the public land laws.

On March 20, 1885, the company selected lots 1, 2, 3, and 4, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, of said Sec. 3; and on June 23, 1885, it selected the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section.

Inasmuch as Clara M. Ayers' desert-land entry was made (August 5, 1893), subsequently to the date of said selections by the company, the latter acquired the prior and paramount claim to such of the tracts as had been surveyed, to-wit, lots 1 and 2, and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 3; and your office, by decision of August 20, 1895, properly held the desert land entry for cancellation in so far as it embraced said tracts.

The SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 3 was, at the date of your said office decision, unsurveyed; your office therefore held that it was not subject to selection by the railroad company, and held its list for cancellation in so far as it embraced said tract.

The railroad company has appealed, alleging that your office was in error, (1) in holding that the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ was not subject to selection by the railroad company, because unsurveyed. It contends that—

Instead of cancelling the company's selection for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of this section, the Commissioner should have suspended the same to await acceptance of the survey.

In the case of the Northern Pacific Railroad Company (15 L. D., 8), the company selected lands of which it is said that "after an examination of the plats," it was "found practicable to protract the lines of survey of the adjoining sections of which survey had theretofore been made so as to include the two southwest quarters, selected by the company." Your office rejected the selection. The company appealed, contending that—

the establishment of the three corners and the survey of the exterior lines completed the field survey; and making and filing of the plat of the same by the surveyor general sufficiently identified the land to admit of their selection.

But the Department affirmed said decision, saying:

No plat of survey of the tracts in question was approved or on file in the district office or anywhere else at the date of the railroad selections; it follows that said selections were properly rejected.

The selections were not suspended "to await the acceptance of the survey." I do not think that it would be proper practice to pursue

such a course, and allowing lands to be "tied up" for an indefinite period by selections made prior to survey. If such "suspended" selections were to be considered a bar to settlement or entry, they might better be allowed. If they were to be considered no bar thereto, they might better be canceled.

(2). The company contends further that, inasmuch as the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ was unsurveyed, "it was error not to have canceled the desert-land entry of Clara M. Ayers for the same."

It having been decided that the railroad company has no valid claim to said SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the question as to what course the government may pursue with regard to Mrs. Ayers' desert-land entry for the same is one solely between the government and her, with which the railroad company has no concern.

(3). The question as to whether land within the indemnity limits of said company is subject to settlement and entry prior to selection has been decided in the affirmative by the Department in the case of said company against Jennie L. Davis (19 L. D., 87), and many others.

I concur in the conclusions reached by your office in the decision appealed from, and therefore affirm the same.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

LINCOLN v. SOWERS.

The right of purchase under section 5, act of March 3, 1887, is not defeated by a prior adverse application to enter under which no settlement right is asserted. Land subject to indemnity selection, and sold to a purchaser in good faith, as a part of the grant, may be purchased under said section, though no selection of the land was made by the company.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 8, T. 84 N., R. 23 W., Des Moines land district, Iowa.

The record shows that your office, on July 8, 1875, ordered a hearing in the case of Edward W. Templeman v. Cedar Rapids and Missouri River Railroad Company, the former having applied to make soldier's additional homestead entry for the tract in controversy, together with other land. Subsequently, on February 13, 1879, your office notified the local officers that it was not necessary to have the hearing ordered, in view of the decision of the Department holding that a homestead entry of record, uncanceled, segregated the land and was sufficient to defeat the grant in behalf of the Cedar Rapids and Missouri River Railroad Company, made on June 2, 1864 (13 Stat., 95), and the records of your office showing that one Bechtels had made homestead entry for the tract on February 6, 1863, which remained of record until canceled on April 29, 1872. Your office therefore held that this tract of land was

excepted from the operation of the grant in behalf of said railroad company. Of this action the attorneys for the railroad company were notified by letter of October 14, 1893, and the local officers were instructed to notify Templeman. On March 8, 1894, the local officers reported that after repeated attempts they had failed to serve him.

On June 26, 1894, the local officers transmitted the application of George B. Lincoln to make homestead entry of the land in controversy, and the alternative applications of James W. Sowers, either to enter or purchase under section 5 of the act of March 3, 1887.

From the application of George B. Lincoln it appears that it was filed on June 14, 1894, and was rejected by the local officers because of the pending application of Templeman; from which action Lincoln appealed, asserting that Templeman had no interest in and to this tract, as was shown by a letter from said Templeman to the attorney of Lincoln, dated Adel, Iowa, January 9, 1894, in which he said, "I have taken up all of my government lands that are due me." It appears further that the attorney of Lincoln had sought for Templeman with the intention of purchasing his preference right, and that this was his reply to such attempt.

In reference to the application of James W. Sowers, it appears that this was filed on June 18, 1894,—four days later than that of Lincoln,—and being rejected, Sowers took appeal. Sowers made application to enter as an adjoining farm homestead, he being the owner of the remainder of the said SE. $\frac{1}{4}$. It further appears in his affidavit, that he sets forth that he and his grantors "have been in open, actual and peaceable possession" of said land "from May 15, 1868, until the present time, claiming to be the owners thereof, and that my claim of title is derived as follows." And it further appears that the Cedar Rapids and Missouri River Railroad Company, claiming this land under the said act of June 2, 1864, sold, on May 13, 1868, to one Francis R. Hughes; and then by regular conveyances of warranty deeds this tract came into possession of Sowers on February 14, 1880; and he asked that he be allowed to purchase.

Your office decision of August 1, 1895, passing upon the issues thus joined, rejected the application of Lincoln and allowed Sowers to purchase under the act of March 3, 1887; from which action Lincoln appealed.

The section under consideration is as follows (24 Stat., 556, Sec. 5):

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company, to make payment to the United States for said lands, at the ordinary government price for like lands, and thereupon, patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That

all lands shall be excepted from the provisions of this section, which, at the date of such sales, were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupations have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries, and receive patents therefor: *Provided further*, That the said section shall not apply to lands settled upon, subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same, as aforesaid, shall be entitled to prove up, and enter, as in other like cases.

In the case of *Jenkins et al. v. Dreyfus* (19 L. D., 272), in construing said section, it was said (syllabus):

The right of purchase under section 5, act of March 3, 1887, is not defeated by an adverse application to enter made after the passage of said act, nor by an application to enter pending at the passage of said act under which no settlement right is alleged.

And on the same line was decided the case of the Union Pacific Railroad Company *v. Norton* (on review), 19 L. D., 524; and also the case of *Sethman v. Ulise*, 17 L. D., 307.

It is further objected by the appellant, that this land being a part of an even numbered section, the above cited opinions have no bearing. While the even numbered sections within the primary limits were not specifically granted as lands in place, they were by the act of 1864 made subject to indemnity selection in satisfaction of a loss in place. See case of *Cedar Rapids and Missouri River Railroad Company et al. v. Herring* (110 U. S., 27), wherein it was held that the purpose of the said act of 1864, among other things, was—

To adjust the amount of lands, to which the company would be entitled under this new order of things, and to enlarge the source from which selection might be made for the loss of that not found in place.

And the court further said—

This latter is accomplished by declaring that *all* the sections within the fifteen-mile limits shall be subject to such selection on the same terms on which only alternate sections could previously be selected.

Your office in its decision erred in treating this land as land within the primary limits and that the entry of Becketts excepted it from the operation of the grant. Being lands whereof indemnity selection could be made, the right of selection would exist at any time when the record was clear.

In the case of *Pierce et al. v. Musser-Sauntry Company* (19 L. D., 136) it was held (syllabus):

Lands lying within railroad indemnity limits, not required in the final adjustment of the grant, nor selected on behalf of the same, but sold as a part of said grant to purchasers in good faith, are of the character subject to purchase under section 5, act of March 3, 1887.

This would seem to be ample authority for holding that Sowers' application to purchase should be allowed, though no selection was made of this tract by the company.

In the opinion *supra* it was said, in speaking of the title of the railroad company, "It is not necessary that it should be a legal or valid one. It is sufficient if it be colorable."

For the reason given your office decision is hereby affirmed.

CONTEST AFFIDAVIT—ATTORNEY—NOTARY PUBLIC.

TALLEY *v.* GASS.

In those States or Territories whose laws do not forbid an attorney to administer an oath to a client, the necessary oath to a contest affidavit may be administered by an officer or notary who is also the attorney of the contestant; but in States where the local laws forbid such practice it will not be allowed by the Land Department.

The case of *Werden v. Schlecht*, 20 L. D., 523, overruled, and section 13, instructions of December 15, 1885, 4 L. D., 297, modified.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897.
(I. H. L.) (C. W. P.)

George I. Talley has appealed from the decision of your office of July 27, 1895, dismissing his contest against the homestead entry, No. 933, of Addie E. Gass, of the SE. $\frac{1}{4}$ of Sec. 15, T. 28, R. 11, Alva land district, Oklahoma Territory.

The ground of said decision is that the affidavit of contest was made before the contestant's attorney.

At the hearing the defendant moved to quash the proceedings, on the ground that the affidavit of contest was not properly verified, it being sworn to before the contestant's attorney. The register and receiver overruled this motion, and the case was heard upon the testimony offered. The local officers found for the defendant. The contestant appealed. Your office held that it was error in the local officers not to dismiss the contest on said motion of the defendant, saying:

The affidavit was made before the contestant's attorney. The evidence was before you that such was the case at the time it was filed, as the affidavit and power of attorney were on one and the same sheet of paper, and it should not have been received by you. No notice should have been issued thereon. The Department has ruled that the affidavit of a party taken before his attorney as notary public, will not be accepted by the Department,

And you cite the case of *Werden v. Schlecht*, 20 L. D., 523, as authority for your decision.

Upon further consideration of the question presented, the Department is led to the conclusion that the doctrine announced in the case of *Werden v. Schlecht*, cited by your office, is not sound, and the same will not be followed.

In the case of *William R. Sutley*, 3 L. D., 248, it was held, after a thorough discussion of the subject, that the Code of Dakota, fairly construed, did not forbid an attorney to administer the necessary oath to a contest affidavit, and that the contest affidavit, which was executed

before the contestant's attorney, was not invalid. This decision was followed in the case of *Hopkins v. Daniels*, 4 L. D., 126.

The laws of Oklahoma on the subject of affidavits and depositions are the same as those of Dakota, cited in the case of William R. Sutley, *supra*, and such laws not forbidding it the contest affidavit as made in this case will be accepted.

The rule in such cases hereafter will be that in those States or Territories whose laws do not forbid an attorney to administer an oath to a client, the necessary oath to a contest affidavit may be administered by an officer or notary who is also the attorney for the contestant; but in States where the local laws forbid such practice it will not be allowed. Section 13 of the circular of instructions issued December 15, 1885 (4 L. D., 297-9), is to that extent modified; and the case of *Werden v. Schlecht*, so far as in conflict with these views, is overruled.

Your office having dismissed the contest without considering the case on its merits, the record is returned for such consideration, and in view of the delay caused by the proceedings already had you are requested to act upon the case as early as practicable.

FOOTE v. McMILLAN.

Motion for review of departmental decision of March 7, 1896, 22 L. D., 280, denied by Secretary Francis, January 18, 1897.

COAL LAND—FINAL PROOF—LIFE OF FILING.

SKOYEN v. HARRIS.

A coal land claimant who appears, on the last day of the life of his filing, at the local office and within the business hours designated by official regulations, and is prevented from submitting his final proof and making payment at such time by the receiver's office being closed contrary to said regulations, should not be regarded as in default, where such proof and payment are tendered on the next business day.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (E. B., Jr.)

This is a contest under the coal land law—sections 2347 to 2352, inclusive, of the Revised Statutes.

The record shows that John Harris filed his coal declaratory statement No. 992, March 23, 1893, for the SE. $\frac{1}{4}$ of Sec. 16, T. 21 N., R. 7 E., Seattle, Washington, land district, alleging that he came into possession thereof on the twentieth of the same month, and had located and opened a valuable mine of coal and expended \$100 in labor and improvements thereon; that on March 30, 1894, Peter O. Skoyen filed his coal

declaratory statement No. 1028, for the same land; alleging possession on and since March 21, 1894, and that he had located and opened a valuable mine of coal and expended \$20.00 in labor and improvements thereon; that on May 21, 1894, Harris applied to purchase the land, and offered proof and tendered payment therefor; that on July 7, 1894, after notice of Harris' application, proof and tender, Skoyen filed a protest against the same, on the ground that Harris' declaratory statement

had fully expired by limitation of law before he tendered proof and payment for said land, more than fourteen months having intervened between the date of his alleged possession and the date of his said proof;

that a hearing was duly had in January following; that on April 2, 1895, the local office decided that although the evidence showed "that Harris has expended about \$2,000 in money and work upon this land and has acted in apparently good faith," yet by his failure to apply to enter and tender proof and payment therefor within one year and sixty days from the commencement of his possession and improvements he forfeited his right thereto "as against an adverse claimant," and rejected his application to purchase, and, in effect, recommended the cancellation of his coal filing; that on appeal by Harris your office, on July 2, 1895, decided that Skoyen had failed to show that he had opened and improved a coal mine on the land, or that he was acting in good faith, that he did not therefore have a valid adverse claim to the land when Harris applied to purchase, that Harris, having otherwise complied with the law, might enter the land after one year and sixty days from the commencement of possession and improvements, in the absence of any valid adverse claim, that Skoyen's filing should be canceled and Harris' final proof received, and he be allowed, upon payment, to make entry of the land; and that a motion by Skoyen for rehearing was denied by your office October 7, 1895.

An appeal by Skoyen brings the case before the Department, error being assigned as follows:

I. Error to decide that the proof of contestee's good faith is ample and entirely satisfactory.

II. Error to decide that contestant has failed to show that he was acting in good faith.

III. Error to decide that contestee's possession must be regarded as having commenced upon March 20, 1893, instead of about the middle of February, 1893, the time he states in his testimony that he came into possession.

IV. Error to decide that Harris made tender of payment on May 21, 1894, or at any other time; it appearing that tender was not made by him, and that he had no money of his own or in his possession for such purpose.

V. Error to decide that on said 21st day of May, 1894, when such tender is alleged to have been made, there was "no valid adverse claim" to the land applied for by him.

VI. Error to decide that said application of Harris to purchase said land to be allowed.

VII. Error to decide that the coal declaratory statement No. 1028 of protestant be canceled.

VIII. Error to decide that it is immaterial what contestant has done in the way of improvements upon said land since the day when contestee (Harris) tendered proof and payment therefor.

IX. Error to refuse said petition for re-hearing.

X. Error to decide that said petition for re-hearing alleged no sufficient grounds for a re-hearing.

XI. Error not to decide—

First: That said final proof and payment by Harris were not made in time.

Second: That the possession of said Harris was commenced in February, 1893, and that proof and payment should have been tendered in April, 1894.

Third. That the declaratory statement No. 1028 of contestant is a valid adverse claim to said land and that said contestee had no right thereto as against said adverse claim.

Fourth: That the work done by the said Skoyen as a basis for said coal declaratory statement filing was sufficient and that he was entitled to his full time of one year and sixty days after taking possession of said land in which to open and develop the coal deposits thereon and to show his good faith in the premises, and that the amount of his improvements was not a material question in the hearing upon the right of Harris to enter said land, it being true that his application to enter was made too late.

Fifth: That said Skoyen has since and within the life of said filing made such improvements, and that his good faith is thus demonstrated.

Sixth: The application of Harris to enter said land should be denied and his coal declaratory statement No. 992 canceled, and that said land be awarded to Peter O. Skoyen under his coal declaratory statement No. 1028 and the final proof and payment tendered thereon.

Upon the question of Harris' good faith the evidence abundantly sustains the conclusions of your office and the local office. His possession and improvements have been continuous during all the period in controversy. He has opened and improved a valuable mine of coal, and expended \$2,000 in money and improvements to that end on the land. At the hearing his good faith, except as alleged in the protest and hereinbefore indicated, was openly admitted by the protestant. Upon the contention of the appeal that Harris' "possession" commenced "about the middle of February, 1893," instead of March 20, 1893, it is sufficient to say that although the evidence shows that Harris commenced prospecting for coal on the land and did some work thereon and discovered coal during February, 1893, it does not show that he had possession of the land or went upon it to take possession as a claimant under the coal land law until, as alleged in his filing, on March 20, 1893.

Under the coal land law, as contained in the sections of the Revised Statutes above indicated, a claimant seeking a preference right to purchase, and coming lawfully into possession of public coal land, is entitled, upon continued compliance therewith in good faith, to hold and possess the same as against any other party claiming under the same law, for the period of one year and sixty days "after the date of actual possession and commencement of improvements on the land" (sections 2349 and 2350, Revised Statutes). This period, in the case of Harris' filing, within which he might make entry of the land, expired on Saturday, May 19, 1894.

Harris testifies that by reason of an attack of rheumatism during three days preceding the 19th, he was delayed in reaching the local office, and did not, therefore, arrive there until about three o'clock P. M. of the 19th with his proof, and money to pay for the land, when he found the office closed. It appears from the register's statement that only the receiver's office was closed, that office closing regularly at one o'clock P. M. on Saturday to enable the receiver to make deposits of public money. The record, as already stated, shows that tender of proof and payment was made on Monday, March 21, following.

There is no evidence to controvert the truth of Harris' testimony as to his previous sickness, and his presence at the land office on Saturday, May 19, 1894, with his proof and money to pay for the land. The register's statement corroborates Harris as to the receiver's office being then closed. Under the law as expressed in official regulation governing his attendance, the receiver should have been there at the time Harris arrived, and thence on until four o'clock P. M. (General Circular, p. 120.) The law gave Harris until that hour within which to comply with its requirements. Standing ready to comply within the time allowed, and being prevented from so doing only by the previous closing, contrary to law, of the receiver's office, his right should not thereby suffer any prejudice or impairment. Harris' tender of proof and payment should be regarded in contemplation of law as duly made at the hour he alleges, and therefore within the specific statutory life of his claim.

It is unnecessary in this view of the case to pass upon any other question sought to be raised by the appeal.

The contest of Skoyen is dismissed, and your office decision of July 2, 1895, as herein modified, affirmed.

Harris will be allowed to duly complete his entry, subject, however, to any valid adverse claim of the State of Washington under its grant of school lands.

SETTLEMENT RIGHT—SUCCESSFUL CONTESTANT—RELINQUISHMENT.

GOURLEY v. COUNTRYMAN.

While as between two parties claiming the same tract, the settlement right of one may not defeat the superior right of the other as a successful contestant, yet if such contestant thereafter enters the land, and relinquishes the entry, such settlement right, if maintained, will defeat the subsequent entry of a third party.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (C. W. P.)

This case involves the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 28, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma.

The record shows that on May 11, 1889, A. G. Blauvelt made homestead entry of the above described land; that on October 17, 1889, William Gourley contested said entry, on the ground that the entry-

man had executed, for a valuable consideration, a relinquishment of his entry, and had asserted afterwards no claim to the land; that on September 30, 1890, Thomas W. Pence contested the entry of Blauvelt, charging abandonment and the relinquishment of his entry, and that the contest of Gourley was instituted when the relinquishment was in his possession, and was speculative and intended to prevent others from securing any rights upon the land, until he could sell the relinquishment, or hold the land until such time as suited him to make entry thereof; that on December 21, 1891, Gourley filed the relinquishment of Blauvelt and made homestead entry of the said land, together with the S. $\frac{1}{2}$ of the said NE. $\frac{1}{4}$. A hearing was had, the contest of Pence was dismissed. On appeal, your office sustained the action of the local officers. But upon a further appeal, the Department reversed your office decision. A motion for review of this decision was denied on December 24, 1894. See *Pence v. Gourley*, 18 L. D., 358; *Id.* on review, 19 L. D., 588. Your office, on January 17, 1895, canceled Gourley's *entire entry*. On February 14, 1895, Pence made homestead entry for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 28, and relinquished the same on July 26, 1895, and on the same day George W. Countryman was allowed to make homestead entry of the said N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$. On October 15, 1895, Gourley filed an affidavit of contest against Countryman's entry, alleging settlement dating from November, 1889, and that he was a resident of the land at the date of Pence's relinquishment and Countryman's entry. On February 10, 1896, Gourley filed an application for reinstatement of his homestead entry, alleging, in addition to the allegations in his contest affidavit, that Countryman knew of his settlement and residence when he made entry, and that said entry was made with the intent to defraud the petitioner of his improvements.

Your office, by decision of May 14, 1896, held that it was error to cancel Gourley's *entire entry*, and reinstated his entry as to the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, improperly canceled, but denied his application for reinstatement as to the N. $\frac{1}{2}$ of said quarter section.

On June 6, 1896, Gourley filed a motion for review of your office decision, and with said motion he filed an amendment of his application for reinstatement, in which it is represented by him, under oath, that when he purchased the relinquishment of Blauvelt's entry, he did so in good faith, with no intent of defrauding any one; that he was first awarded the land by the register and receiver, and the Commissioner of the General Land Office, and that he felt that he had been greatly wronged and injured by the departmental decision reversing the action of your office and the local officers and holding that his contest against Blauvelt's entry was not in good faith; that the entry made by Pence was with the intent and design of speculation, and that he never intended to submit final proof in support of said entry, and that he

is informed and believes he (can) establish by proof that there was a conspiracy between said Pence and said Countryman to hold said land by said entry so made by

each of them as aforesaid, for speculative purposes and for the purpose of availing themselves of the benefit of the amount of money, which said affiant has put into said tract involved; that each of said parties has known all the time of the claim of said affiant by virtue of having observed him in open, notorious, visible and adverse possession of said tract, exclusively occupying and cultivating the same.

Upon this motion for review, your office on July 28, 1896, held as follows:

Gourley's contention that he was unjustly dealt with by the Department can not be considered by this office. The action of this office in such cases is subject to review by the Department, and this office is bound by the final judgment of the Department. Nor do I see any reason why office decision of May 14, 1896, should be disturbed on Gourley's charge (that he) was a settler on the land. The Department held that Gourley had shown bad faith in his dealing with the government and declared that Gourley had acquired no right by his settlement and residence.

It is true that Pence who secured the cancellation of Gourley's entry has relinquished his entry, but it is also true, as held in office decision of May 14, 1896, that before Gourley asked for a reinstatement of his entry, Countryman's rights acquired by virtue of his entry had attached.

It does not appear to me that the charge in reference to Pence's bad faith, or fraudulent design in prosecuting his contest against Gourley's entry is a material one. Pence's entry is not now the subject of attack. Whatever right was accorded him by virtue of his contest, has been waived and relinquished to the government.

The fact that Countryman made entry for the land with the knowledge that Gourley had improvements on it, and had asserted ownership thereto, does not invalidate his entry. Gourley's entry had been canceled as the result of a contest that had been prosecuted to a final judgment before the Department, and in that judgment it was held by the Department that Gourley acquired no right to the land by reason of his improvements and "continuous residence." The land, after Pence's entry was canceled by relinquishment, became a part of the public domain, subject to appropriation by entry, and it was not unlawful for Countryman to enter the same even though he knew of the improvements made by Gourley and his residence on the land;

and denied the motion for review.

Gourley appeals to the Department.

While I concur in that part of your office decision which holds that the decisions of the Department of April 5, 1894, and December 24, 1894, are final, as to all matters that preceded the entry of Pence by virtue of his preference right, as contestant, and think that Gourley's application for reinstatement of his entry was properly denied, I can not agree with you that Gourley could acquire no rights by virtue of settlement and continuous residence upon the land, after the cancellation of Pence's entry.

In the case of *Pence v. Gourley* the Department did not decide that Gourley could not acquire a right to the land as against a third party by his settlement and residence upon the land, but simply as against the contestant Pence. When Pence relinquished his entry, the land was restored to the public domain, and if Gourley was then residing on the land, his settlement right would attach *eo instanti* upon the filing of Pence's relinquishment, and could not be defeated by Countryman's entry. (*Rickers v. Fisher*, 19 L. D., 421.) I therefore think a hearing should be had on Gourley's affidavit of contest, as amended by his affidavit filed June 6, 1896, and direct that a hearing be had for the

purpose of determining the rights of the parties, which will be confined to the question of Gourley's residence upon the land at the time of Pence's relinquishment and his allegation that there was a conspiracy between Pence and Countryman to hold the land by the entries made by each of them, respectively, for speculative purposes and for the purpose of availing themselves of the benefit of his improvements upon the land, both parties knowing him to be in possession of the land, actively occupying and cultivating it.

Your office decisions of May 14, 1896, and July 28, 1896, are modified accordingly.

ORDER OF CANCELLATION—RESIDENCE.

UNITED STATES *v.* MONTOYA ET AL.

The cancellation of an entry without notice to the entryman is void for want of jurisdiction.

A homestead entry will not be defeated by the fact that the entryman, through mistake, builds his house outside the lines of his land, where in good faith he resides in the house so located.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (E. B., Jr.)

This is an appeal by Juan de los Reyes Martinez from your office decision of November 9, 1895, in the case of the United States *v.* Deciderio Montoya and others by which the final homestead entry, No. 685, made by Montoya September 18, 1892, for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 20, T. 24 N., R. 32 E., now in the Clayton, formerly in the Santa Fe, New Mexico, land district, was reinstated and the pre-emption declaratory statement No. 84, filed May 28, 1890, by said Martinez, for the same tract, was held for cancellation.

It appears that said final entry was canceled by your office February 3, 1886, without notice to the entryman, or his transferees, on the ground that, as reported by a special agent, "Montoya never lived on the land embraced in his entry," and "the county records show that Montoya conveyed the land to S. W. Dorsey October 31, 1882, who conveyed the same to the Palo Blanco Cattle Co. March 7, 1884," that at the instance of said Dorsey, and after a report September 3, 1892, by another special agent, showing due residence, improvements and compliance otherwise with the homestead law by Montoya, and recommending the reinstatement of the entry, your office, on September 29th following, ordered a hearing "in order to determine the rights of the parties to the land involved;" that the hearing was duly held, at which the government, Martinez and the transferees were duly represented, Martinez having filed, on the second day of the hearing, an affidavit charging failure to reside on the land on the part of Montoya; and

that "from the testimony presented" the local office found briefly, "that the land embraced in said homestead entry has not been resided upon by Deciderio Montoya as required by law," and recommended that his entry "should be canceled."

The appeal is largely made up of assignments of error relative to the consideration by your office of "the report of the special agent" and to the status given Martinez in the case. It is unnecessary to consider them at any length. Martinez appears to have been accorded all the rights of a contestant at the hearing, among which were those of cross-examining witnesses and objecting to testimony, and "the report of the special agent" (which evidently has reference to the second such report mentioned above) was only preliminary to the hearing, and is only referred to in that connection in said decision. The remaining assignments of error are as follows:

Fifth. In failing to hold that the decision of the local officers was binding.

Sixth. In failing to hold that the cancellation of the homestead entry in October, 1885, and all the accompanying proceedings were, at least, *prima facie*, valid, and must stand as the valid act of a government official until the illegality of the proceedings be shown.

Seventh. In reinstating the homestead entry.

Eighth. In holding for cancellation the D. S. filing, and

Ninth. Because of other errors both of law and fact appearing upon the face of the record.

The cancellation of this entry without notice to the entryman was void for want of jurisdiction (*Drew v. Comisky*, 22 L. D., 174, and *Castello v. Bonnie*, 23 L. D., 162): so that the cancellation was a nullity, and in law the entry was intact as though the order of cancellation had not been made when Martinez's declaratory statement was filed. Such filing therefore, equitable title having vested in Montoya, gave Martinez no right whatever to the land.

The testimony taken at the hearing shows that, of the five years immediately preceding his final entry, Montoya had resided upon the land in a log house thereon until about 1881, when he moved into a stone house just built by him about two hundred yards south of the log house, and which (stone house), as was afterwards ascertained, had been located, apparently by reason of mistake as to the south boundary line of the tract above described, upon the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of the said section. In this house he lived until after he made his final entry for the said tract. It does not appear that he was aware, at any time prior to final entry, that the stone house was not actually on his own land. It is well settled that residence in good faith in a house built by an entryman by mistake outside the lines of his land will not defeat his entry (*Talkington's Heirs v. Hempfling*, 2 L. D., 46; and *Smith v. Brearly*, 9 L. D., 175).

The Department would doubtless be justified, in view of the evidence and all the circumstances of this case, in holding that this entry is confirmed by the seventh section of the act of March 3, 1891 (26

Stats., 1095), on the ground that there was no claim adverse thereto prior to final entry, and that after such entry and prior to March 1, 1888, it had been sold to a *bona fide* purchaser for a valuable consideration. No question has been raised at any time by appellant as to the *bona fides* of the alleged sales. In view, however, of the facts that the evidence established the good faith of the entryman as to residence and shows compliance otherwise with the homestead law, and that no record evidence of these sales appears among the papers in the case, only parol evidence appearing on that point, the Department does not deem it necessary to pass upon the question of confirmation of the entry under said section.

Your said decision is affirmed. Montoya's entry will be reinstated, and passed to patent. Martinez's filing will be canceled.

SCHOOL LAND—INDEMNITY SELECTION—SURVEY.

STATE OF CALIFORNIA *v.* WRIGHT.

The date of the survey of a township is not fixed by the date of the work in the field, but by the approval of the plat.

An alleged loss in an unsurveyed township will not authorize a school indemnity selection.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (C. J. W.)

On July 8, 1895, M. J. Wright, as locating agent for the State of California, made application for, and selected, the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 20, T. 11 S., R. 9 E., Mount Diablo meridian, as indemnity for deficit in school land, viz: the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 36, T. 9 N., R. 22 W., forty acres; the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 36, T. 9 N., R. 22 W., 38.78 acres, and Sec. 36, T. 1 N., R. 16 E., 1.22 acres—eighty acres.

On December 21, 1895, by letter ("K"), your office held said selection for cancellation as invalid, because the plat of township 9 north, range 22 west, S. B. M., on file in your office, showed that the only portion of the township surveyed was section 24.

On March 24, 1896, by letter ("K"), your office acknowledged receipt of evidence showing service of notice of letter "K" of December 21, 1895, upon the surveyor general of California, and his failure to appeal from the decision holding selection for cancellation; whereupon the cancellation was ordered. The local officers were directed to note the cancellation on the records of their office and to advise the surveyor general. They were also directed to give notice to W. W. Wright of this action, and to advise him that his application to have a portion of section 20, township 11 south, range 9 east, M. D. M., reserved and held for him, for the purpose of a reservoir and dam which he wished to construct, would be made the subject of a separate letter.

On June 12, 1896, by letter "G" of that date, referring to office letters "K" of December 21, 1895, and March 24, 1896, in which school indemnity selection R. & R. No. 216 (State No. 2934) was canceled, your office instructed the local officers, as follows:

I now advise you that the action above set out is revoked because it was founded upon a misapprehension of facts and consequently was erroneous. The said application is therefore reinstated. You will note such reinstatement upon the records of your office, referring to this letter, and notify the State surveyor general of California accordingly. And give notice of this action also to W. W. Wright, who filed in your office a protest against the said selection on November 2, 1895. The misapprehension above mentioned was caused or at least contributed to by the U. S. surveyor general for California, who furnished Mr. Wright with a certificate to the effect that the only surveyed land in the township was section 24, while, as a matter of fact, the whole township was surveyed, and a portion of school section 36 therein returned as mineral in character.

After the cancellation of the selection and before its reinstatement, the surveyor general of the State of California made application for its reinstatement, and on April 21, 1896, your office, in passing upon the same, said in reference to the cancellation formerly ordered: "As I can see no reason for doubting the propriety of this action, I must decline to revoke it, and to reinstate the selection upon the records." Afterwards, in the letter of June 12, 1896, your office, of its own motion, as for the correction of a mistake in fact, reinstated the State's canceled application.

On November 2, 1895, W. W. Wright filed application to have the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 20 reserved for his use for reservoir and right of way, under the act of March 3, 1891 (26 Stat., 1095), and appended to said application is the certificate of W. S. Green, U. S. surveyor general for California, in which it is stated that the plat of township 9 north, range 22 west, S. B. M., on file in his office, approved by Theo. Wagner, U. S. surveyor general, December 12, 1879, shows the only portion of said township surveyed to be section 24, and that a copy of said plat was duly filed in the United States land office at Los Angeles, January 19, 1880.

On November 16, 1896, your office forwarded a map and papers filed in the Stockton, California, land office, by W. W. Wright, in which you recommend that the map be considered in connection with this case, and be approved subject to all valid subsisting rights, with or without exception, as to the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 20, so as to harmonize with the disposition to be made of said land.

W. W. Wright has appealed from your office decision of June 12, 1896, reinstating the said school indemnity selection, which was canceled March 24, 1896.

The errors specified are:

1. In failing to adhere to and sustain the decision of December 21, 1895, which held that there was no valid basis for said indemnity selection at the date when it was filed, and held the same for cancellation.

2. Due notice of said decision of December 21, 1895, having been given to the proper officer of the State of California, and no appeal having been taken from said decision, the same became final, and said indemnity selection was duly canceled by office letter "K" March 24, 1896, and it should not be disturbed.

3. After said final action of March 24, 1896, had been taken, an application to reinstate the selection was made by the surveyor general for the State of California, which, on April 21, 1896, was refused, and should have been final.

4. Error in undertaking to reinstate said selection upon the ex-parte application of the attorney here for the State of California, improperly made, and filed without any notice thereof to applicant Wright.

5. Error not to deny action on such application until due notice was given to Wright.

6. It was error, after having, on June 1, 1896, recognized Wright as an applicant for reservoir rights on the land, to reinstate the selection without considering his intervening rights.

7. In not holding that said alleged basis, T. 9 N., R. 22 W., was not surveyed until the official township plat and field notes thereof had been duly approved by the United States surveyor general on January 8, 1896.

The last proposition announced, if found to be true, would control the case, and render unnecessary the consideration of the minor grounds of error.

Your office allowed the State's selection in the first instance on an apparent state of facts, which entitled it to such selection. Afterwards, your office canceled the selection, on the ground that the facts were not as alleged, and that no proper basis for the selection existed; subsequently, your office reached the conclusion that a mistake was made in the facts, which demanded the reinstatement of said canceled selection, and thereupon ordered its reinstatement.

In office letter "K" of December 21, 1895, it is stated that the plat of township 9 north, range 22 west, S. B. M., on file in your office, shows the only portion of the township surveyed to be section 24. This was the reason for holding the application for cancellation. In your office letter "G" of June 12, 1896, it is stated: "I now advise you that the action above set out is revoked, because it was founded upon a misapprehension of facts, and consequently was erroneous." The application was for this reason reinstated.

The township map referred to has been examined. The surveys included in it run through a series of several years, the actual surveys in the field closing January 2, 1894, thus antedating the application of the State to make the selection in question. The plat, however, was not approved by the surveyor general of the United States for California and filed in office until January 8, 1896, which is after the filing of Wright's application to have the land reserved for reservoir purposes,

this application having been filed November 2, 1895. The fact to which your office refers, as having been misapprehended, is not purely a question of fact, but one of mixed law and fact.

The actual survey of the township in question had been made at the time the State filed application to make indemnity selection, but the survey had not been approved and the map filed, so the question remains: Was the township surveyed at the time the State's application was filed. The basis of the selection is the mineral character of a part of section 36 of said township. In the case of *Pereira v. Jacks* (15 L. D., 273), it is held, that if land is shown to be mineral in character by return of the surveyor-general at completion of the survey, it is excepted from the school grant to California. In the case of *Niven v. State of California* (6 L. D., 439), it is held that the grant to the State takes effect as of the date of the survey.

In the cases cited it is clearly indicated that the date of a survey is fixed not by the date of the work in the field, but by the approval and filing of the map. In the case of *Southern Pacific Railroad Company v. Burlingame* (5 L. D., 415), it is held that the date of a survey is determined by the date of its approval. This ruling is not only well founded, but has been very uniformly followed by the Department, which is in accord with the ruling of the courts.

The supreme court of California, in the case of *Michael Finney v. James N. Berger* (50 Cal., 249), say:

The statutes of this State do not contemplate a sale of the sixteenth and thirty-sixth sections until the title to the same has vested in the State, and the title to said sections does not vest in the State until the plat of the survey is approved by the United States surveyor general.

In the case of *Medley v. Robertson et al.* (55 Cal., 396), the court hold:

The title to a particular sixteenth or thirty-sixth section does not vest in the State before the plat of the survey of the township has been approved by the United States surveyor general; and an application to purchase such land made before the approval of the survey is unauthorized and void.

The application of the State, as was first held by your office, showed no proper basis for the selection applied for, for the reason that the township in which the alleged deficit existed was unsurveyed, and such application was unauthorized and void, and the selection under it was properly canceled. It would seem to follow that its reinstatement was erroneous.

Your office decision of June 12, 1896, is accordingly reversed, and selection R. & R. No. 216, State No. 2934, is canceled; the map filed by W. W. Wright is in accordance with your recommendation approved.

CONFIRMATION—SOLDIERS' ADDITIONAL HOMESTEAD.

DAVID WALTERS.

The confirmation of a soldier's additional homestead entry under section 7, act of March 3, 1891, is not defeated by the failure of the register to issue the formal final certificate, where it appears from the record that the soldier complied with all the requirements of the law and regulations thereunder.

The departmental decision herein of August 3, 1892, 15 L. D., 136, revoked.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (W. A. E.)

The Department is in receipt of your office letter of September 24, 1896, asking for instructions relative to the soldier's additional homestead entry of David Walters, made July 1, 1875, for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 29, T. 28 N., R. 6 E., Susanville, California, land district.

It appears that your office suspended said entry, for reasons not necessary to set out here, and called for additional affidavits; that the Sierra Lumber Company, claiming to be the transferee of Walters, applied to have said entry confirmed under the act of March 3, 1891, or to purchase the land under section 2 of the act of June 15, 1880; that your office denied this application, and held the entry for cancellation, the reason assigned for the ruling that said entry had not become confirmed under the act of March 3, 1891, being that no final certificate had issued on said entry; that on appeal to the Department your office decision was affirmed, in so far as it refused to hold said entry confirmed, but the company was awarded the right to purchase the land under the act of June 15, 1880 (see 15 L. D., 136).

The company having failed to perfect the entry as authorized by said departmental decision, instructions are now asked as to what action shall be taken in regard to said entry, in view of the recent decision of the Department in the case of the Sierra Lumber Company (22 L. D., 690), wherein it was held that a soldier's additional homestead entry, similar to this, and upon which, as stated by your office, no "final certificate" had issued, was confirmed under the seventh section of the act of March 3, 1891.

The original holding of the Department in this case, that Walters's said additional entry was not confirmed under the act of March 3, 1891, was based upon the ruling in the case of the United States *v.* Bush (13 L. D., 529). The Bush case, however, involved a cash entry made under the act of May 23, 1880 (21 Stat., 143), for Osage Indian lands. This act provided that actual settlers on the Osage Indian trust and diminished reserve lands in Kansas might, within a certain fixed time, make proof of their claims, and pay one-fourth of the purchase price, the balance of the purchase price to be paid in three equal annual installments thereafter. It was held in the case cited that an entry of Osage

land is not confirmed under the proviso to section 7 of the act of March 3, 1891, until two years have elapsed from date of final payment, as "final certificate" is not issued until all the payments have been made.

Afterwards, in the case of William R. Sisemore (18 L. D., 441), the Bush case was overruled, and it was held that when a claimant for Osage land under the act of May 28, 1880, submits proof of his qualifications to enter, shows due compliance with law, and makes his first payment for the land, his right thereto is a vested interest, subject to the lien of the government for the unpaid purchase money; and the receipt then issued to him is a "final receipt" that entitles a subsequent purchaser of the land to the benefit of the confirmatory provisions of section 7, act of March 3, 1891, if otherwise within the terms of said section.

Clearly, these rulings in regard to entries for Osage lands have no direct bearing upon the question of confirmation of soldiers' additional homestead entries. There are no annual payments, no final proof, to be made on the latter. All that is required of the soldier is that at the time he makes his application for an additional entry, he shall file, in addition to the regular homestead affidavits, special affidavits showing his identity as the soldier he represents himself to be, his military service, the description of his original entry, his compliance with law in regard to said original entry, and his unimpaired right to make additional entry. He then pays the fees and commissions prescribed by law, and the receiver's receipt and the register's certificate are issued. "Final certificate" should also be issued at the same time (General Circular of 1895, page 29).

The difference between an Osage entry and a soldier's additional entry is thus very apparent, and the question as to what is sufficient to bring the latter within the confirmatory provisions of the act of March 3, 1891, is entirely distinct from the question involved in the Bush and Sisemore cases.

The seventh section of the act of March 3, 1891, provides that:

All entries made under the pre-emption, homestead, desert land, or timber culture laws, in which final proof and payment may have been made and certificates issued, and to which there is no adverse claim originating prior to final entry, and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty, and after final entry to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation of a government agent, fraud on the part of the purchaser has been found, be confirmed and patented.

As said above, no final proof is required on a soldier's additional homestead entry, and the soldier is supposed to do, at the time of making entry, all that the law requires of him in the matter of filing the proper affidavits and paying the prescribed fees and commissions.

When the record shows, as it does in the present case and the Sierra Lumber Company case, that the soldier has complied with all the requirements, will the failure of the register to issue formal final certificate defeat confirmation under the act of March 3, 1891? It was held

in the Sierra Lumber Company case that it would not, and this ruling seems to be in accordance with law and equity.

It is a well established rule of the Department that rights of parties are not impaired through the negligence of the local officers.

As the present case (which has not yet been closed) is identical in all essential particulars with the Sierra Lumber Company case, and as the former holding of the Department that Walters's said additional entry was not confirmed under the act of March 3, 1891, was erroneously based upon the ruling in the Bush case, the former action of the Department herein is revoked and set aside, and the entry will be passed to patent.

It is not intended by this ruling to change the procedure heretofore followed in regard to soldiers' additional homestead entries. In other words, you will still require the receiver to issue "final receipt," and the register to issue "final certificate," in accordance with the circular instructions. This ruling merely protects the entryman against the consequences of neglect on the part of the local officers.

HOMESTEAD—PRE-EMPTION—ALIENAGE.

BUTLER *v.* DAVIS.

A pre-emption filing, or application to make homestead entry, made by an alien prior to declaration of intention to become a citizen, confers no right either under the pre-emption or homestead law, and a settler occupying such status is without protection as against an intervening adverse claim of record.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897.
(I. H. L.) (A. E.)

On June 17, 1886, James J. Butler filed a pre-emption declaratory statement of his intention to purchase the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 28, and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 29, T. 4 N., R. 24 W., S. B. M., Los Angeles, California. On December 11, 1891, Butler applied to make homestead entry of the same land; his application was rejected because he failed to show that he was a citizen, or had declared his intention to become such. On February 12, 1892, Butler declared his intention to become a citizen, but did not make new application to enter the land, nor offer to make proof on his pre-emption filing.

On February 9, 1894, Silas R. Davis made homestead entry for the land.

On February 17, 1894, Butler's naturalization being completed, he applied to make homestead entry of the land, and his application was rejected, because covered by Davis's entry.

On March 4, 1894, Butler filed a contest against Davis's entry, alleging that Davis had full knowledge of Butler's residence and improvements when he made his entry.

After a hearing the local office recommended that the entry of Davis be canceled.

On appeal, your office, on August 21, 1895, held that the declaration of intention made by Butler to become a citizen

could not relate back to the filing of his pre-emption declaratory statement, and thus benefit him; and his settlement and declaratory statement could not become operative from its date, because the pre-emption law had been repealed prior thereto. While it is true that defendant knew of the residence, improvement and claim of plaintiff at the time he made his entry, yet the plaintiff's failure to properly assert his claim in time is in no manner due to any act of the defendant.

Your office then decreed that the contest of Butler be dismissed and the entry held intact.

From this Butler has appealed to the Department.

No argument accompanies the appeal, and the appellant does not show specifically wherein your holding was contrary to law.

The case has, however, been carefully considered. While the loss of his home is a misfortune to the appellant, this Department is without authority under the law to protect him in the face of the intervening adverse claim of record, which claim was initiated in accordance with law. The homestead entry of Davis was made at a time when the land was subject to entry.

Butler was not a citizen and had not declared his intention to become a citizen at the time of making his pre-emption filing in 1886, or when he first applied to make homestead entry in 1891.

Said filing and application were therefore without any force or validity whatever and he could acquire no right thereunder. Before he applied as a qualified claimant to make homestead entry of the tract it had been entered by Davis, whose entry is protected by the law, provided he complies with its requirements in the matter of settlement, residence and cultivation.

Your office decision must be and it is therefore affirmed.

SECOND CONTEST—OKLAHOMA LANDS.

CLARK *v.* RENFRO ET AL.

In a contest between applicants for land in Oklahoma, involving priority of settlement, the question of "soonerism" is necessarily raised as to each party thereto, whether formally charged or not, and where, in such a contest, evidence is submitted on said question, and a decision rendered thereon, a second contest should not be allowed on that question.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (J. L. McC.)

On May 25, 1889, William T. Renfro made homestead entry for lots 6, 8, 9, and 10, of Sec. 31, T. 12 N., R. 2 W., Oklahoma City land district, O. T.

On June 14, 1889, Daniel Page, Jr., initiated contest against Renfro's entry, alleging prior settlement.

The local officers found that Renfro was the prior settler. Your office, on January 23, 1892, sustained the local officers, and dismissed the contest.

Ten days later—to wit, on February 2, 1892—Will H. Clark filed an application to contest Renfro's entry. No action was taken thereon except to note the date of filing.

On April 3, 1893, Clark filed an amended affidavit, in which he charged upon information and belief, that Page's claim and contest were fraudulent, illegal and void, for the reason that he went into the territory during the prohibited period. His charges were corroborated merely upon information and belief. This amended complaint was not acted upon by the local office.

Page in due time appealed from your office decision of January 23, 1892; and on December 5, 1894, the Department reversed said decision, held that Page had a prior adverse claim, and directed that Renfro's entry should be canceled upon the completion of entry by Page.

Renfro filed a motion for review of said departmental decision; but said motion was denied, and the decision of December 5, 1894, re-affirmed on September 12, 1895 (314 L. and R., 314).

On April 10, 1896, Clark renewed his charges against Page, in a "supplemental and amended affidavit of contest," in which he alleged that Page's homestead entry was illegal, for the reason that at the time it was allowed he (Clark) had a contest pending, which charged that Page had occupied a portion of the land described in the President's proclamation of March 23, 1889, during the prohibited period; therefore Clark asked a hearing.

Your office on August 19, 1896, denied a hearing, holding:

Inasmuch as Renfro's entry has been canceled, Clark's application to contest the same is hereby dismissed.

The matter of Page's entering upon the territory during the prohibited period *has been adjudicated*; therefore Clark's application to contest Page's entry is dismissed.

The above language has reference to the fact that, on the trial of the case of *Page v. Renfro*, Page, on cross-examination by counsel for Renfro, acknowledged that he passed through the territory in the night, on a railroad train, two or three days (or nights) before the land was opened to settlement.

Clark has appealed from said decision on the following grounds:

First. The Honorable Commissioner erred in holding and finding that the question of defendant Page's qualifications was *res judicata*, for the reason that the qualifications of Page as charged in this affidavit of contest were never adjudicated except upon the statements of the said Page, no disqualification ever having been charged against him or evidence introduced against him in the trial of the case of *Page v. Renfro*, the sole issue in that case being prior settlement.

Second. The Honorable Commissioner erred in holding and finding that the decision of the government or any officer thereof upon an *ex parte* showing is an

adjudication binding upon claimants not parties to that suit, unless the charge of disqualification was formerly made by way of contest, and evidence introduced thereunder.

The departmental decision of September 12, 1895 (on review), explained how the question of Page's premature entry into the Territory arose:

A motion (for review) has been filed on behalf of Renfro, the only ground of error in which that was not considered in the previous decision is the first, namely: "in not considering the testimony of the contestant, Daniel Page, Jr. (see page 37 of the record, question 2), in that contestant admits that he crossed the corner of Oklahoma Territory in travelling from Purcell to the Pottawatomie country, April 18, 1889."

A further examination has been made of the testimony upon this point, and it is found, as alleged, that Page admits that, on April 18, 1889, he crossed from the Chickasaw country at Purcell, passing through Oklahoma Territory to the Pottawatomie country. The distance across the Oklahoma Territory at this point to the Pottawatomie country is about five miles. After reaching the Pottawatomie country he appears to have followed the Pottawatomie line, travelling north until about opposite the land in question, being a distance of about thirty-five miles. It was from this point in the Pottawatomie country that he made his run to the land in question.

* * * * *

I am of the opinion that the fact of his having crossed the Territory from Purcell to the Pottawatomie country after which he traveled about thirty-five miles north within the Pottawatomie country to the point from which he made his run on April 22, did not disqualify him. He certainly gained no advantage by reason of knowledge of the country acquired in crossing from Purcell to the Pottawatomie country; and while he may be within the strict letter of the law, having entered the country after the President's proclamation and prior to the day set for the opening, yet under the peculiar circumstances, I do not think he transgressed the spirit of the law, and should not be held to be disqualified thereby.

It will be seen that the question of Page's disqualification upon the allegation of premature entry has been adjudicated; but the applicant herein contends that such adjudication is not "binding upon claimants not parties to that suit, unless the charge of disqualification was *formally made by way of contest.*"

The case (between Page and Renfro) arose upon Page's allegation of priority of settlement. Before either of them could be permitted to make entry, he must take the following oath (see General Circular, page 239):

I, ———, of ———, applying to enter a homestead, do solemnly swear that I did not enter upon and occupy any portion of the lands described and declared open to entry in the President's proclamation dated March 23, 1889, prior to 12 o'clock, noon, of March 22, 1889.

When the hearing was ordered to determine whether Page or Renfro was the prior settler, the question as to whether *either* of them could take that oath (without which he could not be a legal settler) was necessarily involved—whether "formally" raised or not. It was raised; testimony bearing upon that point was taken; and the question has been adjudicated by the Department. The case at bar, in my opinion,

comes within the rule that an issue once tried and determined will not be made the issue of a second contest (*Curtin et al. v. Morton*, 22 L. D., 91). And this rule is applicable to contestants, claiming a prior right to lands, as was held in the case of *McEvers v. Johnson*, 23 L. D., 472.

The decision of your office denying a hearing is affirmed.

SMITH ET AL. v. TAYLOR.

Motion for review of departmental decision of November 12, 1896, 23 L. D., 440, denied by Secretary Francis, January 30, 1897.

RAILROAD LANDS—REIMBURSEMENT—ACT OF MARCH 3, 1887.

JOSEPH PRETZEL.

The right to reimbursement under the act of March 3, 1887, cannot be recognized if the title conveyed by the government is paramount to the claim of the railroad company.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (P. J. C.)

This is an application for reimbursement under the act of March 3, 1887, 24 Stat., 550 (5 L. D., 627), made by Joseph Pretzel. The government issued its patent to him, August 20, 1881, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 27, Tp. 3 N., R. 1 E., 6th P. M., Beatrice, Nebraska.

He alleges that the tract was embraced in the grant to the State of Kansas for the use of the St. Joseph and Denver City Railroad Company, by act of July 23, 1866 (14 Stat., 210); that the Kansas and Nebraska Railway Company of Kansas, the transferee of the grant, by its trustees, on November 15, 1881, conveyed the tract to one W. Pringle Mitchell; that, in order to remove the cloud from his title, he did, on June 7, 1883, pay to Mitchell, "who claimed prior and paramount title to said land" by virtue of his deed aforesaid, the sum of eighty dollars, and received a quitclaim deed from Mitchell for the land; "that he has not been sued and subjected to any judgment, but that he paid the sum demanded of him," and believes he ought to be reimbursed under said act of March 3, 1887.

It appears that your office, by letter of May 16, 1895, addressed to an attorney in Nebraska, in relation to "the claims of Franz Rothemier and Joseph Pretzel for reimbursement," stated,

that the title held by said parties from the railroad company is paramount to the title given by the government, as the land had passed to the railroad company prior to the date of the patents issued to Rothemier and Pretzel.

Your office required some additional evidence to show no transfer or incumbrance of their title under government patents. This additional evidence was also required by letter of July 25, to the Nebraska attorney, also of August 22, 1895, to local attorneys.

By letter of December 19, 1895, in passing upon the Pretzel claim, it was said:

I have to inform you that upon a re-investigation of the evidence and facts in the case, I fail to find that there has ever been a similar case presented and acted upon by this office, in which a decree of court was rendered on account of priority of the railroad grant.

The records of this office show that on March 7, 1870, Gerhard Busch made homestead entry No. 3914, for the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 27, Tp. 3 N., R. 1 E., canceled for abandonment April 5, 1872.

The rights of the St. Joe and Denver City Railroad Company did not attach until March 28, 1870, and as this land was segregated by virtue of prior homestead entry No. 3914, it was excepted from the grant to said railroad company.

On April 22, 1872, Joseph Pretzel made homestead entry No. 6509 for the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 27, Tp. 3 N., R. 1 E., and at that date the railroad company had not selected said tract, and hence the title derived from the United States, based upon homestead entry No. 6509, is a valid one.

The claimant does not show that the government patent has been set aside by a decree of court on account of priority of the railroad grant, nor am I aware of a case similar to this, in which the court held that the railroad had the paramount title.

The claim was therefore denied, and the patent and quitclaim deed to the government made by Pretzel were returned to him.

A motion for review of this decision was filed by applicant, and as a ground therefor it was contended that the letters of your office of May 16, July 25, and August 22, 1895, were a final adjudication of the right of Pretzel to reimbursement; that by reason of these decisions this question was *res adjudicata*. This motion was denied on the ground that the prior instructions given were upon the hypothesis that the railroad title was paramount, when, as a matter of fact, it was shown not to be by the records of your office, and the whole matter still being within the jurisdiction of your office, it had the authority to revoke the former decision and render judgment in accordance with the record. (*Littlepage v. Johnson*, 19 L. D., 312.)

The applicant prosecutes this appeal, assigning error in your office decisions in holding that his claim does not come within the provisions of the act of March 3, 1887; that the railroad company's title was not paramount to that of appellant, and in overruling the motion for review.

It was not error in your office to decide this matter according to the record facts as subsequently disclosed in your office. Even if the former letters could be dignified into a decision, the later discovery of the actual condition of the subject-matter of the controversy, while your office still retained jurisdiction, would not prevent it from deciding it according to the facts.

The fact that the land was excepted from the grant by reason of a prior homestead entry is sufficient in itself to defeat the claim for reimbursement. By reason thereof the title conveyed by the government is paramount to the claim of the railroad company.

This finding renders it unnecessary to discuss any other feature suggested by the record.

FEES—DESERT LAND - STATE SELECTIONS.

T. J. FOSTER ET AL.

On the location of desert lands by a State under the fourth section of the act of August 18, 1894, the register and receiver are each entitled to a fee from the State of one dollar for each final location of one hundred and sixty acres.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (J. L.)

This case involves a question of law affecting administration:

Have the registers and receivers, in the location of lands by a State under the fourth section of the act of August 18, 1894 (28 Statutes, 372-422), the right to demand a fee of one dollar for each officer for each final location of one hundred and sixty acres, to be paid by the State making such location, in accordance with the first clause and the seventh subdivision of section 2238 of the Revised Statutes of the United States?

The case arose in this way. On August 28, 1896, the register and receiver at Buffalo land district, Wyoming, telegraphed your office as follows:

Are we to accept State selections under act of August 18, 1894, without fees.

On the next day, August 29, your office replied by telegraph as follows:

Accept lists under section four act of August 18, 1894, without fees, according to office letter of March 21, 1896. Copy will be sent.

And on the same day your office by letter "F" confirmed the telegram, and transmitted "a copy of so much of said letter to the Hon. Secretary in relation to Idaho list 1, under the same act, as decides this question of fees." Said letter to the Secretary was dated March 21, 1896.

On August 31, 1896, your office by letter "M" instructed the receiver of public moneys at Buffalo, Wyoming, to return to the State of Wyoming all moneys paid as fees on selections of desert lands under the 4th section of the act of August 18, 1894 (28 Statutes, 372-422) "as fees are not properly chargeable on such selections."

On September 20, 1896, the register, T. J. Foster, and the receiver, F. B. Proctor, in a joint letter respectfully requested your office to review and reconsider the decisions aforesaid affecting their fees and greatly reducing their official compensation.

On October 5, 1896, your office by letter "M" denied the application for review, but said:

If you are under the impression that fees are properly chargeable on selections under the act of August 18, 1894, the proper course for you to pursue is to appeal from the decision of this office.

Whereupon the register and receiver jointly appealed to this Department.

By reference to the Secretary's letter, dated April 21, 1896, in reply to the Commissioner's letter dated March 21, 1896, it will appear that the Secretary did not consider or decide the question raised in respect to the fees in controversy. That question is now distinctly presented for adjudication, unembarrassed by any previously expressed opinion by this Department.

The opinion and ruling contained in your office letter "F," dated February 20, 1895, and addressed to the register and receiver at Cheyenne, Wyoming, is clearly right. The opinion expressed in your office letter "F," dated March 21, 1896, and addressed to the Secretary, is erroneous.

Section 2238 of the Revised Statutes provides that:

Registers and receivers, in addition to their salaries, shall be allowed each the following fees and commissions, namely:

* * * * *

Seventh. In the location of lands by States and corporations under grants from Congress for railroads and other purposes (except for agricultural colleges), a fee of one dollar for each final location of one hundred and sixty acres; to be paid by the State or corporation making such location.

By the fourth section of the act of August 18, 1894, Congress agreed upon certain terms and conditions prescribed, to bind "the United States to donate, grant and patent to the State free of cost for survey or price, such desert lands not exceeding one million acres in each State," as the state might within ten years after the passage of the act, cause to be irrigated, reclaimed, occupied and cultivated (to the extent of not less than twenty acres in each one hundred and sixty acre tract) by actual settlers. There is nothing in this act tending to repeal, modify or in any way affect the law contained in section 2238 aforesaid. The express limitations—*free of cost for survey*, and *free of price*—by necessary implication exclude any other exemption from the usual costs, fees, charges and expenses attending the administration of the Land Department in such matters.

Your office decisions appealed from are hereby reversed. Your office will direct registers and receivers, on the location of desert lands by a State under the fourth section of the act of August 18, 1894, to require the State to pay for each officer a fee of one dollar for each final location of one hundred and sixty acres, as prescribed by section 2238 of the Revised Statutes. Your office will also notify any State or States having applications under said fourth section pending and undetermined in which said fees have not been paid, that action upon their applications will be suspended, until after they shall have paid to the local officers the fees due in accordance with the aforesaid section 2238, and this decision.

SWAMP LAND—SURVEY—CHARACTER OF LAND.

STATE OF CALIFORNIA ET AL. v. UNITED STATES ET AL.

Where it is apparent from the record that in the survey of a township, a large body of land adjacent to a navigable lake has been omitted from actual survey, through the establishment of a meander line between alleged swamp and dry lands, instead of at the true shore line of the lake, a survey of the lands so omitted should be made.

The claim of a State under the grant of swamp lands must fail if it does not appear that the lands were of the character granted at the date of the grant.

Secretary Francis to the Commissioner of the General Land Office January 30, 1897. (J. L.)

This case involves the lands described in the following petition, situated in San Francisco land district, California.

By a petition dated May 29, 1890, John A. Fairchild, Annie Fairchild, Jerome P. Churchill, F. E. Wadsworth, Mary Wadsworth, F. S. Ackerman, Elisha De Witt, Helen Martin and William Lennox, describing themselves as "applicants for the government title to the swamp and overflowed lands hereinafter described," requested the governor of the State of California to apply to the United States surveyor general for the State of California, for an immediate survey of the following described swamp and overflowed lands, to-wit:

Fractional portions of sections twenty-two (22), twenty-seven (27), twenty-six (26), twenty-five (25), thirty-five (35), and thirty-six (36), all in township forty-eight (48) north of range one (1) east, M. D. M.

Fractional portions of sections seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), and thirty (30), all in township forty seven (47) north of range two (2) east, M. D. M.

In support of this petition and as part thereof, they filed the affidavits of Jerome Churchill, John A. Fairchild, John Q. Hendricks, and David Ream, respectively.

David Ream made oath:

That all of the unsurveyed land in townships 48 north of range 1 east M. D. M., and 47 north of range 2 east, M. D. M., which lies west of a meandering ridge or elevated strip of land extending from a point near the center of the eastern boundary of section sixteen (16) in township forty-seven (47) north of range two east, M. D. M., northerly to the northern boundary line of said Siskiyou county, which is also the northern boundary line of the State of California, (and which said ridge or strip of elevated land forms the natural western boundary of the shore of Little Klamath lake—a portion thereof), was in the said year of 1874, and ever since it has been, swamp and overflowed land.

John Q. Hendricks in his affidavit, qualified the foregoing statement of David Ream, by inserting after the word "all," the words, "or nearly all;" and by substituting the year 1872 instead of "1874."

Jerome Churchill in his affidavit made oath that:

All the unsurveyed portion of said last mentioned townships lying west of a certain ridge, or elevated strip of land, which forms the western boundary of Little

Klamath lake proper, (and which said ridge or strip of elevated land extends from a point near the center of the eastern boundary line of section sixteen (16) in township forty seven (47) north of range two (2) east, M. D. M., in a general northerly direction, with various indentations, until the said ridge reaches the northern boundary line of said Siskiyou county), was, on the occasion of affiant's first visit in 1865, and ever since it has been, swamp and overflowed land.

John A. Fairchild in his affidavit, modified Churchill's statement aforesaid by inserting the year 1858 instead of "1865."

In pursuance of said request, the governor of California, on September 3, 1890, in accordance with section 4 of the act of July 23, 1866, entitled "An act to quiet land titles in California," (14 Statutes, 218—U. S. Rev. Stat., Sec. 2488), filed with the United States surveyor general an application to have segregation surveys made of the above described lands, representing and describing what land of the said lands, was swamp and overflowed under the grant, according to the best evidence that can now be obtained. The governor forwarded with said application the petition and affidavits aforesaid, and a copy of a plat of survey of said land as made by the county surveyor of Siskiyou county, California. Counsel were employed by the State authorities to represent the State and the swamp land claimants; upon condition that the State "shall not be held responsible for any costs or expenses in the matter."

On March 2, 1891, the U. S. surveyor general transmitted to your office for instructions, all the papers in the case, including all papers, plats and field notes that had accumulated in his office in consequence of correspondence with the State surveyor general.

On May 29, 1891 (by letter "E"), your office, "without passing upon the merits of the application," denied it, because there were "no funds applicable for such character of surveys." Subsequently the swamp land claimants deposited money to pay the expenses of the survey requested by the governor. And on September 11, 1891, eighteen persons claiming to be homestead settlers upon the lands involved, to-wit: Will B. McGill, Henry N. Beal, M. Brownell, James Hayes, Joseph Knight, J. Thackery (or Thackara), J. Doyle, A. Defreits (or Defratas), J. Randall, F. Kenney, C. McManners, B. F. Oatman, S. Andrews, J. Browning, F. Oatman, T. Smith, Augustus Mansfield, Jack White and D. W. Inman, intervened, by filing a petition in which they deny the claim of the State of California and the swamp land claimants, that the lands involved are or were swamp and overflowed lands made unfit thereby for cultivation. On the contrary, they alleged that said lands were and are good agricultural lands, susceptible of cultivation by the ordinary means of farm tillage; and that crops of wheat, oats, barley, corn, grasses and garden vegetables, now grow upon said lands by the application of the ordinary processes of agriculture. In their petition they described severally the tracts of land occupied by the settlers respectively, and upon which—they alleged—they reside with their families, forming a prosperous agricultural community, with dwelling

houses, barns and fences, public roads, a United States post office (Brownell), and a public district school house attended by fifteen pupils. They pay taxes, and are in all respects under the government of the regular State and county officers.

Thereupon the homestead settlers prayed that the lands be officially surveyed, with a view to determining the respective rights of the State of California and the swamp land claimants on the one hand, and of the United States and the homestead settlers on the other; in order that they may be able to make their entries according to law.

All parties to this controversy in their statements or pleadings agreed, (1) that the lands involved have never been officially surveyed; (2) that said lands lie outside of Little Klamath lake; (3) that the true boundary of the lake is the ridge or elevated strip of land hereinbefore described; and (4) that said lands should now be officially surveyed. They differed only as to the character of the lands; which can be determined as to each smallest subdivision, only after an official survey.

On January 7, 1892 (by letter "E"), your office rejected the application of the governor of California "to have segregation surveys made of the above described land;" but instructed the surveyor general to call a hearing as provided in the fifth subdivision (or paragraph) of section 2488 of the Revised Statutes of the United States, "to determine the character of the lands in question at the date of the swamp-land grant, namely, September 25, 1850."

The hearing began on June 14, 1892, and was closed on August 20, 1892.

On September 16, 1892, the surveyor general rendered his decision as to the lands situated in township 48 range 1 east, as follows:

In view of this undisputed evidence, corroborated by a personal inspection of the land, I am of the opinion and so decide that the land in question was swamp and overflowed at the date of the passage of the swamp land act of September 28, 1850, and as such should inure to the State.

On May 6, 1893, the surveyor general rendered his finding as to the lands situated in township 47 north, range 2 east, as follows:

In conclusion it is my opinion that the lands under consideration embraced both swamp and overflowed land and public land (meaning dry and arable lands), at the date of the passage of the swamp land act of September 28, 1850; but as the official subdivisional surveys have not been extended over this land, it is impossible to give either public, or swamp land an official designation. Such being the case, a decision must be postponed until the necessary survey shall have been made.

It is my judgment that the official plat on file in this office, of township 47 north, range 2 east, M. D. M., is erroneous; that there is a body of land in said township which did and does exist, where a lake is alleged to exist; that the same is not a tract of land notoriously and obviously swamp and overflowed.

That a portion of said land is public land fit for, and now settled upon and improved as, agricultural land; that portions of the said tract are swamp and overflowed; that before the character of these lands can be fully determined by legal subdivisions necessary to final adjudication, the public surveys must be extended over the same; and until such is done a decision as to the character of each forty acre tract must be

postponed, and for that purpose I recommend an immediate survey of all surveyable land in said township lying outside of the meander line shown on the official plat.

On March 20, 1894, your office decided that the lands described in the governor's application for a survey, were not swamp and overflowed lands made unfit thereby for cultivation, within the intent and meaning of the swamp land grant of September 28, 1850, and thereupon disallowed the claim of the State thereto and rejected the governor's application for a survey. Your office further found and decided:

That "for many years (prior to 1874 and doubtless in 1850), the waters of Little Klamath lake covered all of the lands which were subsequently found to be situate outside of the meander line established by McKay in his survey of 1874 and 1879," and "that lands covered by an apparently permanent body of water at the date of the swamp land grant are not of the character contemplated by said grant." . . . "It therefore follows that as the lands which were embraced in the so-called 'impassible tule swamp'" in T. 47 N., R. 2 E., M. D. M., at the date of the official survey in 1874 and 1879, were in 1850 no doubt fully and completely covered by the waters of the Little Klamath lake, no testimony to the contrary having been submitted, and as the lands are now admitted to be in the main adapted to agriculture, it is apparent that the State of California has no claim thereto under the swamp land act of September 28, 1850. The application of the governor of the State of California on September 3, 1890, for a segregation survey of said lands was rejected for reasons set forth in office letter "E" of January 7, 1892. The claim of the State to said lands, on the assumption that the same were swampy and overflowed on September 28, 1850, is hereby disallowed.

Your office then proceeded to state, that

an examination of the official records shows that all of the lands in the several lots in sections 18, 19 and 30, abutting on the official meander lines of Little Klamath lake, have been disposed of; also, with the exception of two lots, all of the similar lots in sections 17 and 20. With the exception of lot 1 in section 34 and lots 1 and 6 in section 35, the title to all of the remaining lands adjacent to and closing on the meander lines, is still vested in the United States.

And after referring to the case of "Lake Malheur" reported in 16 L. D., 256, and others, your office decided as follows:

It therefore seems clear that the requisite exterior, meander and subdivisional lines in T. 47 N., R. 2 E., M. D. N., should be extended, where the title to the lands up to the shore line remains in the government, and you are accordingly hereby authorized to award a contract to a competent and reliable deputy surveyor for the extension of said lines. This authorization, however, must not be applied to any portion of the uncovered or recession lands in said township where the titles to the lots adjoining the original meander lines of Little Klamath lake in sections 17, 18, 19, 20, 30, 34 and 35, as hereinbefore detailed, have been disposed of; it being held in those cases that the riparian rights of said adjoining proprietors must be recognized.

In respect to "the alleged swamp and overflowed lands in the fractional portions of sections 22, 25, 26, 27, 35 and 36, in township 48 north, range 1 east, M. D. M., as claimed by the State of California under the swamp land grant of September 28, 1850, your office found the facts as follows:

1. In the absence of evidence to the contrary, and in view of the admitted condition of the lands in 1887, as shown by the returns of the county surveyor, it appears

fair to presume that at the date of the swamp grant in 1850 the lands in question were covered with water, and were in no sense swamp land as contemplated by the statute. It is held by the Department that land covered by an apparently permanent body of water at the date of the swamp grant is not of the character contemplated by said grant.

2. The official records do not show that the title to any of the lands in T. 48 N., R. 1 E. (except to the swamp lands in sections 21, 22, 27, 28, 33, 34 along Hot creek, and in section 36, all of which are designated as swamp on the official plat), has passed from the government.

And thereupon your office decided as follows:

For reasons herein set forth, the application of the State of California that the lands in the designated fractional sections in T. 48 N., R. 1 E., M. D. M., be declared as swamp and overflowed land within the intent and meaning of the swamp land grant of September 28, 1850, is hereby rejected.

The application for the survey of these lands was rejected for reasons stated in office letter "E" of January 7, 1892; I know of no reason why the said action should be reversed, and the same is reaffirmed.

Subsequently your office overruled a motion for a review of said decision; and thereupon the homestead settlers aforesaid appealed to this Department.

The State of California and the swamp land claimants have not appealed; and to that extent at least they seem to have acquiesced in the decision of your office, and to abandon all claim of the lands in question under the acts of September 28, 1850, and July 23, 1866 (14 Statutes, 219). This conclusion is placed beyond all doubt by the fact, that the swamp land claimants have employed special counsel to resist and oppose the homestead settlers' appeal. On page 2 of the brief filed by said counsel it is said:

The present brief is filed on behalf of John A Fairchild and others, who are owners of tracts adjoining a portion of the land in controversy, and who seek an affirmation of the Commissioner's decision establishing their title as riparian owners.

The plaintiffs manifestly expect, under color of riparian rights as recognized and enforced by your office decision, to accomplish the same practical results that they had hoped to attain by their petition as swamp land claimants.

Following the method adopted by the surveyor general and also by your office, this Department will consider the two townships separately.

Township 47 N., R. 2 E., M. D. M.

This Department concurs in your office finding that on September 28, 1850, the lands embraced in T. 47 N., R. 2 E., M. D. M., were not swamp and overflowed lands made unfit thereby for cultivation; and your office decision disallowing the claim of the State of California to said lands under the swamp land act of September 28, 1850, is hereby affirmed.

As was said in the case of *Oregon v. Porter*, 22 L. D., 156-159:

When after the lapse of more than (forty) years,—after the death of a generation of men—persons claiming to be assignees of the State, go out to search for lands

which were swamp and overflowed in (1850), they must expect to find the burden of proof aggravated, but not shifted: Especially if the lands they may select, be not now swamps, but the productive farms and healthy homes of industrious citizens.

Your office erred in assuming that Little Klamath lake is a non-navigable lake. In fact, it is a navigable lake, eighteen or twenty miles long and ten or twelve miles wide, lying about one half in California and half in Oregon, with well-defined shores full of deep water, over which there is now, and for many years has been, carried on useful and profitable interstate commerce of freights and passengers, in steamboats and other vessels. (See record of testimony, pages 614, 615, 621 and 622.) The cases cited and quoted in your office decision, in respect to riparian rights, and lands acquired by accretion or reliction, are not relevant in this case.

Your office erred in finding as follows:

In the absence of any testimony showing the character of the lands in T. 47 N., R. 2 E., at the date of the swamp land grant (September 28, 1850), taken in conjunction with the admitted condition of the "impassable tule swamp" in 1874 and 1879, the conclusion is reached that for many years (prior to 1874 and doubtless in 1850), the waters of Little Klamath lake covered all of the lands which were subsequently found to be situate outside of the meander line established by McKay in his survey of 1874 and 1879.

The testimony does not sustain said "conclusion." The topography of the neighboring country as shown in evidence, proves conclusively, that it is physically impossible, that the lands referred to, could have been covered in 1850, or in 1874, or in 1880, or at any other time, since 1850, by the waters of Little Klamath lake.

In the month of July, 1874, when United States deputy surveyor Alexander McKay made his survey of said township, he ran and established a meander line to mark the boundary between the "plateau" of arable public land and the lands which he considered swamp and overflowed and unfit for cultivation. Then and there, between that meander line and the shore or water line of the distant lake itself, there lay uncovered and visible to the eye, a tract estimated to contain 7,080.69 acres of land, which he, the deputy surveyor, did not survey, but designated on his plat and in his field notes as "swamp and overflowed land."

Moreover, if it were true that in the year 1850, said 7,080.69 acres constituted part of the bed of Little Klamath lake and were entirely covered by its waters, that fact (if shown), would be immaterial and irrelevant in this case. If in the interval between 1850 and 1874, said 7,080.69 acres had been brought to the light, by accretion or by reliction—by the gradual accumulation of earthy matter or by the recession of the waters of the lake—such increment of land would have been in 1874 the property of the United States as the sole owner during that period of time.

The only colorable evidence to be found in this record tending to support your office finding "that for many years (prior to 1874 and

doubtless in 1850), the waters of Little Klamath lake covered all the lands which were subsequently found to be situate outside of the meander line established by McKay in his survey of 1874," is one of the plats or maps of T. 47 N., R. 2 E., M. D. M., now on file in your office. This map bears the certificate of the surveyor general in the following *unusual* form:

The above map of township No. 47 north, range No. 2 east, Mount Diablo meridian, has been constructed in accordance with instructions from the General Land Office dated November 26, 1879, from the field notes of the surveys thereof on file in this office.

THEO. WAGNER,
Surv. Genl. Cal.

SURVEYOR GENERAL'S OFFICE,
San Francisco, California, February 3rd, 1880.

There is another plat or map of said township also on file in your office (and bound in the same volume 27 with the other), which bears the surveyor general's certificate in the usual form, as follows:

The above map of township No. 47 north, range No. 2 east, Mount Diablo meridian, is strictly conformable to the field notes of the surveys thereof, on file in this office, which have been examined and approved.

THEO. WAGNER,
Surv. Genl. Cal.

SURVEYOR GENERAL'S OFFICE,
San Francisco, California, November 13, 1879.

The history of these two maps of the same township as compiled from the official papers now before me, will make it clearly manifest that your office committed errors in holding (1) that the lands in question were once part of the bed of Little Klamath lake; (2) that the fractional lots shown upon said maps, abutted upon or were adjoining to the shore line of said lake; and (3) that the owners of said lots had riparian rights which must be recognized.

The date of McKay's contract with surveyor general Hardenburg was October 6, 1873. McKay began his survey on July 7, 1874, and finished it on July 20, 1874:—*except* as to four courses, which he (the deputy surveyor), in his field notes calls, "Meanders of Little Klamath lake and *outer line* of tule and swamp unfit for cultivation." "This water line was run on the ice February 19, 1879," as hereinafter stated.

McKay did not return his field notes to the surveyor general's office until 1877; when they were returned to him for the reason "that they were not sufficiently explicit as to the meander line of Klamath lake as run by him." "The notes were again returned by Mr. McKay April 3, 1879, with the explanation that the long delay had been occasioned by the necessity of waiting until the ice had formed so he could re-run the meander line as directed by the office;" and with an amendment to the field notes in the following words:

Meanders of Little Klamath lake and outer line of tule and swamp unfit for cultivation.

Commencing at the end of the 13th course as reported, in the meanders of Sec. 25 of the inner meander line between arable land and swamp and overflowed land unfit for cultivation.

Course.	Dist.	Remarks.
S. 75° W.	101.50	
N. 20° W.	253.00	
N. 3° W.	50.00	
N. 33° W.	100.00	To $\frac{1}{4}$ Sec. and meander cor. between Secs. 4 and 33 on the north boundary of the township. Note. This water line was run on the ice Feb. 19, 1879.

Surveyed by

ALEX. MCKAY.

On September 29, 1879, Surveyor General Theo. Wagner, accompanied by one of his deputies as compassman, went in person upon the premises, and "carefully retraced the line of segregation of the swamp and overflowed land from the dry land."

I found (he said in his report to your office of November 14, 1879), that said line was properly established; and that the meander line of Mr. McKay's survey had been properly run upon the shores of the lake, and might have been established at any time by submitting to a little inconvenience and wading through the mud—the waiting for the formation of the ice being wholly unnecessary.

And on November 13, 1879, the surveyor general certified the map which had been prepared in strict conformity with the field notes of the surveys of the township examined and approved, as first made by Deputy Surveyor McKay and afterwards by the surveyor general in person. The face of the map itself, and the application to the map of the calls of the field notes of the meanders of the swamp and the lake respectively, show that in 1874 and 1879 there was in existence, uncovered and visible to eye, a body of land called "swamp" by the surveyors, and containing by estimation 7,080.69 acres, which was carefully segregated from the arable land and from the lake, by the inner and the outer meander lines delineated and described.

On November 26, 1879, by letter "E" addressed to the surveyor general, your office,

found the returns of survey defective and irregular in that neither the exterior meanders nor subdivisional lines were actually established in the field; but the line called the outer line of tule &c., or segregation of the impassable swamp from the open lake, although run and measured on the ice, was not marked in any manner, neither was there any subdivisional corner set or driven in any part of the "impassable swamp."

Your office then proceeded to say:

Under these circumstances the survey as a whole, cannot be approved by this office, and is therefore rejected in so far as relates to the running of said "outer meander line" and the consequent platting of swamp lands.

I have to direct that upon receipt hereof, you will make annotation upon the plat and field notes of this survey, of my decision, and prepare a new plat showing the survey of the township only to the "inner meander line," so called by the surveyor.

It is plain that the phrase "inner meander line" was understood by all parties to mean the meander line between arable land, on the one side, and swamp and overflowed land unfit for cultivation, on the other; and that the phrase "outer meander line," meant the line along the shore of the lake proper, close to the water's edge, separating the water

of the lake from the swamp and overflowed land. The objection of your office embraced only the four meander courses copied above, which were run and measured on ice (and which on the map first returned, marked the western boundary of Little Klamath lake); and "the consequent platting (imaginary) of swamp lands." Your office distinctly recognized "the inner meander line so called by the surveyor"—not as a meander of Little Klamath lake—but as the line of demarkation between the lands high and arable, and the lands alleged to be swamp and overflowed; and plainly directed the surveyor general to "prepare a new plat showing the survey of the township only to that line," which was in fact the extent of McKay's actual survey. Your office thus approved the plat and survey and field notes first returned, so far as courses had been run, lines meandered, and corners established, actually, in the field; and rejected them only as to the residue of the township. The new plat was intended to show that the township was only partially surveyed; and that all the lands north and east and northeast of the arable land aforesaid were unsurveyed. Your office gave this direction with knowledge of the fact, that said unsurveyed portion of the township embraced (by estimation) 7,080.69 acres said to be swamp and overflowed, and 7,619.13 acres said to be covered by the waters of Little Klamath lake. The new map was to be ancillary to the first map, and prevent confusion by showing separately the arable public lands open to settlement and entry: Reserving for future consideration all questions between the United States and the State of California, in respect to the alleged swamp and overflowed lands.

On February 4, 1880, the surveyor general furnished the new plat or map "constructed in accordance with instructions." It shows only the arable public lands which had been actually surveyed. The lines of the survey were closed upon the "inner meander line," separating the arable from the swamp lands; and the fractional subdivisions thereby made necessary, were divided into lots and numbered. The new plat and the first plat were bound together in volume 27 of the official maps of California, and thus remain of record in your office jointly as a delineation of the township. They show conclusively that none of the lots surveyed and numbered therein abut upon or adjoin Little Klamath lake;—except lots 4, 5 and 6 in section 25, which have not been disposed of by the United States.

A further examination of the records of your office shows that only four patents have been issued for said lots, as follows:

On May 6, 1887, to Jerome Churchill for lots 1, 2, 3, 4 and 5 of section 18 and lot 2 of section 19.

On April 29, 1889, to Manuel J. Miller for lot 1 of section 30.

On January 28, 1890, to Norris F. Skeen for lots 3, 4 and 5 of section 35.

On November 9, 1891, to Annie E. Fairchild for lots 1, 2 and 3 of section 17, and lots 1 and 2 of section 20.

Two of said patentees, Jerome Churchill and Annie E. Fairchild were original plaintiffs in this controversy. None of them have any riparian rights whatever. The lands granted by their patents were limited by the straight subdivisional and meander lines which defined the lots on the face of the map.

The voluminous testimony in this case has been carefully examined. There appear such discrepancies as usually appear when interested parties, very much in earnest, are called to testify against each other. The witnesses all agreed that in 1874, there was no lake upon the land in controversy; and that the estimated tract of 7,080.69 acres, designated on the first map as "swamp and overflowed land," was land in full view. They differed as to the *character* of the land, whether it was in whole or in part, wet or dry—arable or unfit for cultivation. It is not necessary for the disposition of this case to decide between them. It is enough to find, as this Department does, that there is a large body of public lands belonging to the United States which has never been surveyed now occupied by homestead settlers.

Your office decision of March 20, 1894, in respect to the lands in T. 47 N., R. 2 E., M. D. M., is hereby reversed so far as it conflicts with the opinions herein expressed. Your office is hereby instructed to cause an official survey to be made of all the lands in said township lying north of the meander line established in the field by deputy surveyor McKay and delineated on the maps of said township on file in your office; and cause said survey to be closed upon the true shore or water line of Little Klamath lake, as ascertained, meandered and established by actual survey.

Township 48 N., R. 1 E., M. D. M.

In respect to the lands in T. 48 N., R. 1 E., your office decision found that they were not in 1850 swamp and overflowed and unfit for cultivation; and decided that they did not pass to the State of California under the act of September 28, 1850. This finding and decision are hereby approved and affirmed.

Your office further found that on September 28, 1850, said lands were probably a part of the bed of Little Klamath lake, and covered with water. The only evidence in this case tending to support this finding is the official map of said T. 48 N., R. 1 E., approved by the surveyor general on April 21, 1875, and now on file in your office. Said map purports to be a complete plat of the whole township and its correctness does not appear to have been called in question before this controversy arose. On the face of the map 772.40 acres of "swamp and overflowed land" are designated within the surveyed portion of the township, to-wit: 40 acres in section 36, 200 acres in section 34, 80 acres in section 33, 280 acres in section 28 and 172.40 acres in sections 21 and 22. "The meanders of Little Klamath lake," which were run on May 30, 1874, are plainly drawn upon the map, and seem to mark

the boundary between the arable public lands and the waters of the lake, as they stood on that day. The area of the lake was estimated at 5,622.65 acres. The plaintiffs in their application claimed only 1,685.60 acres; which according to Mitchell's map filed by them, appears to be an increment of land developed since the date of the official survey; and which has been caused, perhaps in part, by the fact that Little Klamath lake has been tapped to irrigate large areas of arid lands in Oregon, which lie below the level of the lake.

Your office decision certifies that,—

The official records do not show that the title to any of the lands in T. 48 N., R. 1 E. (except to the swamp lands in sections 21, 22, 27, 28, 33 and 34 along Hot creek and in section 36, all of which are designated as swamp on the official plat), has passed from the government.

So that the government remains the sole owner, except as to said "designated" swamp subdivisions.

The testimony in respect to the lands in this township is comparatively meagre (Record pp. 1 to 52). Only seven witnesses were introduced by the plaintiffs, and none by the defendants, of whom, only one ever claimed a settlement on this township, to-wit: "D. W. Inman, on portions of section 36, T. 48 N., R. 1 E."; and he appears to have abandoned his settlement. The concurrent testimony of all of said witnesses shows that in the year 1874, there was no lake, at the places where the lands claimed by the plaintiffs in this township now appear; which accords with the affidavits filed with the plaintiffs' application, and appears to be true notwithstanding the official map.

This Department does not concur in your office opinion that "it appears fair to presume that at the date of the swamp grant in 1850 the lands in question were covered with water."

That part of your office decision which rejects the application of the governor of California for a survey of the lands claimed in this township 48 N., R. 1 E., is hereby affirmed; but without prejudice to the jurisdiction and authority of your office, at any time, upon the application of any other person interested, or of your own motion, to direct an extension of the lines of the former survey over the whole township, in order that the meander lines now appearing on the map may be readjusted; that the true shore or water lines of Little Klamath lake, and of other meanderable lakes that may be found in said township, may be meandered and definitely established; and that the character of the lands now apparent, down to the smallest subdivision, may be determined.

ALIENATION-HOMESTEAD ENTRY.

WALKER v. CLAYTON.

A written agreement to convey the land covered by a homestead entry, made prior to the submission of final proof, will defeat the right of the entryman to perfect his entry.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (E. B., Jr.)

I have considered the case of *L. M. Walker v. Charles J. Clayton*, on appeal by the latter from your office decision of October 29, 1895, holding his homestead entry, No. 7386, made December 27, 1889, for the NE. $\frac{1}{4}$ of section 32, T. 26 S., R. 23 E., M. D. M., Visalia, California, land district, for cancellation on the ground, in effect, of his bad faith, as evidenced by his agreement with one May, to convey the land to him, prior to final proof. The only question necessary to be discussed is that of bad faith.

A contest charging generally, that Clayton made the entry for speculative purposes and specifically that on July 14, 1894, he entered into a written contract with E. F. May, to convey to him for a valuable consideration in money and land the tract above described and certain other property, was initiated by said Walker, February 7, 1895. He had, on August 30, 1894, filed a contest affidavit of the same tenor, which was dismissed December 13, 1894, upon Clayton's motion, "for want of prosecution." A hearing, in March, 1895, upon the contest first above mentioned, resulted adversely to the entryman, the decision of your office being an affirmance of the decision of the local office.

The record shows that Clayton entered into a contract as charged, which was to be executed within sixty days from the date thereof, the party making default to forfeit to the other "one thousand dollars as liquidated damages, and such other damages as may in consequence of such failure be legally established." An endorsement on the contract shows that Clayton sought an extension for ninety days of the time within which the contract might be executed. No extension was agreed to by May. The contract has not been executed in any particular, so far as appears, on the part of either party. It is admitted by Walker that Clayton had complied with the homestead law up to the time of the hearing in respect to residence and cultivation.

Clayton commenced to reside upon the land in February, 1890. He was allowed leave of absence under the act of March 2, 1889 (25 Stat., 854), from May 13, to December 13, 1890, a period of seven months. The five years of residence and cultivation necessary to acquire title by that means under the homestead law would not end, therefore, until September, 1895. The agreement to convey was thus made about fourteen months before he could submit his final proof or acquire any title

to the land, unless by purchase under section 2301 of the Revised Statutes, and it is not shown that he had any intention to so purchase. In his homestead affidavit he had sworn that the entry was made for his exclusive benefit and not directly or indirectly for the benefit or use of any other person or persons whomsoever, and he knew that in his final affidavit he would be required to make oath, subject to an exception not here in point, that he had not alienated any part of the land (Sections 2290 and 2291, Revised Statutes). It was evidently implied, if not expressed, in his contract with the United States, that he would continue to hold, reside upon and cultivate the land for his exclusive use and benefit until the time should arrive, when, after the submission of final proof as required by law, he had earned his right to receive patent therefor.

It is no adequate defence that May could not enforce specific performance of the contract. Clayton might, of his own volition, have carried it out, and it is this mischief that the statute is designed to remedy (*Molinari v. Scolari*, 15 L. D., 201). Neither is it any sufficient answer that by its terms the agreement had come to an end long before contest was initiated. It was in force when the first contest affidavit was filed, and was sought by Clayton on August 29, 1894, to be continued ninety days beyond the limit first agreed upon. If when threatened with exposure of bad faith a homesteader could in each instance avoid the consequences by simply repudiating his contract to convey, the sanction of the law would be overthrown.

In the case of *Tagg v. Jensen* (16 L. D., 113), it was laid down as the settled construction of the pre-emption law relative to alienation "that any agreement to convey any part of an entry or claim to another made prior to final proof will defeat the claim." While the language of the pre-emption law was more explicit than that of the homestead law as it stood at the date of this entry, the spirit and intent of each on the point at issue was the same; and section 2290 of the Revised Statutes, as amended by the act of March 3, 1891 (26 Stat., 1095), was made to conform substantially to the language of the former. See in this connection *Bashford v. Clark et al.* (22 L. D., 328).

The suggestion in the argument of counsel that Clayton "may have been inveigled into making" said contract by the contestant Walker, should receive some attention. It appears that the initiative in the matter of said contract was taken by Clayton himself; that he came to the office of Walker who was then a member of a firm of real estate agents in San Francisco, California, and employed him to effect the sale or exchange of this tract and other real estate then held and claimed by him (Clayton); and that Walker had no knowledge that any of the property thus sought to be sold or exchanged was government land, until on August 29, 1894, when Clayton sought the ninety day extension of the contract hereinbefore mentioned, which extension was not made. Walker was then informed by Clayton for the first time

that this tract and another, for which the latter had made timber culture entry, and which were both included in the contract to convey, were government land upon which he had not made final proof, and that he wanted the extension to give him time within which to make such proof. He had up to that time successfully concealed from Walker the fact that the contract embraced government land, concerning which the former was apparently attempting to commit a fraud against the government. The next day after hearing this fact Walker filed his first contest affidavit against the entry. The evidence does not in any way connect Walker with the attempted fraud.

The decision of your office is affirmed, Clayton's entry will be canceled, and Walker given the preference right to enter the land.

APPLICATION TO ENTER—CONTEST—RELINQUISHMENT.

COWLES *v.* HUFF ET AL.

An application to enter should not be received during the time allowed for appeal from a judgment canceling a prior entry of the land applied for; nor the land so involved held subject to entry, or application to enter, until the rights of the entryman have been finally determined.

The case of Allen *v.* Price, 15 L. D., 424, cited and followed; and the case of Henry Ganger, 10 L. D., 221, overruled.

Where an entry is under contest, and a relinquishment thereof is filed, followed by an application to enter, made by a stranger to the record, such application should be held to await the expiration of the time allowed a successful contestant for the exercise of his preferred right of entry, or may be allowed if it appears that such contestant is disqualified to make entry, or has waived his preferred right.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (W. M. W.)

In the case of R. Jay Cowles *v.* James L. Huff *et al.* Cowles appealed from your office decision of March 31, 1894, rejecting his application to enter the NE. $\frac{1}{4}$ of Sec. 7, T. 22 S., R. 34 W., Dodge City, Kansas, land district.

On October 31, 1895, my predecessor rendered a decision reversing the judgment of your office in said case. By letter of November 14, 1895, the Department requested your office to re-transmit the papers and decision in the case for re-examination, which request your office complied with on the 20th of November, 1895; and also advised the Department that said decision had not been promulgated.

Such re-examination has been made. It appears that on April 28, 1885, one Mary J. Moore made timber-culture entry for the land in question.

On May 11, 1889, A. C. Brady filed a contest against Moore's entry, charging failure to comply with the law.

On December 19, 1891, your office held Moore's entry for cancellation upon Brady's contest.

On December 26, 1891, James L. Huff applied to make homestead entry for the tract. His application was rejected by the local officers, and he appealed to your office.

On January 8, 1892, Moore appealed to the Department from your office decision of December 19, 1891, holding her entry for cancellation.

On July 7, 1893, the Department affirmed the judgment of your office holding Moore's entry for cancellation.

On July 22, 1893, said departmental decision was promulgated.

On August 19, 1893, Huff filed a motion for review.

On December 26, 1893, Moore's relinquishment was filed in the local office, bearing date August 21, 1893.

On December 26, 1893, at the same time Moore's relinquishment was filed in the local office, Cowles presented his application to enter said land, which was rejected by the register and receiver because of Brady's preference right and the rights of Huff under his appeal.

Moore's relinquishment having been forwarded to the Department to accompany the motion for review filed by her in the case, thereupon, on January 25, 1894, the motion for review was returned to your office, with the statement that action by the Department was rendered unnecessary by said relinquishment.

Cowles appealed on February 10, 1894, from the action of the local officers rejecting his application to enter said land, urging that he was the first legal applicant for this land; that Brady was not qualified to enter the tract, and that he had sold his interest to Huff before the latter presented his application to enter; that Huff gained nothing by his application, for the reason that the land applied for was not subject to entry at the time the application was made; and that he (Cowles) was a bona fide settler on the land.

In reply to Cowles' appeal, Huff denied the alleged superior right of Cowles, and furnished an affidavit of Brady, sworn to February 7, 1894, stating that he (Brady) brought his contest against Moore in good faith, expecting to make a timber culture entry for the tract in question; that by reason of the repeal of the timber culture law "he is not now a qualified entryman (having used his homestead right), and that he can not enter said tract." He also stated that he informed Huff of these facts, and that Huff has paid the expenses of said prosecution to him (Brady), and "in consideration of which affiant agreed to assert no claim to said tract, and that with this understanding said Huff made application for said tract."

Cowles' appeal and Huff's answer were forwarded by the local officers to your office on the 19th day of February, 1894, and though received on the 23d day of February, 1894, by your office, they did not reach the files in time to be considered in your office decision of February 27,

1894, which closed the case of *Brady v. Moore*, and held that the local officers

erred in *rejecting* Huff's application to enter *after* this office had held Moore's entry for cancellation and *before* Moore had appealed from such action (see *Henry Gauger*, 10 L. D., 221, and *Patton v. Kelley*, 11 L. D., 469), as you should have held such application to await the termination of the right of the prior parties; directed you (the local officers) to allow Huff to enter the land in controversy, if qualified to do so, in the event Brady did not exercise his preference right of entry;

and instructed the local officers to forward the appeal of Cowles in case he should file one.

By your office decision of March 31, 1894, Cowles' appeal was dismissed, without prejudice to his right to contest Huff's entry, should the latter make entry, upon any sufficient ground: Huff was allowed by the local officers to make homestead entry for said land on March 29, 1894.

Cowles appeals.

The errors assigned substantially amount to two propositions: (1) That Huff acquired no rights by virtue of his application or appeal of December 26, 1891, for the reason that at that time the land in question was covered by the uncanceled entry of Moore. (2) That Moore's relinquishment, filed on the 26th day of December, 1893, served to release the land, and that Cowles' application to enter the land, made on the same date, should have been allowed.

Counsel for appellant has filed a brief, wherein he contends that the case of *Henry Gauger*, 10 L. D., 221, cited in your office decision, is distinguishable from the case at bar, and that the other case cited, *Patton v. Kelley*, 11 L. D., 469, is not in point.

In order to determine the questions presented, it seems proper to refer at some length to the rulings of the Department on the points raised.

In the case of *Henry Gauger*, *supra*, a timber culture entry had been made and contested; on such contest said entry was held for cancellation; before the time in which the entryman might have appealed and that allowed the contestant to assert his preference right of entry had expired, Gauger made application to enter said land under the timber culture law. His application was rejected by the local officers, and their judgment was affirmed by your office. The Department reversed the decision of your office upon Gauger's appeal, holding as follows:

A judgment rendered by your office holding an entry for cancellation is final as to your office, and an application to enter during the time allowed for appeal from such judgment "should be received subject to the right of appeal, but not made of record until the rights of the former entryman are finally determined, either by the expiration of the time allowed for appeal or by the judgment of the appellate tribunal" (*John H. Reed*, 6 L. D., 563); and an application to enter, made before the time allowed the successful contestant to assert his preference right has expired, should be allowed subject to such preference right, and, on its subsequent assertion within the prescribed time, "due notice thereof should be given the intervening

entryman, with opportunity to show cause why his entry should not be canceled, and the contestant allowed to perfect his entry" (Geo. Premo, 9 L. D., 70; Welch v. Duncan, 7 L. D., 186).

The record in the John H. Reed case shows that, at the time said Reed applied to enter the tract there in question, it was shown by the records of your office and the local office, to be open and subject to entry by the first legal applicant; of this there can be no question, for the entry of George G. Reed for the tract was canceled and so noted on the records of the local office on January 5, 1885, and thereafter there was no entry or application to enter prior to January 23, 1885, when John H. Reed made his application to enter it. It thus appears that the date of the cancellation of George G. Reed's entry was not material in determining the case before the Department. The reasoning in the Reed case quoted in the Gauger case was based solely on an immaterial issue, not involved in the case. The quotation in the Gauger case from the Reed case is mere *dicta*, and can not be accepted as authority.

In Patton v. Kelley, 11 L. D., 469, the facts are, that on December 20, 1886, Kelley made homestead entry for the land involved; Patton contested said entry, and on June 1, 1889, your office held the entry for cancellation; on July 10, 1889, the widow of the entryman appealed from your said office decision; on August 8, 1889, the widow of the contestant filed an application to make homestead entry of the tract; the register and receiver rejected her application, because the tract was covered by Kelley's entry; on her appeals, respectively, to your office and the Department, the decision of the local officers was affirmed. It is clear that Patton v. Kelley does not follow the Gauger case.

In Perrott v. Connick, 13 L. D., 598, the Gauger case is referred to, but the record shows that Perrott's application to purchase the land in question was made *two days after* the final judgment of the Department cancelling the cash preemption entry of Setchel and at a time that the land was clear and open to entry.

The right of Henry Gauger to the land involved in his case, reported in 10 L. D., 221, was also involved in the case of Owens v. Gauger, 18 L. D., 6. It was there held that Gauger acquired no rights to the land under his contest, for the reason that the entry of Sheppard was canceled upon a prior contest of one Bunce, and that Owens was the first applicant to enter the land after Sheppard's entry was canceled. Thereupon Gauger's entry was canceled and Owens' former entry reinstated.

In McNamara v. Orr *et al.*, 18 L. D., 504, the Henry Gauger case was referred to, but the doctrine announced was not a controlling factor in determining that case.

In McMichael v. Murphy *et al.*, 20 L. D., 147, the Henry Gauger case was cited with approval. The facts showed that the entry under attack was held for cancellation March 7, 1890, and four days thereafter an application to make soldier's additional homestead entry of the tract

was made; that such application was not placed of record, but held under the rule announced in the Gauger case. These facts clearly brought the case within the rule laid down in the Gauger case, and was governed by that rule.

In *Allen v. Price*, 15 L. D., 424, it was held (syllabus) that:

On the successful termination of a contest the land embraced within the canceled entry should be reserved for the benefit of the contestant during the statutory period provided for the exercise of his preferred right of entry. If an application to enter is presented during said period, by a stranger to the record, it should be held in abeyance to await the action of the contestant. If a waiver of the preference right, duly executed by the contestant, is filed, the tract will be thereafter held subject to entry.

On March 30, 1893, the Department issued a general circular respecting the practice under motions for review, and after referring to *Allen v. Price*, *supra*, it was said:

In cases where an entry is canceled by reason of contest, the land covered by the same is to be reserved from entry for the period of thirty days from due notice to the contestant of his preference right of entry thereof. Should an application to enter the land be presented by a stranger to the record, you will receive and hold the same in abeyance to await the action of the contestant, and should such contestant fail to exercise his right, such application or applications must be disposed of in accordance with the law and rulings of the Department. Should a waiver of the preference right of entry duly executed by the contestant be filed, the tract will at once become subject to entry. (See 16 L. D., 334.)

The Henry Gauger case was referred to in *McDonald et al. v. Hartman et al.*, 19 L. D., 547, 557.

Allen v. Price has been referred to and followed in the following cases: *Severy v. Bickford* (on review), 16 L. D., 135; *Newell v. Pete-fish*, 20 L. D., 233; *Mayers v. Dyer*, 21 L. D., 187, and *McCormack v. Violet*, *Id.*, 451.

The several points decided by the Gauger and *Allen v. Price* cases may be summarized as follows:

The Gauger case held, (1) That an application to enter made during the time allowed for an appeal from a judgment of your office holding an entry for cancellation, should be received subject to the right of appeal but not made of record until the rights of the former entryman are finally determined. (2) That an application to enter, made before the time allowed the successful contestant to assert his preference right has expired, should be allowed subject to such preference right. (3) On the subsequent assertion of the preference right by the contestant within the time prescribed, notice thereof should be given the intervening entryman to show cause why his entry should not be canceled.

Allen v. Price held, (1) That on the successful termination of a contest and the cancellation of an entry the land embraced in such entry should be reserved for the benefit of the contestant during the period allowed by law for the exercise of his preferred right of entry. (2) If an application to enter is presented by a stranger to the record, during

the time allowed the successful contestant to make entry of the tract involved, such application should not be acted on by the register and receiver when presented, but should be held in abeyance to await the action of the contestant. (3) If a successful contestant files a duly executed waiver of his preference right, the tract involved will thereafter be subject to entry.

This summary shows beyond any question that there is, in some particulars, at least, an irreconcilable conflict between these cases. To the extent of such conflict, one or the other of them must be overruled. From a careful examination of the subject I am convinced that the doctrine announced in *Allen v. Price* furnishes the better practice and it will be followed. The case of *Henry Gauger*, 10 L. D., 221, is therefore overruled. All other cases following it, in so far as they may be in conflict with the views herein expressed, are also hereby overruled.

In the case at bar, *Huff* made his application to enter while *Moore's* entry was still in existence, and continued to exist for over a year and a half thereafter. His application was rejected, and he appealed. The question is, whether he acquired any rights under his application under the law, or rulings of the Department. This question can best be determined by reference to the rulings of the Department and courts.

The Department has repeatedly held that an entry segregates the land covered thereby, and so long as such entry exists, it precludes any other disposition of the land. *Whitney v. Maxwell*, 2 L. D., 98; *Schrotberger v. Arnold*, 6 L. D., 425; *Allen v. Curtius*, 7 L. D., 444; *James A. Forward*, 8 L. D., 528; *Russell v. Gerold*, 10 L. D., 18; *Swims v. Ward*, 13 L. D., 686; *Hauscom v. Sines, et al.*, 15 L. D., 27; *Faulkner v. Miller*, 16 L. D., 130.

The courts have held the same view. *Witherspoon v. Duncan*, 4 Wall., 210; *Hastings and Dakota R. R. Co. v. Whitney*, 132 U. S., 357; *Starr v. Burk*, 133 U. S., 541, 548.

If the land covered by a subsisting entry is not subject to disposition, it follows that an application to enter such land confers no rights whatever upon the applicant. If such application shall be rejected, and an appeal be taken from such action, it is not a pending application that will attach on the cancellation of the previous entry, for the appeal can not operate to create any right not secured by the application itself. See *Patrick Kelley*, 11 L. D., 326; *Goodale v. Olney* (on review), 13 L. D., 498; *Maggie Laird, Id.*, 502; *Holmes v. Hockett*, 14 L. D., 127; *Swanson v. Simmons*, 16 L. D., 44; *Mills v. Daly*, 17 L. D., 345; *Cook v. Villa* (on review), 19 L. D., 442; *Walker v. Snider* (on review), *Id.*, 467; *Gallagher v. Jackson*, 20 L. D., 389; *McMichael v. Murphy et al.* (on review), *Id.*, 535; *McCreary v. Wert et al.*, 21 L. D., 145.

In view of these authorities, it is held that *Huff* did not acquire any rights, either by his application to enter, or by his appeal.

The procedure in such cases ought to be:

1. That no application to make entry will be received by the local

officers during the time allowed for appeal from a judgment of cancellation of an entry; but in all such cases the land involved will not be subject to entry or application to enter until the rights of the entryman have been finally determined until which time no other rights, inchoate or otherwise, can attach.

2. If during the time accorded a successful contestant to make entry of the land involved an application or applications to enter should be made by a stranger or strangers to the record, such application or applications will be received and the time of presentation noted thereon, but held to await the action of the contestant, and should such contestant fail to exercise his preference right, or duly waive it, then such application or applications must be acted upon and disposed of in accordance with law and the rulings of the Department.

The only remaining question to be determined is, whether Cowles acquired any rights under his application to enter, dated December 26, 1893.

At the time Cowles made his application to enter, Moore's relinquishment was filed in the local land office. When said relinquishment was filed, it took effect at once, so far as releasing the land covered by it from the existing entry was concerned. *McCall v. Molnar*, 2 L. D., 265; *David J. Davis*, 7 L. D., 560, 561; *Dunn v. Shepherd et al.*, 10 L. D., 139.

Under *Allen v. Price*, and the instruction of March 30, 1893, it was the duty of the local officers to have held Cowles's application during the period allowed a successful contestant to exercise his preference right of entry; therefore the action of the local officers in rejecting his application and your office in affirming the judgment was erroneous.

Brady, the successful contestant, stated in his affidavit, dated February 7, 1894, hereinbefore referred to, that he "is not now a qualified entryman . . . and that he can not enter said tract," and that in consideration of Huff paying the expenses of the contest, "affiant agreed to assert no claim to said tract."

If these facts had been before the register and receiver at the time Cowles made his application to enter, his entry should have been allowed under *Allen v. Price*, and the departmental instructions thereunder, for they show: (1) that he was disqualified to make entry of the tract, and therefore could not lawfully exercise the preference right accorded a successful contestant; (2) that he relinquished his preference right. In such cases the land is subject to entry by the first legal applicant. In the case at bar, Cowles was such applicant.

Huff's entry was erroneously allowed by your office decision.

Your office decision appealed from is accordingly reversed. Huff's entry will be canceled, and Cowles will be allowed to make entry of the tract under his application of December 26, 1893.

The conclusion reached in the departmental decision of October 31, 1895, rendered in this case, is adhered to, but inasmuch as said decision did not overrule the Gauger case, *supra*, and give the reasons therefor, it is hereby recalled, and this decision substituted therefor.

TIMBER LAND—APPLICATION—PROTEST—PRACTICE.

HARRIS *v.* BELKNAP.

Prior to the issuance of final certificate under a timber land application the local office has full jurisdiction to order a hearing on a protest, or adverse claim, filed against such application.

An appeal will not lie from an interlocutory order of the local office made during the progress of a hearing, and if the party adversely affected thereby withdraws from the case, he is not entitled to have it remanded for further hearing even though it may appear that the local office erred in its ruling.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (R. W. H.)

It appears from the record in this case that, on June 6, 1894, William H. Belknap filed his sworn statement with his application to purchase the land in question under the act of June 3, 1878, and notice by publication was given that his proof would be offered September 15, 1894. September 14, 1894, Arthur Corning as agent for Wm. H. Carpenter, filed a protest against the acceptance of Belknap's final proof, alleging that the land contains valuable deposits of coal and is chiefly valuable therefor, and proposing, as such agent, to purchase the same under the coal land act. On the following day, to wit, September 15, 1894, James R. Nesbit filed a protest of similar purport—claiming that he had possession of the tract under the coal land law, and that Belknap was conspiring to secure the land for the benefit of others. On the same day Belknap offered his proof, which was suspended by the local office subject to action on said protests.

October 22, 1894, Burdette R. Harris made application to enter the land as a homestead, at the same time filing a protest against the allowance of Belknap's proof, alleging that the tract is practically devoid of timber and only valuable for agriculture.

A hearing was ordered for December 5, 1894, at which Harris and Belknap appeared in person and by counsel—Carpenter and Nesbit making default. Harris made affidavit asking for a continuance of the case for thirty days because of the absence of a material witness, one Wm. Yantis, whose attendance at the hearing he had used due diligence to procure, but without success. Upon Belknap's agreement, however, to admit that the witness would, if present, testify to the statement set out in the application for continuance, the local office, under Rule 22, denied the motion and proceeded with the hearing.

Harris did not support his protest by his own testimony, and introduced only one witness, who testified that there were not more than seven or eight acres of green timber on the forty acres in dispute, and that it was all in a "burn". He made no other examination of the soil except "in digging for coal along the hill side near the land." To the

question, on cross examination: "Did you find any coal?" the witness answered: "Yes, I did, I found coal on the south line that we run." At this stage the protestant rested, and the attorney for timber claimant moved the dismissal of the protest on the ground that a *prima facie* case had not been shown.

The register and receiver ruled that

if the case proceeds the costs will be taxed to the protestant, and if he does not see fit to proceed with the case and pay the costs, and the timber land claimant wants to introduce his evidence and is willing to pay his own costs it makes no hardship on the protestant, and the case will proceed.

The homestead claimant (Harris) objected to any further proceeding in the case on the ground that as the timber land claimant (Belknap) had interposed a demurrer, and said demurrer had been sustained, that the case was closed so far as the jurisdiction of the local office was concerned; that its decision sustaining the demurrer was equivalent to a decision on the merits, and that no further evidence could be considered, or proceedings had, until the protestant could secure a ruling of the Commissioner upon the question of costs.

The local office adhered to its ruling, and Belknap thereupon protested against paying any of the costs, and moved that in the event of the homestead claimant persisting in his refusal to pay the costs that the whole proceeding be dismissed, and his timber land entry be made a matter of record.

The case was proceeded with, Belknap and his witnesses giving in their testimony, and the protestant declining to take further part in the hearing.

The local office considered the case on its merits, found that the land is chiefly valuable for its timber, and that it is timber land in the meaning and intent of the act of June 3, 1878, and recommended that Harris' homestead application be rejected, his protest dismissed, and that Belknap be permitted to make payment for and perfect his title to the land.

Your office held that there was nothing in the record to show that Harris gave notice of an appeal from the ruling of the local office in the matter of costs, but as it was an interlocutory order, it was not of itself the subject of an appeal, and furthermore there was nothing to show that Harris was denied the privilege of cross-examining the defendant's witnesses, as he had absented himself voluntarily.

You further held that it was not error under the circumstances to allow Belknap to submit his testimony and to decide the case on its merits. You accordingly affirmed the decision of the local office dismissing Harris' protest, and holding the sworn statement and application of Belknap subject to final action in the case.

Harris' appeal to the Department makes but one assignment of error, to wit:

"Error not to have remanded the case for further hearing."

Paragraphs 14 and 15, page 45, G. L. O. Circular (1895), prescribes

the mode of procedure under the timber and stone act of June 3, 1878, as follows:

14. When an adverse claim, or any protest against accepting proof or allowing an entry, is filed before final certificate has been issued, the register and receiver will at once order a hearing, and will allow no entry until after their written determination upon said hearing has been rendered. They will report their final action in all protest and contest cases and transmit the papers to this office.

15. After certificate has been issued, contest, applications, and protests will be submitted to this office as in other cases of contest after final entry.

It will thus be seen that the jurisdiction of the local office is complete as to all matters arising at hearings under the timber and stone act until certificate has been issued, after which, contest, applications, and protests are to be submitted to your office as in other cases of contest after final entry.

The ruling of the local office upon the question of costs being made in the progress of the hearing, was interlocutory, and not subject to appeal, it matters not whether the ruling was erroneous or not. No right of the protestant was denied. Its exercise was only coupled with the condition that he should pay all the costs as in hearings under Rule 54. This he refused to do and withdrew from the case, after giving notice of appeal. It would seem, therefore, if his interests were in any wise prejudiced, that it was the result of his own premature action.

While your office did not concur in the ruling of the local office that the protestant should pay all the costs of the hearing as in regular contest cases under the act of May 14, 1880, it was held not to be error under the circumstances to allow Belknap to submit his testimony, and to decide the case upon its merits, inasmuch as there was "nothing in the record to indicate that Harris was denied the privilege of cross-examining the witness introduced by Belknap," and "in his brief did not claim that he was denied this privilege, but stated, after it was ruled that he should pay all the costs, he "gave notice of appeal and did not appear further in the case," clearly showing that he absented himself voluntarily."

In deciding that the hearing should have been held under Rule 55, instead of Rule 54, you have afforded Harris the only relief of which the case admits. It was entirely within the jurisdiction of your office for decision upon its merits as it came from the local office, and there was no error in your refusal to remand the case for further hearing.

Your office decision is therefore affirmed.

ADDITIONAL HOMESTEAD—ACT OF FEBRUARY 10, 1894.

ELBERT HURST.

The special right to enter additional lands conferred by the act of February 10, 1894, when such additional lands become subject to entry, is defeated by a prior selection of the land as school indemnity under the provisions of the act of March 2, 1895.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (C. J. G.)

Elbert Hurst has appealed from your office decision of September 20, 1895, sustaining the action of the local office in rejecting his homestead application made July 3, 1895, for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 8, T. 4 N., R. 2 E., Indian Meridian, Guthrie land district, Oklahoma.

The basis for said action was that the land is embraced in Oklahoma clear list No. 6, school indemnity lands, approved May 17, 1895, and therefore not subject to homestead entry.

On October 22, 1891, the appellant made original homestead entry for that part of the NE. $\frac{1}{4}$ of Sec. 8, T. 14 N., R. 2 E., lying north or on the left bank of the Deep Fork river. He claims the right to make homestead entry of the land in question by virtue of the act of Congress approved February 10, 1894 (28 Stat., 37). That act provides as follows:

That every homestead settler on the public lands on the left bank of the Deep Fork river in the former Iowa reservation, in the Territory of Oklahoma, who entered less than one hundred and sixty acres of land, may enter, under the homestead laws, other lands adjoining the lands embraced in his original entry when such additional lands become subject to entry, which additional entry shall not, with the lands originally entered, exceed in the aggregate one hundred and sixty acres.

The record shows that the land in question is situated on the right bank of the Deep Fork river, and was included in the Kickapoo reservation. The act of Congress approved March 2, 1895 (28 Stat., 899), gave the Territory of Oklahoma the right to select school indemnity lands in this reservation. That act provides as follows:

That any State or Territory entitled to indemnity school lands or entitled to select lands for educational purposes under existing law may select such lands within the boundaries of any Indian reservation in such State or Territory from the surplus lands thereof, purchased by the United States after allotments have been made to the Indians of such reservation, and prior to the opening of such reservation to settlement.

The instructions of May 18, 1895 (20 L. D., 470), issued in connection with the proclamation of the President opening the Kickapoo Indian lands to settlement, contains this language:

It must be remembered that, while the parties coming under the provisions of the said act of February 10, 1894, are permitted the privilege of making an additional entry, based on the original entry theretofore made by them, there is no provision permitting the reservation of any particular tracts for their benefit, and, therefore, their claims to any lands under said statute will rest upon a priority of initiation as in other cases.

The lands to be so opened to settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of lands within the Kickapoo Reservation, Oklahoma Territory, to be opened to settlement by proclamation of the President," but notice is hereby given that should any of the lands described in the accompanying schedule be properly selected by the Territory of Oklahoma under and in accordance with the provisions of said act of Congress approved March second, eighteen hundred and ninety-five, prior to the time herein fixed for the opening of said lands to settlement such tracts will not be subject to settlement or entry.

Your office decision is hereby affirmed.

HENSLEY v. WANER.

The conditions attendant upon opening lands to settlement in Oklahoma require the recognition of extremely slight acts of settlement in determining priorities between adverse claimants.

I have considered the case of *Elbert S. Hensley v. John Waner*, involving the homestead entry made by the latter for the NW. $\frac{1}{4}$ of Sec. 27, T. 12 N., R. 1 E., Oklahoma land district, Oklahoma Territory.

The land was embraced in the former Pottawattomie Indian reserva-

tion, but was purchased from that tribe, and by act of March 3, 1891, directed to be opened to settlement and entry. An executive proclamation to carry said act into effect was issued September 18, 1891; and the land was so opened to settlement and entry on September 22, 1891. The particular tract in controversy had at some previous time been the allotment of an Indian named "High," but said allotment had been canceled, and the land restored to the public domain.

John Waner made entry of the tract in controversy on September 26, 1891.

On November 14, 1891, Elbert S. Hensley applied to make homestead entry of the tract; but his application was rejected because of the prior entry of Waner. He alleged settlement prior to entry or settlement by Waner, whereupon a hearing was ordered and had, commencing July 25, and continuing until August 22, 1894.

From the voluminous testimony taken the local officers found in favor of Waner.

Hensley appealed to your office; which, on October 12, 1895, reversed the decision of the local officers, and held Waner's entry subject to Hensley's superior right.

Waner has appealed to the Department.

In the arguments filed upon appeal, a number of questions are presented, to which no reference is made either in the decision of the local officers or of your office, some of which are new and deserving of consideration.

Hensley had resided and leased farms from different parties in the Indian Territory for years prior to the passage of the act of March 3, 1891; first in the Chickasaw country; afterwards, upon invitation of his brother, he came to the Pottawattomie country, and the two took a lease jointly of the allotment of one Daniels. This was some time in the last week of 1890. From that date until he went out of the territory preparatory to "making the run" back into it (with one exception, to be noted hereafter), Hensley, with his wife and five children, occupied said Daniels allotment.

The Department has held that

one who is rightfully within the territory during the prohibited period, but goes outside prior to the hour of opening, and gains no advantage over others by his presence in the territory during the prohibited period, is not by such presence disqualified as an entryman (*Metz v. Seely*, syllabus, 21 L. D., 148).

But counsel for Waner contend that the above ruling can not apply to Hensley, inasmuch as he was *wrongfully* within the territory; that the leasing of an allotment from a Pottawattomie Indian was in violation of law; in support of which they copy a letter from the then acting Commissioner of Indian Affairs to one George L. Young, at Sacred Heart, O. T., dated April 2, 1891, which says:

In reply to your communication dated March 16, 1891, you are advised that the leasing of lands by members of the Citizen band of Pottawattomies is illegal and

void, and that parties within the reservation under such pretended leases have no rights whatever on the reservation. The allotments have not been approved, and the allottees as yet have no title to the land. Prior to the passage of the act of February 28, 1891, an allottee or patentee had no right to lease his land for any purpose.

It may be true that there was no departmental approval of the lease from the Indian, Daniels, to Hensley. But if there were not, what penalty could properly and legally be inflicted upon Hensley? Simply removal from such reservation, as an intruder. But if the passage of the act found within the limits of the territory opened to settlement by it, a person residing, or farming, or engaged in business, without the written permission of the Department, does that fact forever disqualify such person from acquiring title to land within such territory? I find no statute imposing such penalty; and it appears to me improper, unjust, and unwarranted to give so broad a construction to the prohibition contained in the act in question. The Department in its recent decision in the case of *Brady v. Williams* (although that case is not in all respects the exact parallel of the one here under consideration), enunciates a ruling equally applicable to Hensley—to-wit: that even if a settler on an Indian reservation, under a lease that had not received the affirmative sanction of the Department, “were guilty of a crime either against the United States or the Indians, he would not” thereby “be disqualified from availing himself of the right to make a homestead entry” (23 L. D., 533-537).

In my opinion, therefore, the fact that at the date of the passage of the act of March 3, 1891, Hensley was found in the Pottawattomie country, occupying land under a lease that had not been approved by this Department, would not, *per se*, disqualify him from acquiring land in the territory then and thereby opened to settlement and entry.

Counsel for Waner contend that, whether or not Hensley was rightfully in the country prior to March 3, 1891, he certainly was not after that date—in view of the fact that the prohibition against going into the territory began to run at the date of the passage of the law. Furthermore, that Hensley was ordered out of the territory, and left it—but returned, without legal authority to do so. In support of this contention they introduce a copy of a letter of instructions from Mr. Secretary Noble to the Commissioner of Indian Affairs, dated March 30, 1891 (twenty-seven days after the passage of the act). That letter said (*inter alia*):

It is reported by the governor of Oklahoma that large numbers of persons are invading the recently purchased land from the Sac and Fox, Cheyenne and Arapahoes, and others, with a view to gaining an undue advantage in the selection of homesteads, etc.; and I have to call your attention to the necessity of excluding them by whatever degree of force it may be necessary to obtain from the army for that purpose Not only should those intruding be peremptorily removed, but all private stakes or monuments, or other indications of possession that they may endeavor to establish should also be destroyed.

The Commissioner of Indian Affairs issued instructions to Indian Agents in the vicinity of the lands above named, directing them to carry out the above order.

But the question arises as to whether the above order was aimed at Hensley, or persons in his position. It would not on its face appear to do so, unless he was "invading" the land "with a view to gaining an undue advantage in the selection of homesteads, etc."—which is a question that will be inquired into hereafter; and it is not alleged by anybody that he was establishing "private stakes, or monuments, or other indications of possession."

Whether this order was intended for him or not, Hensley in some way became acquainted with the substance thereof, and did move out, with his family; but about a fortnight afterward returned.

Counsel for Waner contend that he returned without authority.

When Hensley left the territory he went out into what was commonly known as "Old Oklahoma," that had been opened to settlement and entry in 1889, and camped upon the "ranch" of a friend named Powers. At the hearing Powers testified:

Mr. Hensley camped on my place for about two weeks; he had been ordered out of the Pottawattomie country, he said; he then went back to finish up his crops; it was the general understanding among the people that they had received permission to return and take care of their crops.

The testimony of J. W. Daniels, from whom Hensley leased the allotment, will throw some further light upon this branch of the case:

As I understand the matter, there was an order issued notifying all white people that wanted homes there, to leave the reservation; that was about the last of May or the first of June—I wouldn't be authentic in regard to the time. I remember well that Hensley did move his family and himself out of said reservation. The Pottawattomie Indians made complaint to the Department that they would be seriously damaged by removing the renters from said Indian lands. John Anderson, and others, told me that the order had been rescinded, and that the renters could return and cultivate their crops. It was a question that concerned me considerable; and Mr. Outcalt told me that an order would be made that they could go back, and then they would be told when to go out again.

George W. Outcalt, a merchant of Choctaw City, testified:

A number of persons holding leases had moved out of the Pottawattomie country and were camped at Choctaw City and around there. I talked with Judge Harvey in regard to the matter, and we both thought it was a great inconvenience and wrong to the settlers to force them to leave their lands and crops. I wrote to Col. Patrick, the Indian Agent, in reference to the matter, and told him the situation; and he told me that the order was not intended to compel *tenants* to leave the Pottawattomie country or their homes, and to tell them to go back. I told Mr. Hensley, and a number of others, that Col. Patrick had instructed me to tell them they could go back to their homes. . . . Col. Patrick told me this personally, at my store; he explained that the order of expulsion was intended only for three or four persons, who had made themselves objectionable, and was given to an Indian policeman, who, not understanding the matter, had served the order on *all parties*. He said that his understanding was that, before the opening, all parties would have sufficient notice to enable them to get out in time.

On September 18, 1891—four days before the land in controversy was opened to settlement—the President issued the following proclamation (27 Stat., page 992, last six lines):

Notice, moreover, is hereby given that it is by law enacted that until said lands are opened to settlement by proclamation, no person shall be permitted to enter upon and occupy the same; and no person violating this provision shall be permitted to enter any said lands, or acquire any right thereto.

This proclamation came to witness Daniels' knowledge on the day of its date—he being at the time in Oklahoma City. Daniels explains how it was brought to Hensley's knowledge:

I was in Oklahoma City. Knowing Mr. Hensley to be a very poor man, and cultivating my place under a lease, I was anxious to see him get a home for himself and family. Riding home some time between 9 and 10 o'clock at night, accompanied by John Clinton, I remarked to Clinton that I had given the Hensley Brothers a lease of said place, and that as the president had declared said reservation opened so very unexpectedly, and being fully satisfied that said brothers had not come into possession of the fact, I thought it would be nothing more than right that we should drive around and notify them that the proclamation had been made. . . . He (Hensley), being a poor man, got my horses, and moved out of there about midnight.

Hensley and his family went again to the ranch of his friend Powers, on the border of "Old Oklahoma," and there remained until the morning of the day of the opening.

The local officers decided against Hensley on two points, one of which was:

We can not dispute the conclusion, from all the evidence, that Hensley knew this tract in dispute, and that, in a general way at least, he had an advantage over other homeseekers by reason of his stay in this reservation.

The Department has frequently held, as expressed in the syllabus to the decision in the case of *Monroe et al. v. Taylor* (21 L. D., 284):

Knowledge of lands within the territory, acquired by presence therein prior to the passage of the act, . . . can not disqualify a settler who subsequently complies with the prohibitive terms of said act.

In view of this ruling, the mere fact that a person, "in a general way," some time or other, learned something about a tract of land, is not sufficient reason for holding him disqualified. It must appear that such information was acquired subsequently to the passage of the act.

Upon this point the decision of your office is specific:

It does not appear that Hensley gained any advantage by his presence in the territory during the prohibited period. It is true he resided within a mile and a half of the land he now seeks to enter. It is also true that he had abundant opportunity to gain a knowledge of the land before the date of the act opening the country to settlement, March 3, 1891; and his residence within the country after that period did not, I think, give him any additional information.

An attempt was made at the hearing to show that Hensley had an opportunity to obtain "additional information." He worked one day, in the summer of 1891, for a man named Fansler, hauling to market

some hay that Fansler had cut upon the tract in controversy, and stacked (with other hay) near his (Fansler's) house. Fansler testifies that the land in controversy was "in plain view" from his house, and that "there was nothing to prevent him" (Hensley) "from looking at it." This is the sum total of the proof tending to show that Hensley learned anything additional regarding the tract after March 3, 1891.

Counsel for Waner specifies as one thing that Hensley learned while upon the reservation during the prohibited period, that the allotment for the land in controversy was fraudulent. But regarding this Hensley testifies:

The day before the opening, I learned, on the line there, that the soldiers had declared that what was called the "High allotment" was a fraud, and that it was then opened up as public domain.

Inasmuch as Hensley, "the day before the opening," was not in the Pottawattomie country, but in the Old Oklahoma country, it appears that the information obtained by him that the allotment was a fraud, was received by him while outside the Pottawattomie reservation.

I concur with your office in its finding that there is nothing in the testimony to indicate that Hensley gained any additional information regarding the land because of his presence in the territory after the passage of the act opening it to settlement and entry.

On the morning of March 3, 1891, Hensley started from the point in "Old Oklahoma," where he had been for three days camped upon the ranch of his friend Powers, and, going eastwardly, crossed the line into the Kickapoo Indian Reservation. He traveled through this a distance of about twelve miles, until he reached a point on the north bank of the North Fork of the Canadian river, as near the land in controversy as he could get and yet be outside of the prohibited territory. The question arises, does the fact that Hensley started from the Kickapoo country to make the run for the land in controversy, disqualify him from acquiring the land?

Some suggestive light may be thrown upon this question by reference to the departmental decision in the case of *Brady v. Williams* (23 L. D., 533, *supra*). That case arose upon the opening of the Cherokee Outlet, September 16, 1893. In that case the President's proclamation (August 19, 1893,) contained a proviso for a strip of land one hundred feet in width along the outer boundary of the country then opened, "open to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement" of said Cherokee lands. But this one-hundred-foot-strip proviso in no way invalidates the argument regarding the right of an intending settler to start from the margin of an Indian reservation that had not yet been opened to settlement and entry. In that decision the Secretary said:

It must be assumed that it was known to the President and the Secretary of the Interior, at the time the proclamation was promulgated, that the Indian reservations

of the Kansas, the Osages, the Poncas, and the Otoes and Missourias, immediately joined the Outlet on the east; yet there is no inhibition in the proclamation from settlers entering from those reservations.

In the case at bar, it must be assumed that the President and the Secretary of the Interior knew that the Kickapoo Indian reservation immediately joined the Pottawattomie reservation on the north; yet there is no inhibition in the proclamation from settlers entering from that reservation.

Again, the decision in the Brady-Williams case says:

The only theory upon which the Secretary of the Interior could possibly prevent persons from making the run from these Indian reservations was that, under the laws and treaties with the tribes, white people were not allowed therein, and were trespassers, and could be forcibly and summarily ejected as such. But . . . if they passed through the Indian reservations, and got on to the one-hundred-foot strip, and made the run from there in good faith, should they be deprived of their homestead rights? I find myself unable to yield assent to such a proposition. If the settler were guilty of a crime against the United States, or the Indians, he would not be disqualified from availing himself of the right to make a homestead entry.

In view of the above ruling in the Brady-Williams case, I must hold that in the case at bar the fact that Hensley started from the Kickapoo Indian reservation did not disqualify him from acquiring land in the former Pottawattomie reservation when it was opened to settlement and entry.

Hensley does not deny that he had the High allotment in view when he started from the Kickapoo country at noon of September 22, 1891—having that morning, while yet in the “Old Pottawattomie” country, learned from certain soldiers that said allotment had been declared fraudulent and invalid, and the land restored to the public domain. He does not deny, but acknowledges, that he sought a starting point as near said tract as possible, and yet be outside the prohibited territory. The route, after crossing the river (the North Fork of the Canadian) was steep and through timber for a short distance—about a quarter of a mile. The following is his own story of the run—omitting questions:

The horse I rode was a good horse—fast; he made the winning on the Oklahoma race track on the Fourth of July; I rode him just as fast as he could run; I got him headed in the direction and let him run; I lost my hat and blanket and one of my stirrups; the stirrup was torn off early in the race, by the horse running too close against a tree; when I reached the claim I jumped off the horse; as quick as I got off I saw parties coming from different directions; so I got back into the saddle and waved my flag over my head to the people coming in; I thought they could see the flag better with me on the horse than if I stood upon the ground.

An attempt is made to show that Hensley must have started from the Kickapoo line before noon, in order to reach the land in controversy before any of his competitors did. The principal reliance in support of this contention is the testimony of witness Ivy, who said of Hensley: “He was in there a minute or two before the other parties came; I don’t know whether they were slow or he was fast.” But this testimony

must be construed in connection with that previously given by the same witness:

A while before noon I had crossed the river into the Pottawattomie country; . . . I wasn't on the line when the rest of the people made the run; . . . The first I saw of Hensley he was coming on a run a quarter of a mile west of the claim, or about that.

So this witness, after all, does not say that Hensley was in the prohibited territory a minute or two before the other parties; but that he arrived "there"—where the witness was, nearly a mile inside the line—"a minute or two before the other parties came": which is precisely what Hensley himself asserts. After a careful examination of all the testimony bearing upon this branch of the question, I concur in the finding of the local officers, who say:

Evidence was also introduced tending to show that Hensley could not have reached the tract at the time he said he did without having started from the Kickapoo line prior to the noon hour. We do not think the evidence sufficient to find against him on that point.

Upon the question of fact as to whether Hensley made settlement on the land prior to the date of Waner's entry, the local officers found:

It is questionable whether the settlement he made, and his acts subsequent to his going on the land on September 22, are sufficient to hold in his favor on the ground of prior settlement.

In considering this branch of the matter it should be remembered that

the conditions attendant upon the opening of Oklahoma to settlement require the recognition of extremely slight initial acts of settlement in determining priorities between adverse claimants, if such primary acts are followed by residence within such time as clearly show good faith (*Penwell v. Christian*, syllabus, 23 L. D., 10).

Hensley slept upon the ground the night after the opening—under a wagon-sheet. He testifies that the next day, September 23, he plowed about a quarter of an acre. He began the foundation of a house before the date of Waner's entry (September 26, *supra*), which he afterward finished, and he and his family moved into it about the first of November, and has ever since resided there, with his wife and five children.

Waner, the entryman, testifies that on the 24th of September, 1891, when he first saw the land, he did not notice any plowing or other improvements. To one question addressed to him on cross-examination he made a peculiarly evasive answer:

Q. Did you not tell me in my office, here in Oklahoma City, in the fall of 1891, that you knew Mr. Hensley was the prior settler on this tract of land, but that he couldn't hold it, because he had been leasing land, and was a sooner?—A. I said he was a sooner, and that I believed I could prove every word of it at the trial.

Witness Kay testified that about September 24, or 25—he is positive that it was before the 26 (the date of Waner's entry)—he "saw a little patch of breaking done, and a log foundation laid."

The decision of your office, appealed from, finds that Hensley, "being the prior settler on the land, had the superior right thereto."

For the reasons hereinbefore given, I concur in the conclusion that Hensley acquired a superior right to the land in controversy, and therefore affirm said decision.

DESERT LAND ENTRY—ALIENATION.

WHEATON v. WALLACE.

An agreement by a desert land entryman to convey title to the land after the submission of final proof, will not operate to defeat the entry, where said agreement was entered into after the passage of the amendatory act of March 3, 1891, which recognizes the right of assignment in the entryman, and where the initial entry appears to have been made in good faith.

An agreement by a desert entryman, made subsequent to the initial entry, to convey title to the water supply after the submission of final proof, is not ground for cancellation, if it appears that such agreement was afterwards, and prior to final proof, repudiated.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (C. J. W.)

The land involved herein is the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ section 26, and the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ of section 35, T. 6 S., R. 32 E., M. D. M., Independence, California, land district.

The records of your office show that on May 4, 1888, Bion Samuel Wallace made desert land entry for said tract, together with one hundred and twenty acres of adjoining land, and that on February 10, 1891, shortly before the expiration of the time within which he was by law required to make final proof, he relinquished his entry, whereupon on the same day Daniel T. Wallace made desert land entry for the tract now in controversy, being three hundred and twenty acres.

September 13, 1893, the local officers issued notice of Wallace's intention to offer final proof on October 28, 1893. At the appointed time Wallace appeared with Samuel B. Wallace and J. H. Jackson, two of the witnesses named in his final proof notice. At the same time appeared Wesley J. Wheaton, and filed an affidavit of protest against the final proof on the following grounds:

1. That said Daniel T. Wallace does not own, nor have a clear right to the use of sufficient water to irrigate said land and to keep it permanently irrigated.
2. That the reclamation of said land has been effected by the use of water owned and controlled by another party, and not by the use of any water owned by this claimant.

That the said entry of Daniel T. Wallace is fraudulent and illegal in this, to-wit: That at the time said entry was made the said claimant made and entered into a contract by which he agreed to obtain title to said lands for another party, and that said entry was made for speculative purposes and not made in good faith.

3. That no water owned by this claimant has ever been conducted upon said land as required by law, or at all.

Thereupon on motion of Daniel T. Wallace the case was continued until October 30, 1893. On that day Wallace filed an affidavit as follows:

Daniel T. Wallace being first duly sworn, deposes and says; My name is Daniel T. Wallace, and I am the identical person who on the 10th day of February, 1891, made desert land entry No. 619, at the U. S. Land Office at Independence, California, which said entry embraces the [description of land in controversy].

That affiant never filed or caused to be filed in the U. S. Land Office at Independence, Cal., any notice of his intention to make final proof of the reclamation of said tract of land; that affiant never signed any such notice nor caused the same to be signed, and that such notice bearing affiant's signature thereto was signed by some person other than affiant and without affiant's authority or permission.

That affiant received no notice or information of the time or place of making final proof herein until the 20th day of October, 1893, on which day affiant received a letter from S. B. Wallace, dated and postmarked at Bishop, Cal., and addressed to affiant at "Midas, Nev.," which last mentioned place is more than two hundred miles from the U. S. Land Office at Independence, California; That affiant received said letter at his ranch, which is twenty-five miles further from said land office than the distance above stated.

That affiant is not now prepared to make said final proof, nor to prove the reclamation of said tract of land, and therefore prays that all proceedings heretofore had as to said final proof herein, be dismissed until such time as the same may be made after legal notice by affiant and claimant herein.

Wheaton filed an affidavit protesting against allowing the entryman to make proof at any other time, and alleging that Daniel T. Wallace and Samuel B. Wallace on May 31, 1893, entered into a written agreement, by the terms of which Daniel T. Wallace was to make final proof and receive final certificate for the benefit of Samuel B. Wallace.

The affidavit was accompanied by a copy of the alleged agreement.

Wheaton also on the same day, but at different hours, filed two affidavits executed that day by Samuel B. Wallace.

In the first he states that he was the authorized agent of Daniel T. Wallace in Inyo county. That S. B. Wallace and D. T. Wallace entered into an agreement by which S. B. Wallace was authorized to do all necessary things preparatory for the submission of final proof for the lands embraced in D. E. No. 619, so that D. T. Wallace could come from his home in Nevada and make final proof without delay. That the copy of the agreement attached to the affidavit of Wesley J. Wheaton is a correct copy of the original agreement. That at the instance of D. T. Wallace said S. B. Wallace caused notice of said final proof to be published, said proof to be submitted on October 28, 1893. That D. T. Wallace appeared with his witnesses at the time named, but when confronted with a protest refused to proceed with his final proof.

In the second affidavit he states that on said 28th day of October, 1893, D. T. Wallace did not even have the right to the use of sufficient water to irrigate said land, and does not now own or have such water or water-right, and that the water conducted upon the land belonged to affiant. That after the water had been run upon the premises,

affiant transferred to said Daniel certain stock in the Owens River Canal Company, and that said Daniel T. Wallace gave him bond and security for the return of said stock, after making his final proof.

The following letter in reference to the agreement is in evidence:

AUSTIN, NEV., *September the 18th, 1893.*

Mr. BION WALLACE, *Bishop.*

SIR: I have been waiting for some time expecting to hear from you in regard to proving up on that land. I am ready at any time to come down and do my part towards it, and would like to know whether you have got the land in shape so that it can be proved up on or not, and what you intend to do in regard to it. You know that the agreement was that it should be ready in August for me to do my share. Now, sir, I either want you to be ready soon for me to prove up on it, or else send me part of the money that is coming to me on it, so that I will know that you intend to keep your agreement with me in regard to it. Now let me hear from you in regard to it soon, for if I don't I shall have to come down there and see what I can do in regard to it myself.

Yours in haste,

(Signed) D. T. WALLACE.

Wheaton also on October 30, 1893, filed an uncorroborated affidavit of contest against the entry, alleging on information and belief

that the said Daniel T. Wallace at or before the date of said filing upon said lands made and entered into an agreement for the sale of said lands as soon as he obtained patent therefor, and that said entry was not made in good faith but was made and is now held for speculative purposes.

The local officers on November 11, 1893, granted the entryman's request to dismiss the proceedings in regard to the submission of final proof, and dismissed the protest on the holding that the entryman may offer final proof at any time within the lifetime of the entry. Wheaton appealed from said decision to your office.

During the pendency of the appeal the entryman, on December 20, 1893, gave notice of intention to make final proof, whereupon the local officers set February 5, 1894, as the date for receiving proof. At the appointed time the entryman appeared and submitted his proof, consisting of the testimony of himself and John Schober and William G. Dixon, two of the witnesses named in his notice to make proof, and the certificate of said William G. Dixon, as secretary of said Owens River Canal Company, to the effect that the entryman is the owner of sixteen shares of the capital stock of the Owens River Canal Company, entitling him to the use of one hundred and sixty inches of water measured under a four inch pressure from the canal of said company. Wheaton also appeared and protested against the reception of the final proof, but did not cross-examine the entryman and his witnesses, although he was advised by the local officers of his right of cross-examination. Wallace offered to make payment for the land, but the local officers refused to receive the money, and on the same day reported the facts to your office, stating that they will hold the final proof to await the disposition of contestant's appeal from their office decision of November 11, 1893, dismissing his former protest, and also to await the determi-

nation of the contest, should a hearing be ordered on the contest affidavit filed by Wheaton, October 30, 1893. April 21, 1894, your office considered Wheaton's appeal, and affirmed the decision of the local officers dismissing his protest, and also affirmed their action of February 5, 1894, holding the entryman's final proof subject to the contest proceedings. No comment was made in said decision on Wheaton's failure to cross-examine the entryman and his final proof witnesses and to fully present his case at the time of the submission of the final proof. The decision directed the local officers to allow Wheaton to proceed against the entry on his affidavit of contest of October 30, 1893, if they consider the allegations sufficient.

June 28, 1894, Wheaton filed an amended affidavit of contest alleging that the said entry is fraudulent and illegal because the said Daniel T. Wallace at or before the date of the said filing upon said land, made and entered into an agreement for the sale of said land as soon as he should obtain patent therefor; that said entry was not made in good faith but was made in the interest of another party, and is now held for speculative purposes.

This affidavit was corroborated by Samuel B. Wallace.

September 14, 1894, the local officers issued notice of contest setting the hearing for October 30, 1894. After several continuances had upon the agreement of the parties the case went to trial December 15, 1894. The contestant introduced only one witness, Samuel B. Wallace, to prove his allegations against the validity of the entry, while the defendant offered no testimony at all.

Samuel B. Wallace testified that on May 4, 1888, he made desert land entry for the tract in controversy together with one hundred and twenty acres of adjoining land under the name of Bion S. Wallace, and that on February 10, 1891, shortly before the expiration of the time within which he was by law required to make final proof he relinquished his entry for the reason that he had been unable to obtain water to irrigate the land; that prior to his relinquishment he induced Daniel T. Wallace to agree to make entry for the land immediately upon his relinquishment; that he went to the land office in company with Daniel T. Wallace and filed his relinquishment and furnished the money to pay the land office fees for Daniel T. Wallace's entry. He further testified on direct examination that he had an understanding with Daniel T. Wallace at the date of the entry that he was to receive one-half of the land after final proof, for which he was to give his nine shares of stock in the Owens River Canal Company, but that this understanding was never reduced to writing, and that in 1893, he entered into a written agreement with the entryman by the terms of which he was to do all the work required by law to be done on the land, and to pay for advertising the final proof notice, and to pay \$780 after final proof for a title to all of the land. On cross-examination, he contradicted his statement that he had had an understanding with Daniel T. Wallace at the date of the entry for the conveyance of

one-half of the land; and testified that he did not have such an understanding until after the entry was made. He further testified that he did the work required to be done on the land and paid for advertising first final proof notice; that he, on October 28, 1893, or a few days before that date, transferred to Daniel T. Wallace nine shares of stock in the Owens River Canal Company, but that he took a bond from the entryman for a reconveyance of the stock and that the transfer was not made in good faith, but solely for the purpose of enabling the entryman to make a satisfactory showing on final proof that he had a right to sufficient water to irrigate the land; that Daniel T. Wallace reconveyed the stock to him about December 3, 1893; that he did not induce Wheaton to bring the contest, but that he expected to acquire title to the land under his written agreement with the entryman, and that he had the money (\$320) ready to make final payment to the local officers in case the final proof should be accepted. No copy of the contract alleged to have been entered into between the witness and the entryman on May 31, 1893, was offered in evidence, but on January 9, 1895, after the hearing had been closed, the contestant without notice to the entryman filed a certified copy of the complaint in an action brought by D. T. Wallace against S. B. Wallace in the district court for the State of Nevada in and for the county of Lander, to recover damages for the breach of the alleged contract, which is set out in the complaint.

February 23, 1895, the local officers rendered decision as follows, after making a statement of the facts:

From the testimony presented it appears that the said Daniel T. Wallace at or before the date of the said filing upon the said lands, made and entered into an agreement for the sale of said lands as soon as he should obtain patent therefor, and that said entry was not made in good faith but was made in the interest of another party and is held for speculative purposes. We accordingly recommend that said entry be canceled.

On the entryman's appeal your office on October 10, 1895, rendered decision finding that the entryman made the entry in good faith, and without any agreement or understanding to convey any part of the land to Samuel B. Wallace; that at the date of the final proof he had a clear right to sufficient water to irrigate the land; that he made the final proof to acquire title for his own use and benefit and without any intention to convey the land to any other party; and that on May 31, 1893, he entered into an agreement to convey the land to Samuel B. Wallace after final proof in consideration of certain work to be done and money to be paid by him, but that said Samuel B. Wallace refused to keep his part of the agreement and did not expect the land to be conveyed to him. On this finding, your office held that the agreement to convey the land was a valid assignment of the entry under section 7 of the desert land act, as said act is amended by section 2 of the act of March 3, 1891 (26 Stat., 1095) and affords no ground for the can-

cellation of the entry. The decision of the local officers was therefore reversed and the contest dismissed.

Wheaton's appeal from said decision brings the case before the Department.

The contestant has failed to prove that the entryman had entered the land under any agreement or understanding to convey any part of the land to Samuel B. Wallace, or that he entered into the particular agreement alleged to have been made May 31, 1893. With reference to any written agreement, all that is proved in accordance with the rules of evidence, is that such agreement was entered into between the parties. The agreement itself was not offered in evidence. It was not shown that any effort was made to have it produced, and no foundation was laid to authorize the introduction of a copy or to allow its contents to be shown by parol evidence. If there is any record of the agreement, the fact does not appear. The paper which is denominated a certified copy of the agreement, which is found with the record, is not a certified copy of the agreement, but the certificate is to the effect that the paper is a true and correct copy of a complaint in the clerk's office. This paper was inadmissible, and is not in a legal sense a part of the record. It was filed with the local officers, without notice to the other side, after the case had closed. It does not appear what consideration was given to it by the local officers. Your office construed it, but it is harmless, since, if it were to be considered as evidence, its terms show that it has reference to a transfer to be made after final proof, and was entered into at a time when it would not have been unlawful to make an assignment of the entry under section seven of the desert land act, as amended by the act of March 3, 1891 (26 Stat., 1095).

It has never been carried into effect. S. B. Wallace, one of the parties to it, and protestant's chief witness, repudiates it and claims nothing under it, while the entryman submits his final proof on an entirely different basis from the one contemplated by the agreement. It is insisted, however, as testified to by S. B. Wallace, that there was an antecedent verbal agreement in reference to certain shares of water stock to be furnished the entrymen, but the witness admits that it was made subsequent to the date of the entry of D. T. Wallace, and this being conceded, it could only have reference to acts thereafter to be performed, and which were abandoned and never performed. If D. T. Wallace had carried out the scheme of submitting his final proof on a false basis, it would have been rejected, and his entry canceled.

The mental state, or mere purpose of an entryman, is only to be considered in connection with some material act to be performed by him, either in making the entry or perfecting it. A fraudulent agreement to be acted on in the future, entered into before or at the time of entry will vitiate it, because the illegal purpose and the act of entry are conjoined and coexistent. The contestant is in the attitude of denying that

an illegal purpose or scheme which has reference to a future act to be performed can be abandoned before it ripens into an act, and its consequences avoided. This may be true to a limited extent in the domain of morals, but, in law, the mere entertaining of an unlawful purpose, which is abandoned, while it is yet only a purpose, and never acted upon, is without penalty. The illegal purpose which the contestant charges against the entryman had its origin between the two material acts of making entry and offering final proof. We have already seen that the entry is untainted, and it now remains to be seen how it affects the final proof.

The offense of the entryman is that at one time he contemplated basing his final proof on the spurious ownership of certain water rights, but becoming alarmed, backed out from doing this, and became the owner in his own right of the necessary water and water rights on which he submitted his final proof. It is not denied that the land was reclaimed, and that the entryman was the owner of the water and water rights necessary for its proper irrigation, when his final proof was submitted. This proof meets the requirements of the law.

Your office decision is accordingly affirmed.

SCHOOL LANDS—INDEMNITY SELECTION—APPROVAL.

TODD v. STATE OF WASHINGTON.

The authority of the Secretary of the Treasury in the matter of school lands conferred by the act of May 20, 1826, was transferred to the Secretary of the Interior by the act organizing the Interior Department.

The approval of a school indemnity selection by the Secretary of the Interior passes the title thereto, and, in contemplation of law, makes such selection the act of the Secretary, and it is thereafter not material to inquire how such selection was made in the first instance.

The provisions contained in sections 10, and 11, of the act of February 22, 1889, in so far as in conflict with sections 2275 and 2276, R. S., are superseded by the act of February 28, 1891, amending said sections.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897.

(I. H. L.)

(C. J. G.)

Thomas W. Todd has appealed from your office decision of September 23, 1895, sustaining the action of the local officers in rejecting his homestead application of August 5, 1895, for the NE. $\frac{1}{4}$ of Sec. 9, T. 38 N., R. 2 E., W. M., Seattle land district, Washington.

The ground for such action was that the said tract was not public land of the United States, the same being included in list No. 1 of school indemnity selections approved May 4, 1895, and certified to the State of Washington, and therefore not subject to homestead entry.

It would seem that the said selection was regular and valid notwithstanding the contention of the appellant to the contrary.

The appeal urges that the said selections are invalid for the following reasons:

1. The county commissioners were not authorized to select land in lieu of deficiencies for natural causes.
2. Because Washington was not entitled to indemnity on the basis employed.
3. Because the township in which this land was selected was not entitled to the amount selected.
4. Because the act of February 22, 1889, repealed the acts reserving said land, so far as they apply to Washington.
5. Because the act of February 22, 1889, has provided school lands for the State, and the manner in which she may acquire them.
6. Because the cause for the reservation of the land has ceased to exist.

It will not be necessary for the purposes of this decision to consider the foregoing assignments in regular order.

Section 20 of the act of March 2, 1853 (10 Stat., 172), establishing the territorial government of Washington, provides—

That when the lands in said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory. And in all cases where said sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof, the county commissioners of the counties in which said sections so occupied as aforesaid are situated, be, and they are hereby, authorized to locate other lands to an equal amount in sections, or fractional sections, as the case may be, within their respective counties, in lieu of said sections so occupied as aforesaid.

The act of February 26, 1859 (11 Stat., 385), authorized the settlers on sections sixteen and thirty-six, provided for in the above act, to pre-empt their settlement claims; and if said sections happened to be reserved or pledged for the use of schools, other lands were appropriated in lieu of such as might be patented by pre-emptors, the said lands to be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of May 20, 1826 (4 Stat., 179). The latter act provides that the selections shall be made by the Secretary of the Treasury; hence, the appellant contends that there is no authority under the act of February 26, 1859, for the said selections to be made by the county commissioners, they not being specifically mentioned as in the act of March 2, 1853.

The Department of the Interior was created by the act of Congress approved March 3, 1849 (9 Stat., 395). Section three of said act provides—

That the Secretary of the Interior shall perform all the duties in relation to the General Land Office, of supervision and appeal, now discharged by the Secretary of the Treasury.

In section 441 of the Revised Statutes the Secretary of the Interior is charged with the supervision of public business relating to the public lands.

Hence, all the powers relating to the public lands conferred upon the Secretary of the Treasury by the act of May 20, 1826, were transferred to the Secretary of the Interior by the act of March 2, 1849, organizing the Department. So, granting that the selections herein should be made in accordance with the provisions of the act of 1826, as contended by plaintiff, yet, by virtue of the organic act of 1849, as embodied in said section 441 of the Revised Statutes, the said selections could be made by the Secretary of the Interior, and still be in accordance with the provisions of the act of 1826. Notwithstanding no specific mention is made of the county commissioners in the act of 1859, still the power to make the selections remains with the Secretary of the Interior by virtue of legislation subsequent to the act of 1826. So long, therefore, as they are made under the authority and approval of the Secretary of the Interior it matters not how they were made in the first instance. When approved by the Secretary of the Interior they under the law become his selections. The fact that the selections were made in the first instance by the county commissioners, does not on that account invalidate them. The approval of the selections is the act that passes title, and as has been shown the Secretary of the Interior possesses the authority to make this approval.

Nearly all other propositions contained in the assignment of errors were definitely decided in the case of *Daly v. State of Washington* (20 L. D., 35). It was held in that case that a selection is not necessarily invalid though in excess of the basis on which it is made, for the reason that the excess was undoubtedly in compensation for a deficiency in some other selection embraced in the list; that the act of February 26, 1859, is applicable to the State of Washington, as previously held in the cases of *John W. Bailey et al.* (5 L. D., 216), *Hulda M. Smith* (11 L. D., 382), and *Sharpstein v. State of Washington* (13 L. D., 378); and that the reservation created by the act of March 2, 1853, is not released by the enabling act of February 22, 1889 (25 Stat., 676), as held in the case of *L. H. Wheeler* (11 L. D., 381). See also cases of *Levi Jerome et al.* (12 L. D., 165), and *Sharpstein v. State of Washington* (*supra*).

A lengthy argument is filed by the appellant in support of the errors assigned, and especially in an endeavor to show that the act of February 26, 1859 (R. S. 2275 and 2276), was repealed by the act of February 22, 1889. The act of February 26, 1859, was a general act, and the apparent conflict between said act and sections 10 and 11 of the act of February 22, 1889, has been recognized by the Department, and it has been held that the provisions contained in sections 10 and 11 of the last mentioned act are superseded by the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes. Thus, in the instructions to your office dated April 22, 1891 (12 L. D., 400), it was stated

that the provisions of the prior act of February 22, 1889, in so far as they are in conflict with those of said sections 2275 and 2276 of the Revised Statutes as amended

by the later act of February 28, 1891, are superseded by the provisions of said sections as amended, and the grants of school lands to those States mentioned in said act of February 22, 1889, are to be administered and adjusted under the provisions of this later general law.

The appellant herein makes no allegation of settlement prior to the survey of lands in the field, which would bring him within the provisions of sections 2275 and 2276 as amended. His homestead application was presented August 5, 1895, and hence was properly rejected, the land having been approved to the State May 4, 1895.

Your office decision is hereby affirmed.

PRIVATE LAND CLAIM—ACT OF JULY 7, 1838.

THE PERRINE GRANT.

The grant made to Dr. Perrine by the act of July 7, 1838, and subsequently conferred by Congress upon his heirs, was a grant *in praesenti*, conveying the legal title to the grantees, defeasible only by forfeiture duly declared by act of Congress; and until such forfeiture be so declared the grantees have the right to make the settlement required as a condition precedent to the issue of patent.

Where the attention of Congress has been called to the fact that the conditions subsequent in a grant have not been complied with, and no action is taken by Congress, such failure to act will be taken by the Department as an expression of the legislative will that the decisions of the courts be accepted as a guide in administering the law.

The right of settlement on the granted premises is restricted to the grantees or those claiming under them, and all other settlers thereon are naked trespassers; and their settlements may be claimed by the grantees as a fulfillment of the conditions of the grant, whenever the settlement is such as the grant requires.

If the terms of the grant are complied with it inures to the beneficiaries thereunder, and patent will issue accordingly; it is therefore not material for the government to inquire as to the interest of others in said grant.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897. (I. H. L.) (P. J. C.)

I am in receipt of your report, of date January 9, 1897, upon a communication addressed to this Department by the Honorable Thomas H. Carter, United States Senate, of date December 31, 1896, in reference to the Perrine grant in Dade county in the State of Florida.

The communication is as follows:

Referring to your recent communication concerning the Perrine land grant in Fla., addressed to the Senate Committee on Public Lands I, as chairman of the sub-committee having the matter in charge have been informed that proofs of compliance with the terms of the grant are now before the Commissioner of the General Land Office awaiting examination.

Desiring to dispose of the matter, I have the honor to request that the proofs referred to be taken up for examination at the earliest practicable date and that I be advised of the conclusion of your Department as to their sufficiency.

The subject of this inquiry, the Perrine grant, is a matter that has

been called to the attention of your office and the Department by those interested since the first grant to Doctor Henry Perrine in 1838. Its history, together with that of the original grantee, is replete with incidents in connection with the early settlements of South Florida and endeavors to cultivate and propagate the plants contemplated by the act, together with many distressing incidents brought about by the Seminole Indian War, which prevailed throughout that region for nearly a quarter of a century after the territory had been purchased from Spain. The history of it, so far as necessary to determine the matter that has been again recently brought to the attention of the Department, is as follows:

Congress by act of July 7, 1838 (5 Stat., 302), passed the following act:

Whereas in obedience to the Treasury circular of the 6th of September, eighteen hundred and twenty-seven, Doctor Henry Perrine, late American Consul at Campeachy, has distinguished himself by his persevering exertions to introduce tropical plants into the United States; and whereas he has demonstrated the existence of a tropical climate in southern Florida, and has shown the consequent certainty of the immediate domestication of tropical plants in tropical Florida, and the great probability of their gradual acclimation throughout all our southern and south-western states, especially of such profitable plants as propagate themselves on the poorest soils; and whereas, if the enterprise should be successful, it will render valuable our hitherto worthless soils, by covering them with a dense population of small cultivators and family manufacturers, and will thus promote the peace, prosperity, and permanency of the Union: Therefore, be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that a township of land is hereby granted to Doctor Henry Perrine and his associates, in the southern extremity of the peninsula of east Florida, to be located in one body of six miles square, upon any portion of the public lands below twenty-six degrees north latitude.

SEC. 2. And be it further enacted, that the said tract of land shall be located within *two years* from this date, by said Henry Perrine, and shall be surveyed under his direction, by the surveyor of Florida, provided, that it shall not embrace any land having sufficient quantities of naval timber to be reserved to the United States, nor any site for maritime ports or cities.

SEC. 3. And be it further enacted, that whenever any section of land in said tract, shall be really occupied by a *bona fide* settler, actually engaged in the propagation or cultivation of valuable tropical plants, and upon proof thereof being made to the Commissioner of the General Land Office, a patent shall issue to the said Henry Perrine and his associates.

SEC. 4. And be it further enacted, that every section of land in the tract aforesaid, which shall not be occupied by an actual settler, positively engaged in the propagation or cultivation of useful tropical plants, within eight years from the location of said tract, or when the said adjacent territory shall be surveyed and offered for sale, shall be forfeited to the United States.

It is shown by the voluminous correspondence of Doctor Perrine, after the passage of this act and until some time in the year 1840, that although the obstacles he was forced to encounter in order to carry out the terms of the grant were almost insurmountable, he did make an effort so to do, moved his family there and resided upon the land that he had selected in compliance with this act. It is shown by the same correspondence that he planted some of the plants that were contem-

plated, but owing to the unsettled conditions, marauding bands of Indians infesting the country, the efforts were confined to a very small area, upon which it seems he started a nursery for the purpose of producing the plants that he intended experimenting with. While engaged in this work at Indian Key, some time in the summer of 1840, Doctor Perrine was murdered by the Seminole Indians, his wife and children barely escaping with their lives; his house, furniture, library, out buildings, and other valuable improvements were burned and destroyed.

Congress, by the act of February 18, 1841 (6 Stat., 819), passed the following supplemental act:

Whereas, under the provisions of the act, to which this act is a supplement, Doctor Henry Perrine made, in the manner thereby required, the location therein authorized; and while engaged in the necessary measure to carry into effect the object contemplated by said act, was murdered by the Seminole Indians; and whereas Mrs. Ann F. Perrine, the widow of the said Doctor Perrine is anxious to continue the undertaking thus commenced by her late husband, but is prevented from so doing by the continuance of the Indian War in Florida: Therefore, be it enacted, etc., that Mrs. Ann F. Perrine, the widow of the said Henry Perrine, and Sarah Ann Perrine, Hester M. S. Perrine, and Henry E. Perrine, his surviving children, are hereby declared to be entitled to all the rights and privileges vested in and granted to the said Doctor Henry Perrine, by the act to which this is supplement, and that the time limited by said act, in which every section of said grant should be occupied to prevent the forfeiture of the same to the United States, be, and the same is hereby, extended to eight years from and after the time when the present Indian War in Florida shall cease and determine.

The land was officially surveyed in 1847 and the tract theretofore designated by Doctor Perrine in person was set aside for him, and embraces lands described as follows: Sections 12, 13, 24, 25 and 36 T. 55 S., R. 39 E.; Section 1, T. 56 S., R. 39 E.; Sections 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, T. 55 S., R. 40 E.; and Sections 2, 3, 4, 5, and 6, T. 56 S., R. 40 E., Tala. Mer.

It appears that after the passage of the supplemental act the widow and children of Doctor Perrine undertook to carry out the provisions of the same by establishing settlers on each section. Thirty-six families from the Bahama Islands were engaged came over and commenced to establish their homes on the land, but were soon compelled to abandon them by reason of being frightened or driven off by the Seminole Indians.

Some effort, however, was evidently made by these inhabitants, or the heirs directly, to comply with the terms of the act, as I find in the record the affidavits of Alexander Mackay, R. R. Fletcher and William H. Mears, sworn to on April 5, 1848, in which they say that they superintended the planting of "sea sal hemp" and lime seed; each of them enumerate the sections of land upon which this planting was done, and an examination of the same shows that it covered every one of the sections included in the grant.

It appears that the representatives of the heirs in 1850 presented a memorial to Congress praying that the terms of the grant be extended

owing to the unsettled conditions that then prevailed in that vicinity. No action, however, seems to have been taken by Congress in relation to the matter.

It is a matter of history that the Seminole War, which was referred to by Congress in the supplemental act, was one of long duration and seriously retarded the settlement of that part of the country. It appears, however, by the records in the War Department, that open hostilities officially ceased in December, 1855; yet it is certain that there were marauding bands still harassing the settlers for some time thereafter.

From 1862 down to the present time the heirs of Doctor Perrine have been before your office, the Department and Congress, persistently demanding that their rights to the grant should be recognized; but little seems to have been accomplished in the matter except by reports made from your office to Congress in relation to the status; and in that of March 17, 1887, your office recommended that patents be issued to three sections named, because proof had been made of compliance with the act.

It appears that the land embraced in the grant was regularly withdrawn and set apart under the provisions of said act of 1838, and although there had not been a strict compliance with its terms by the heirs of Doctor Perrine, and proof made as required, yet the lands had been held not subject to disposal on any account until Congress shall have given authority to restore the same to the public domain.

The State of Florida at one time laid claim to the land under the swamp act of 1850, and in 1873 made selection of the same, but in view of the priority of the Perrine grant these selections were suspended by your office and no steps taken in relation thereto until the rights of the grantees were fully determined.

The inquiry of Senator Carter, quoted above, in relation to this grant, seems to have been brought about because of the introduction of a bill in the first session of the fifty-fourth Congress to restore to the public domain in the lands within the grant, to enable settlers within the limits of the same to homestead the tracts actually occupied by them.

The report of your office has been forwarded to the Department, by reason of the request of Senator Carter, together with all the records in connection with the matter, and it has been deemed advisable to investigate the subject with a view of determining whether or not any further legislation is required or whether the parties have complied with the terms of the grant sufficiently to warrant the issuance of patents to them.

After mature deliberation upon this subject, I am convinced that the grant to Doctor Henry Perrine, subsequently conferred as it was by the act of Congress upon his heirs, was a grant *in praesenti*, conveying the legal title to the grantee, defeasible only by forfeiture duly declared by act of Congress. Until such forfeiture be so declared the grantee

has the right to make the settlement required by the grant as a condition precedent to the issuance of patent, as contemplated by the acts of Congress, and whenever the requirements of the grant have been complied with as to any section of the township, and proofs thereof submitted and accepted, a right to title thereto has vested, and Congress can not declare a forfeiture thereof without impairing the validity of the grant.

That the grant is one *in praesenti* is conclusively decided by the supreme court in *Schulenberg v. Harriman* (21 Wall., 44). The question before the court in that case was the construction of an act granting lands to the State of Wisconsin to aid in the construction of railroads, and by the first section it is declared, "that there be and is hereby granted to the State of Wisconsin," etc., certain sections of land enumerated. And it was provided further, in the fourth section, that,

if said road is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States.

Determining whether this grant should be forfeited because the road was not constructed strictly according to the terms of the statute, and referring directly to the last quotation above, the court say:

It is settled law that no one take advantage of the nonperformance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed.

In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement.

The doctrine here announced by the court has been followed by it in a great number of cases subsequently, notably those of *Van Wyck v. Knevals*, 106 U. S., 360; *St. Louis &c., Railway v. McGee* 115 U. S., 469; *Bybee v. Ore. and Cal. R. R. Co.* 139 U. S. 663; *Deseret Salt Co. v. Tarpey*, 142 U. S., 241; and *Lake Superior Ship &c. Co. v. Cunningham*, 155 U. S., 354.

The principle decided in these cases has been invariably applied by the Department in the construction of similar grant. See *Cooper et al. v. Sioux City R. R. Co.*, 1 L. D. 345; *in re Central Pacific R. R. Co.*, 2 L. D., 489; *Wisconsin R. R. Co.*, 5 L. D., 81; *Wisconsin Central R. R. Co.*, 6 L. D., 190; and *Plaetke v. Central R. R. Co.*, 10 L. D., 317.

It has also been decided by the Department that where the attention of Congress has been called to the fact that the conditions subsequent have not been complied with (as in this case by a petition of the grantees in 1850 and again in 1887), and no action is taken by the Congress, the Department accepts its failure to act as an expression of its will that the decisions of the court shall be taken as its guide in administering the law. *Daneri v. Texas and Pacific R. R. Co.*, 2 L. D., 548.

In view of these authorities it would seem that if there has been a compliance with the terms of the act upon the part of the grantees, even though it may have been since the close of the Seminole War, as contemplated by Congress in the supplemental act, the fee of the land still rests in them, and before final action by Congress, or judicial proceedings instituted, patents may be issued to the grantees.

It may be said further, that the right of settlement upon the granted premises would be restricted to the grantees or those claiming under them, and all other settlers thereon are naked trespassers and their settlement may be claimed by the grantees as a fulfillment of the condition of the grant whenever the settlement is such as the grant requires.

It appears that there were a number of settlers on the lands, and in December, 1896, all of them with the exception of John W. Roberts, Sarah M. Roberts, James A. Smith, John F. Roberts and George H. Mehring, made proof before a United States Commissioner, and the same was transmitted to your office. It is not deemed advisable to go into details regarding this proof. Its sufficiency is a matter your office must primarily pass upon, which has not yet been formally done. It is sufficient in this connection to say that in your office letter of January 9, 1897, reporting on reference of letters of Senator Carter, it is said, "the proofs appear to me to be in compliance with the provisions of Sec. 3 of the act of July 7, 1838."

Your office during the month of January, 1897, has forwarded to the Department several letters written by the three Roberts, Mehring and Smith, the persons who, as stated above, refused to make final proof, and one E. I. Robinson, who is acting as attorney for the others. The same parties have also written letters to the Secretary of the Interior; also to a United States Senator, who has forwarded copies of the letters he received to the Department. These letters are not deemed of sufficient importance as bearing upon any question as to the validity of the grant or the improvements placed thereon by themselves or those who did make final proof, to warrant more than a passing consideration.

In your office report to the Department, of January 9, 1897, you refer to the letter of Robinson and say:

I think no showing is made by the said letter which would warrant the sending of an inspector to Florida, or which would raise any presumption of bad faith against the claimants under the grant.

I concur in this. The statements are not under oath, and can not

therefore be accepted to overcome the final proof. Aside from this there is nothing charged, even if sworn to, that would defeat the grant or warrant sending an inspector. The parties do not state that there has been any failure to comply with the terms of the grant in regard to the particular tracts they occupy.

The particular grievance of these persons seems to be against certain railway companies which appear to have been instrumental to some extent in the development of the lands. It is not shown by the record before me what interest the companies have in this land, and it is wholly immaterial what their interest may be. If the terms of the grant are complied with, even if railway companies have assisted in doing so, the grant inures to the beneficiaries under the grant, and the patents will necessarily run to them. Any grievances, therefore, the settlers may have against the companies is a matter between themselves and not one the government will take part in.

These same parties have also forwarded a copy of an affidavit sent to the vice president of the East Coast Railway Company in which is recited at some length their grievances. But as said in reference to the letters, the matters therein contained do not raise any question the government can consider.

There is also a copy of another affidavit made by the same parties, not addressed to any one, but inasmuch as it says,

that if a government inspector authorized to take depositions of settlers and thoroughly honest should come down here he would be kept busy a long time investigating injuries to the settlers and frauds against the government,

I take it that it was meant for your office, yet why a copy and not the original should have been filed is unexplained. In addition to this suggestion in regard to sending an inspector it appears that all they ask is for the government to arrange so that they can deal directly with the government in regard to securing their titles.

As before said the Department is powerless to aid them even if the matter were properly presented for its consideration. By the terms of the grant patents must issue in accordance with the terms of the acts and could not be given either to the settlers or the railway companies.

The record is returned to your office with directions to examine the final proof submitted and if found satisfactory to issue patents to the beneficiaries of said grant.

It is so ordered.

SALT SPRINGS AND SALINE LANDS—SELECTION.

STATE OF OREGON ET AL. v. JONES.

The provisions in the act of February 14, 1859, granting salt springs and adjacent lands to the State of Oregon, and the act of December 17, 1860, amendatory thereof, so far as they fix a time for selections under said grant, are directory, and not mandatory; but as the grant so made only becomes effective as to specific tracts on selection by the State, the right to make such selections after the expiration of the time fixed therefor will be defeated by an intervening adverse right asserted under the general provisions made for the disposal of saline lands by the act of January 12, 1877.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897. (I. H. L.) (C. J. W.)

On September 11, 1895, David R. Jones filed an affidavit duly corroborated, alleging that the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 4 and NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 9, SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 8 and NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 17, T. 35 N., R. 25 E., W. M., Lakeview, Oregon, were lands unfit for cultivation and were saline in character, and should be disposed of as saline lands. On September 25, 1895, proof was submitted in support of said allegations, and on that day, based on the evidence so submitted, the local officers rendered a joint decision, finding the land to be saline in character and recommending its sale.

By letter "C" of date November 23, 1895, your office ordered said land to be advertised and offered for sale, in accordance with the provisions of the act of January 12, 1877 (19 Stat., 221). The land was advertised in accordance with departmental regulations and was sold on February 21, 1895 to David R. Jones, who was the highest and best bidder, and cash certificates Nos. 1867 and 1868 were issued covering said purchases. Subsequently J. K. Barry, who was present and a competitive bidder at said sale, filed a protest against the issuing of patents to Jones on his cash entries, and asking that said sales be set aside and declared void, and that no more lands in Oregon be sold under said act of 1877, until salt springs and contiguous lands granted to the State for its use by act of Congress of February 14, 1859 (11 Stat., 384), have been selected by the governor thereof to the extent named in the grant. On April 21, 1896, your office considered the report of the local officers, touching said sale and Barry's protest, and held that the sale of the lands was authorized by said act of January 12, 1877; that the proceedings connected with said sale were regular and that Jones was entitled to patents for the tracts sold. It was further held that Barry had no right or interest to be considered, and as he exhibited no authority to represent the State of Oregon, he had no right to intervene and his protest should be dismissed.

From this decision Barry appealed. Pending said appeal, but before the papers in the case were transmitted here, the governor of Oregon transmitted to your office an application to select the same lands included

in the sale to Jones, under the aforesaid act of February 14, 1859, which application was transmitted here by your office as a part of the record in said case. W. K. Barry filed his protest, but neither he nor his counsel exhibited any authority to represent the State of Oregon up to the time your office decision was rendered. Since the application of the governor to make selection of the land in question has been filed, the attorney who filed the protest, has also filed authority to represent the State, so that the State may now be considered as a proper party to the case and as properly represented. While your office properly held Barry's protest for dismissal as the record then stood, as the State now makes the protest its own by adoption, Barry's right to file and maintain it becomes inconsequent, and need not be further considered, inasmuch as said protest asserts the right of the State to be paramount. The application of the governor of Oregon to make selection of the land included in Jones' purchase is met by a protest filed by Jones in the form of a motion to reject the list of selections. The contentions thus presented call for an interpretation of the acts of February, 1859 (11 Stat., 384), of December 17, 1860 (12 Stat., 124) and of January 12, 1877 (19 Stat., 221). The contention of the State is that the provisions in the first named acts, as to the time within which the State shall make its selections, are directory and not mandatory, and therefore until the claim of the State is first satisfied, sales of saline lands under the act of January 12, 1877, are made subject to the existing prior right of the State to select such land under its grant.

The correctness of this contention is denied by Jones. Some of the questions presented by the present record and contentions were considered here in the somewhat similar case of State of Colorado, *ex parte* (10 L. D., 222), and the ruling in that case as far as the same is applicable to the present one will be followed. It is to be observed, however, that individual rights were not in issue in that case, and it is stated in the body of the decision,

Had third parties intervened prior to the selection and initiated proceedings under the act of 1877 touching the lands in question, the right of the State thereto might have been lost.

Here Jones initiated proceedings under the act of January 12, 1877; proved the lands to be saline in character; had become the purchaser of them; and had paid the purchase price to the government, before the State made any motion to select these lands under its grant. In the Colorado case, it was held, that the act of January 12, 1877, did not repeal the earlier act making the grant to the State, and that the two acts might stand together, each having a separate field in which to operate, and providing different methods of acquiring title to saline lands.

The act making the grant to Colorado was as follows:

That all salt springs, within said State, not exceeding twelve in number, with six sections of land adjoining, and as contiguous as may be to each, shall be granted to

said State for its use, the said land to be selected by the governor of said State within two years after the admission of the State, and when so selected to be used and disposed of on such terms, conditions and regulations as the legislature shall direct; *Provided*, That no salt spring or lands the right whereof is now vested in any individual or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall by this act be granted to said State.

The language of the act under consideration, granting salt springs to the State of Oregon, is in the same terms as the Colorado grant, except that the selection is to be made in one year after the admission of the State instead of two years as in the Colorado act. The act of 17th of December, 1860 (12 Stat., 124), amending this act, amends it only in the matter of time within which the selection is to be made, by extending it to any time within three years from the passage of the amendatory act. It appears therefore that the language to be construed in order to determine the character of the grant is the same in both grants referred to. As it was held in the Colorado case that the provision in reference to the time within which the selection should be made was directory, and that a failure to make such selection within that time would not of itself work a forfeiture of the grant, a different construction of this clause of the act can not now be given without overruling said decision, and no sufficient reason for doing this appears.

The act of February 14, 1859 (11 Stat., 334) took effect on its approval, and was a grant to the State of certain salt springs and lands in connection therewith, thereafter to be selected by the governor. The grant operated to pass the title to a certain number of salt springs and the prescribed amount of lands in connection with each, from the government; but it did not and could not attach to any specific salt springs or sections of land until selection was made. The act does not in any way limit the power of Congress to provide other methods of disposing of lands of the class contemplated, so long as the same remain unselected. Congress had the power to pass the act of January 12, 1877, and as the act of February 14, 1859, is not repealed or affected by it, effect should be given to both acts as far as may be.

We here have, therefore, a case where one of the principles announced in the case of *Shepley et al. v. Cowen et al.* (91 U. S., 330) is applicable. That is we have two modes of acquiring title to saline lands, both of which may stand. The rule announced in the case referred to, is that in a particular case, where two modes exist of acquiring title from the government, the one will prevail under which the first initiatory step was taken. Here the first step was taken under the act of January 12, 1877, and by Jones.

In support of the contention that title passed to the State of Oregon, to the particular land in question, on the approval of the act of February 14, 1859, the special report in reference to compromise and settlement between the United States and the State of Arkansas, No. 1958, is referred to as an official admission of the correctness of the construction contended for in this case. This report is not authority for the prin-

ciple insisted upon. It is nowhere conceded that the government had parted with the title to saline lands by its original granting act of salt springs to the State of Arkansas, and the very fact that the settlement recommended was recommended as a compromise only, deprives it of value as a judicial precedent. It is a mere recommendation of terms of compromise, which have not yet been approved by Congress. The construction of the act contended for by the State does not seem to be in harmony with the following *proviso* of the act:

Provided, that no salt spring or land, the right whereof is now vested in any individual or individuals, or which may hereafter be confirmed or adjudged to any individual or individuals shall by this article be granted to said State.

After due consideration of the several acts of Congress referred to, and the authorities cited, my conclusions are:

1. That the doctrine announced in the Colorado case, *supra*, construing a similar act to the one here in question to the effect that the provisions of said act relative to the time within which selections of salt springs are to be made by the State, are directory and not mandatory, will be adhered to.

2. That the grant becomes operative, in the sense of attaching to specific lands, only on selection by the State. (139 U. S., 1-5).

3. That the application of the State to make selection of the lands purchased by Jones should be rejected, because his right attached before it made the application, but the right of the State to make selection of any unappropriated saline lands in said State in satisfaction of its grant is recognized.

Your office decision is affirmed.

RAILROAD GRANT—SECTION 2, ACT OF APRIL 21, 1876.

GOODRICH v. CALIFORNIA AND OREGON LAND CO.

The provisions of section 2, act of April 21, 1876, are not restricted to persons who made entries under section 1, of said act, but apply, in the event of abandonment by such original entrymen, to cases where "under the decisions and rulings of the Land Department," the lands covered by such original entries have been "re-entered by pre-emption or homestead claimants who have complied with the laws governing pre-emption and homestead entries," and submitted satisfactory proof of such compliance.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897.
(I. H. L.) (E. M. R.)

This case involved the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 9, T. 30 S., R. 46 E., Lake View land district, Oregon, and is before the Department upon appeal, by the California and Oregon Land Company, from your office decision of October 21, 1895, awarding the tract in controversy to Amelia Goodrich.

The record shows that this tract is within the primary limits of the grant made by the act of July 2, 1864 (13 Stat., 355), to aid in the construction of the Oregon Central Military Road, as shown by the withdrawal made on account thereof on May 2, 1876. Two maps showing the definite location of this road were filed in the Department—one on March 17, 1869, and the other on February 28, 1870.

This tract was listed on August 23, 1883, by the California and Oregon Land Company, successor in interest to the aforesaid road company.

April 15, 1874, A. C. Goodrich filed declaratory statement for the tract in controversy, alleging settlement on July 1, 1873. May 2, 1889, Amelia Goodrich filed declaratory statement for the same tract, alleging settlement on November 18, 1888. After notice given, proof was made by the said Amelia Goodrich, and final certificate was issued January 7, 1891.

The land in question was withdrawn by your office letter of date April 15, 1876, which was received on May 2, 1876, upon which date the withdrawal became effective. At that date this tract was covered by the declaratory statement of A. C. Goodrich.

Your office decision held that this entry was confirmed under the second section of the act of April 21, 1876 (19 Stat., 35), which is as follows:

That when at the time of such withdrawal as aforesaid valid pre-emption or homestead claims existed upon any lands within the limits of any such grants which afterward were abandoned, and, under the decisions and rulings of the Land Department, were re-entered by pre-emption or homestead claimants who have complied with the laws governing pre-emption or homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto.

In the argument filed by counsel for the California and Oregon Land Company it is urged that the confirmatory provisions of the act of April 21, 1876, were intended solely for the benefit of the individual claimants who had abandoned such entries, and to sustain that proposition reference is made to the case of the Northern Pacific Railroad Company (20 L. D., 191), wherein it was held (syllabus):

The confirmation of entries under section 1, act of April 21, 1876, is solely for the benefit of the individual claimant, conditioned upon his compliance with law, and was not intended to confirm the entry absolutely, as against the right of the company, so as to except the land from the grant in favor of any other settler.

That case does not sustain the contention of counsel. The ruling therein laid down applies only to section 1. The second section of the act was not involved, and was not considered in that case.

The case at bar seems clearly to come within the provisions of the second section. That section provides "that when at the time of such withdrawal" (referring to the withdrawal mentioned in section one) pre-emption or homestead claims existed, which were afterwards abandoned, and "under the decisions and rulings of the Land Department, were re-entered by pre-emption or homestead claimants who have com-

plied with the laws governing pre-emption or homestead entries, such entries shall be valid, and patents shall issue therefor to the person entitled thereto." It does not say, "were re-entered by the *original* pre-emption or homestead claimants," but "were re-entered by pre-emption or homestead claimant."

In this case Amelia Goodrich made declaratory statement, and submitted proof upon which entry was allowed and final certificate issued. It therefore becomes pertinent to inquire whether her said filing and entry were made "under the decisions and rulings of the Land Department," as provided in said second section.

In the case of the Northern Pacific Railroad Company *v.* Burns, decided July 13, 1887 (6 L. D., 21), it was held (syllabus):

A homestead claim, existing prior to the receipt of notice of withdrawal on general route of the Northern Pacific, excepts the land covered thereby from the operation of said withdrawal.

Such being the law as then declared by the Department, it was immaterial whether the claim subsequently set up was by the original or a new claimant; and this view of the law remained in force and undisturbed until the decision of March 12, 1895, in the case of the Northern Pacific Railroad Company (20 L. D., 191), wherein said decision (*supra*) was specifically overruled.

In this case Amelia Goodrich filed her pre-emption declaratory statement in 1889, and made her proof and final entry before the Burns case was overruled, and during the time when that case was in force as a decision and ruling of the Land Department, and it is therefore clear that such filing and entry were made "under the decisions and rulings of the Land Department." Nor can it be said that the provisions of section two of said act operate solely to confirm entries and filings made prior to its passage, for this question was considered in the case of the Northern Pacific Railroad Company *v.* Symons (22 L. D., 686), wherein it was held (syllabus):

The confirmatory provisions of section 2, act of April 21, 1876, are not limited to entries made prior to the passage of said act, but are equally applicable to entries made thereafter.

See also, to the same effect, Northern Pacific Railroad Company *v.* Crosswhite (20 L. D., 526).

It is therefore held that the provisions of said section two are not restricted to persons who made entries under section one of the act but apply, in the event of abandonment of such original entrymen, to cases where, "under the decisions and rulings of the Land Department," the lands covered by such original entries have been "re-entered by pre-emption or homestead claimants who have complied with the laws governing pre-emption and homestead entries," and satisfactory proofs of such compliance have been submitted.

The appellee here having made her filing and entry "under the decisions and rulings of the Land Department," as shown, and having

furnished the required proofs of her compliance with the law thereunder, her entry is clearly confirmed by the second section of said act, and the decision of your office is therefore affirmed.

SURVEY—APPLICATION OF STATE—ACT OF AUGUST 18, 1894.

STATE OF WASHINGTON.

An application of a State for the survey and reservation of a township under the act of August 18, 1894, must be denied, where, prior to such application, a survey of the township has been ordered for the benefit of settlers.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897. (I. H. L.) (C. J. W.)

On May 28, 1896, application was duly made by the governor of the State of Washington for the survey and reservation, under the act of August 18, 1894 (28 Stat., 394), of certain townships, in the application designated and described.

On June 15, 1896, by letter "E," of that date, your office denied the application on the ground that other parties had applied for the survey of the same townships, and that they were under contract for survey on the applications and petitions of settlers, and were not subject to reservation under the terms of the act of August 18, 1894.

The State appealed from your office decision, alleging the following errors:

1. Error in holding that such lands were not unsurveyed within the meaning of the act referred to.
2. Error in holding that the State was not entitled to have the same surveyed and reserved from adverse claims in pursuance of said act.

Before considering said appeal, on January 7, 1897, your office was requested to report by virtue of what law or statute the applications of the settlers referred to were entertained. The Department is in receipt of your letter "E" of January 9, 1897, in response to said request, which contains the following report:

In reply I have the honor to report that section 453 of the Revised Statutes of the United States provides as follows:

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands."

Section 2218 of the Revised Statutes U. S. further provides as follows:

"The Secretary of the Interior shall take all the necessary measures for the completion of the surveys in the several surveying districts for which surveyors general have been, or may be, appointed, at the earliest periods compatible with the purposes contemplated by law."

In pursuance of the provisions of law embraced in the quoted statutes this office has from year to year issued to the surveyors general of the several surveying districts annual surveying instructions for their information and guidance.

The act of Congress making an appropriation for conveying the public lands for the fiscal year ending June 30, 1896, contains the following specific proviso: (29 Stat., 434)

"That in expending this appropriation preference shall be given in favor of surveying townships occupied, in whole or in part, by actual settlers and of lands granted to the States by the act approved February twenty-second, eighteen hundred and eighty-nine, and the Acts approved July third and tenth, eighteen hundred and ninety, and other surveys shall be confined to lands adapted to agriculture, except that the Commissioner of the General Land Office may allow, for the survey and re-survey of lands heavily timbered, mountainous, or covered with dense undergrowth, rates not exceeding thirteen dollars per linear mile for standard and meander lines, eleven dollars for township, and seven dollars for section lines, and in cases of exceptional difficulties in the surveys, when the work cannot be contracted for at these rates, compensation for surveys and resurveys may be made by said Commissioner, with the approval of the Secretary of the Interior, at rates not exceeding eighteen dollars per linear mile for standard and meander lines, fifteen dollars for township, and twelve dollars for section lines: *Provided*, That in the States of California, Idaho, Montana, Oregon, Arizona, Wyoming, Washington, Colorado, and Utah, there may be allowed, in the discretion of the Secretary of the Interior, for the survey and resurvey of lands heavily timbered, mountainous, or covered with dense undergrowth, rates not exceeding twenty-five dollars for township and twenty dollars for section lines."

In the annual surveying instructions issued for the fiscal year ending June 30, 1896, which were formally approved by the Department, are the following paragraphs, *viz.*:

"The law requires that in expending this appropriation preference shall be given in favor of surveying townships occupied, in whole or in part, by actual settlers, and of lands granted to the States by the act of February 22, 1889, and the acts approved July 3 and 10, 1890; hence in taking measures for the letting of contracts, it will be your first duty to ascertain the localities in which there are *bona fide* settlers, and the funds should be so applied as to benefit the greatest number of settlers.

"Contracts for subdivisional surveys, when transmitted to this office, should be accompanied by evidences of settlement on the lands embraced in such contracts. Said evidences are usually applications or petitions for survey signed by actual settlers on the lands, together with the affidavits of settlers, setting forth length of residence on their claims and the nature, extent, and value of the improvements made thereon."

It will be observed from the foregoing quotations of law, that in all cases where the rates of mileage to be allowed for public surveys exceed the so-called intermediate (\$13, \$11, \$7), that the same must be specially authorized by the Secretary of the Interior. To that end the Department requires this office to submit the application of settlers for survey, and descriptions of the class and character of the lands, in connection with the proposed public surveys, as provided in the annual surveying instructions herein referred to.

It may be further stated that the existing practice of authorizing the award of contracts for public surveys, on the applications of the settlers on the lands, has been in vogue since 1886, and that the annual surveying instructions from that time to the present, which require said applications, have been uniformly approved by the Secretary of the Interior.

The section of the act of August 18, 1894, under which the governor of the State of Washington makes the application under consideration, is as follows:

That it shall be lawful for the governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota and Wyoming to apply to the Commissioner

of the General Land Office for the survey of any township or townships of public land then remaining unsurveyed in any of the several surveying districts, with a view to satisfy the public land grants made by the several acts admitting the said States into the Union to the extent of the full quantity of land called for thereby; and upon the application of said governors the Commissioner of the General Land Office shall proceed to immediately notify the surveyor-general of the application made by the governor of any of the said States of the application made for the withdrawal of said lands, and the surveyor-general shall proceed to have the survey or surveys so applied for made, as in the cases of surveys of public lands; and the lands that may be found to fall within the limits of such township or townships as ascertained by the survey, shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any such lands not embraced in any valid adverse claim, for the satisfaction of such grants, with the condition, however, that the governor of the State, within thirty days from the date of such filing of the application for survey, shall cause a notice to be published, which publication shall be continued for thirty days from the first publication, in some newspaper of general circulation in the vicinity of the lands likely to be embraced in such township or townships, giving notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands: *And provided further*, That the Commissioner of the General Land Office shall give notice immediately of the reservation of any township or townships to the local land office in which the land is situate of the withdrawal of such township or townships, for the purpose hereinbefore provided.

The act also contains this provision:

Provided that in expending this appropriation preference shall be given in favor of surveying townships occupied in part, by actual settlers and of lands granted to the States by the act approved February twenty-second, eighteen hundred and eighty-nine, and the acts approved July third and July tenth, eighteen hundred and ninety, and other surveys shall be confined to lands adapted to agriculture &c.

Thus while the act makes no specific provision for the survey of townships on the application of settlers, it does recognize the right of homeseekers to make settlement on unsurveyed public lands, and directs that, in expending the appropriation, preference shall be given to the survey of townships occupied in part by actual settlers, and of land granted to the States. It was evidently not the purpose of the act to put any restriction or limitation upon the rights of actual settlers, not already existing, and the act is as favorable to them, in so far as the lands occupied by them are affected, as to the States. The effect is the same as to them whether the survey is made on their petition or request, or on the application of the State. In either event their existing settlement rights must be respected. Over the future or prospective settler, the State is allowed some advantage by this act. On its application the State may have the lands in the townships applied for withdrawn from settlement for sixty days during which period it may select the desirable lands, and leave the rest for settlers.

This privilege is in derogation of the common rights of settlers, and is not to be enlarged, by construction, but the act should be given the construction which is most favorable to the rights of settlers. The townships which remain unsurveyed are those for which the State may make application; under this act. The unsurveyed townships may therefore be surveyed on the application of the State, or your office may direct the survey without such application, if deemed advisable.

In the case under consideration, before the State filed its application your office had ordered the survey of the townships named, and the same were put under contract to be surveyed, so that they ceased to be townships for the survey of which applications would thereafter be received.

Inasmuch as prior to the application of the State, the survey had been determined upon and ordered by your office, with a view to the benefit of the settlers, the townships for the survey of which measures had thus been taken, were no longer within the provisions of said act of August 18, 1894, and your office properly so held, and the decision is affirmed.

RAILROAD GRANT—MODIFIED LINE—ADJUSTMENT.

IOWA RAILROAD LAND CO. (ON REVIEW).

The act of June 2, 1864, authorized a modification of the line of unconstructed road as located under the original grant of 1856, and provided for a branch line connecting said modified line with the line of the Mississippi and Missouri Railroad Company, so as to form a connection with the Union Pacific system. For the modified main line the company was entitled "to the same lands and to the same amount of lands per mile," as provided in the original grant, but for the connecting branch line a new grant was made, to be satisfied from lands within twenty miles thereof, hence in the adjustment of the grant, as made by the two acts of Congress, the "connecting branch line" cannot be regarded as a part of the modified main line.

The act of 1864, so far as the modified main line is concerned, enlarged the source from which the amount of lands granted by the act of 1856 might be satisfied; but the lands certified prior to said act of 1864, along unconstructed road, must remain a charge against the company in the final adjustment of the grant under the two acts.

Secretary Francis to the Commissioner of the General Land Office, January 30, 1897.

(I. H. L.)

(F. W. C.)

With your office letter of September 5, 1896, was forwarded a motion, filed on behalf of the Iowa Railroad Land Company, successor to the Cedar Rapids and Missouri River Railroad Company, for review of departmental decision of July 9, 1896 (23 L. D., 79), in the matter of the adjustment of the grant made by the act of May 15, 1856 (11 Stat., 9), and June 2, 1864 (13 Stat., 95).

The motion is based upon the following assignments of error:

1. The finding and holding that the original location is the measure of the grant for the constructed line of said road, and that the only purpose of the act of 1864, so

far as said line is concerned, was to authorize a change of line and, by enlarging the source from which selections might be made for losses in place along the original line, to fully satisfy the amount granted or intended to be granted for the road west of Cedar Rapids by the act of 1856.

2. The finding and holding that Exhibit A of the adjustment submitted by the Commissioner of the General Land Office is correct and proper "in so far as the extent of the grant is concerned."

3. The failure to find and hold that the 4th section of the act of June 2, 1864, is, as is found by the supreme court in *Herring v. Railroad Company* (110 U. S., 27), a new grant, and that under it the company is entitled to six sections of land per mile for every mile of road constructed by said company west of Cedar Rapids.

4. The finding and holding that the 2,569.75 acres erroneously certified to the railroad company, they having been theretofore disposed of by the United States, being outstanding must remain a charge to the grant unless reconveyed to the United States by said company.

5. The finding and holding that the 76,916.75 acres certified to the State and sold by the Iowa Central Air Line Railroad Company out of the grant of 1856, prior to resumption by the State of Iowa, and to the enactment of the grant of 1864, should not be deducted from the grant made for the modified line by the act of June 2, 1864.

The first three assignments of error question the directions given as to the measure of the grant.

Your office letter submitting this matter presented five plans of adjustment, the first, which was adopted in the opinion under review, being as follows:

Exhibit A is an adjustment upon the theory that the company takes under the original grant from Cedar Rapids, and that the only additional right given the company under the act of 1864 was to satisfy deficiencies within the grant in place, by resorting to the even numbered sections within the six mile limits and both even and odd within the fifteen mile limits, and if there was still a deficiency to resort to the even and odd sections along the modified line within twenty miles thereof. Under this settlement there have been excess approvals to the company of 57,570.24 acres.

To understand the real position of the company it is necessary to review, somewhat, the history of the grant.

The Iowa Central Air Line Company, upon which the State originally conferred the grant, filed a map of definite location of the line of road October 31, 1856, which was duly accepted and upon which the limits of the grant were adjusted and withdrawal ordered.

The road provided for by the act of 1856 was—

from Lyons City to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line, running as near as practicable to the forty-second parallel across the State, to the Missouri River.

Said Air Line Company failed to construct any part of the road and the State resumed the grant in 1860 and conferred the same upon the Cedar Rapids and Missouri River Railroad Company.

Prior to this time, however, a road had been built by the Chicago, Iowa and Nebraska Railroad Company (not a land grant road), from a point on the Mississippi River within three miles of Lyons City to Cedar Rapids, and practically upon the location theretofore made between said points by the Iowa Central Air Line Company.

The Cedar Rapids Company therefore began the construction of its road at Cedar Rapids and, prior to the year 1864, had completed about one hundred miles, or, as appears from your letter, to Nevada, Iowa.

This was the condition of affairs at the time of the passage of the act of June 2, 1864 (*supra*), the fourth section of which provides:

That the Cedar Rapids and Missouri River Railroad Company, a corporation established under the laws of the State of Iowa, and to which the said state granted a portion of the land mentioned in the title to this act, may modify or change the location of the uncompleted portion of its line, as shown by the map thereof now on file in the general land office of the United States, so as to secure a better and more expeditious line to the Missouri River, and to a connection with the Iowa branch of the Union Pacific Railroad; and for the purpose of facilitating the more immediate construction of a line of railroads across the State of Iowa, to connect with the Iowa branch of the Union Pacific Railroad Company, aforesaid, the said Cedar Rapids and Missouri River Railroad Company is hereby authorized to connect its line by a branch with the line of the Mississippi and Missouri Railroad Company; and the said Cedar Rapids and Missouri River Railroad Company shall be entitled for such modified line to the same lands and to the same amount of lands per mile, and for such connecting branch the same amount of land per mile, as originally granted to aid in the construction of its main line, subject to the conditions and forfeitures mentioned in the original grant, and, for the said purpose, right of way through the public lands of the United States is hereby granted to said company. *And it is further provided*, That whenever said modified main line shall have been established or such connecting line located, the said Cedar Rapids and Missouri River Railroad Company shall file in the general land office of the United States a map definitely showing such modified line and such connecting branch aforesaid; and the Secretary of the Interior shall reserve and cause to be certified and conveyed to said company, from time to time, as the work progresses on the main line, out of any public lands now belonging to the United States, not sold, reserved, or otherwise disposed of, or to which a pre-emption right or right of homestead settlement has not attached, and on which a bona fide settlement and improvement has not been made under color of title derived from the United States or from the State of Iowa, within fifteen miles of the original main line, an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of lands per mile granted, or intended to be granted, by the original act to aid in the construction of said railroad shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line and connecting branch within twenty miles thereof: *Provided, however*, That such new located or modified line shall pass through or near Boonsboro', in Boon county, and intersect Boyer river not further south than a point at or near Dennison, in Crawford county: *And Provided, further*, That in case the main line shall be so changed or modified as not to reach the Missouri River at or near the forty-second parallel north latitude, it shall be the duty of said company, within a reasonable time after the completion of its road to the Missouri river, to construct a branch road to some point in Monona county, in or at Onawa City; and to aid in the construction of such branch the same amount of lands per mile are hereby granted as for the main line, and the same shall be reserved and certified in the same manner; said lands to be selected from any of the unappropriated lands as hereinbefore described within twenty miles of said main line and branch; and said company shall file with the Secretary of the Interior a map of the location of the said branch: *And provided further*, That the lands hereby granted to aid in the construction of the connecting branch aforesaid shall not vest in said company nor be encumbered or disposed of except in the following manner: When the governor of the State of Iowa shall certify to the Secretary of the Interior that

said company has completed in good running order a section of twenty consecutive miles of the main line of said road west of Nevada, then the Secretary shall convey to said company one third, and no more, of the lands granted for said connecting branch. And when said company shall complete an additional section of twenty consecutive miles, and furnish the Secretary of the Interior with proof as aforesaid, then the said secretary may convey to the said company another third of the lands granted for said connecting branch; and when said company shall complete an additional section of twenty miles, making in all sixty miles west of Nevada, the secretary, upon proof furnished as aforesaid, may convey to the said company the remainder of said lands to aid in the construction of said connecting branch: *Provided, however*, That no lands shall be conveyed to said company on account of said connecting branch road until the governor of the State of Iowa shall certify to the Secretary of the Interior that the same shall have been completed as a first-class railroad. And no land shall be conveyed to said company situate and lying within fifteen miles of the original line of the Mississippi and Missouri Railroad, as laid down on a map on file in the general land-office: *Provided, further*, That it shall be the duty of the Secretary of the Interior, and he is hereby required, to reserve a quantity of land embraced in the grant described in this section, sufficient, in the opinion of the governor of Iowa, to secure the construction of a branch railroad from the town of Lyons, in the State of Iowa, so as to connect with the main line in or west of the town of Clinton in said state, until the governor of said state shall certify that said branch railroad is completed according to the requirements of the laws of said state: *Provided, further*, That nothing herein contained shall be construed as to release said company from its obligation to complete the said main line within the time mentioned in the original grant: *Provided, further*, That nothing in this act shall be construed to interfere with, or in any manner impair, any rights acquired by any railroad company named in the act to which this is an amendment, or the rights of any corporation, person or persons, acquired through any such company; nor shall it be construed to impair any vested right of property, but such rights are hereby reserved and confirmed: *Provided, however*, That no lands shall be conveyed to any company or party whatsoever, under the provisions of this act and the act amended by this act, which have been settled upon and improved in good faith by a bona fide inhabitant, under color of title derived from the United States or from the State of Iowa adverse to the grant made by this act or the act to which this act is an amendment. But each of said companies may select an equal quantity of public lands as described in this act within the distance of twenty miles of the line of each of said roads in lieu of lands thus settled upon and improved by bona fide inhabitants in good faith under color of title as aforesaid.

While this act authorized a change in the location of the *unconstructed* portion of the road, yet, it still provided that it should be built to the Missouri River, but permitted a change in order to secure a "more expeditious line."

The Pacific railroad system was not in existence at the time of the passage of the original act under which this company claims, viz., May 15, 1856, and a further and new object was included in the legislation made by the act of 1864, viz., a connection with the Iowa branch of the Union Pacific Railway.

To accomplish this latter purpose a branch line was provided for, on account of which a *new* grant was made, and this branch is referred to as the "connecting branch."

By the act of 1856 the line was to run as near as practicable to the forty-second parallel across the State of Iowa. Measurement made of

the locations shows that the old line of 1856 diverges to the north of that parallel twenty-four miles, while the modified line diverges to the south thirty miles, measured to a connection with the Sioux City and Pacific Railroad at California Junction.

By letter of July 5, 1865, William T. Steiger, as agent of the company, filed in this Department a map showing the amended line of location of said Cedar Rapids and Missouri River Railroad.

Said letter contained the following:

I have the honor to transmit herewith the letter of W. W. Walker, Esq., Vice President Cedar Rapids and Mo. Riv. R. R. Co., addressed to you on the 19th instant, together with the accompanying maps duly authenticated of the amended route of said road from Cedar Rapids to the Missouri River, which I beg leave to place on file as the basis of the adjustment of the additional grant of 2nd June 1864.

This map shows a connection with the Sioux City and Pacific Railroad at California Junction, about three miles from the Missouri River, and with this connection the river is reached as the Sioux City and Pacific Railroad crosses the Missouri River.

By letter of December 19, 1867, Hon. J. I. Blair, President of the Cedar Rapids and Missouri River Railroad, filed a second map, with a request that it be attached to the one before filed.

This map shows a line leaving the location made in 1865, at Missouri Valley, about six miles east of California Junction, and runs nearly due south for about twenty-one miles to a connection with the Mississippi and Missouri River Railroad, now the Chicago, Rock Island and Pacific Railroad, at Council Bluffs.

It is claimed by the company that this piece of road last described should be considered as a part of the amended main line.

This contention, if granted, makes the amended line, as constructed, 271.6 miles long, and it is claimed that this becomes the basis for the adjustment of the grant under the act of 1864, which is to be satisfied from the limits of the old location of 1856, as far as possible, the deficiency to be made up along the limits of the modified line, and that this deficiency is not only of lands lost in place along the old location, but that the constructed line, being longer than the old location, the grant was commensurably increased, and that this increase is to be also taken along the modified line.

In the decision under review it was held that (syllabus):

The grant to the State of Iowa by the acts of May 15, 1856, and June 2, 1864, is a grant in place, the extent of which is determined by the location under the original grant, and the amount of lands earned thereunder ascertained by the line of road constructed west of Cedar Rapids, with the additional right under the act of 1864, to satisfy deficiencies within the grant in place by resorting to even numbered sections within the six mile limits, and both even and odd within the fifteen mile limits, and if there is still a deficiency to resort to the even and odd sections along the modified line within twenty miles thereof.

After a careful review of the matter this position is adhered to, and even if the company's contention as to the length of the modified line

be acceded to, yet, the grant made by the act of 1856 for the main line cannot be enlarged under the terms of the act of 1864 for the "modified main line."

For this modified main line the company was to be entitled "to the same lands and to the same amount of lands per mile," and it was provided that—

the Secretary of the Interior shall reserve and cause to be certified and conveyed to said company, from time to time, as the work progresses on the main line, . . . within fifteen miles of the original main line, an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of lands per mile granted, or intended to be granted, by the original act to aid in the construction of said railroad shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line and connecting branch within twenty miles thereof.

The act of 1856, fourth section, provides that—

and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be sold, and so from time to time until said roads are completed; and if any of said roads are not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States.

Under this legislation, when twenty miles were certified as constructed along the modified main line, the company was authorized to sell one hundred and twenty sections along the original location, if the same shall be found within a continuous line of twenty miles along said original location, and so on until the entire road was built.

No new grant in place was made along the modified main line, but the lands within twenty miles thereof might be resorted to in order to satisfy any deficiency not to be found within the limits along the original location.

While it is undoubtedly true, as held by the supreme court in the Herring case (110 U. S., 27), that "it has been the invariable policy of Congress to measure the amount of public lands granted to a land-grant railroad by the length of the road as actually constructed, and not by its length as originally located," when the *entire* line as originally located is not constructed, as was the case with the Cedar Rapids grant, yet, it has never been held by that court that the grant, where one in place, as is the grant of 1856, which acquired precision by location, can be enlarged, by showing that the constructed road is longer than the located line.

In my opinion, however, the modified main line as provided for in the act of 1864, was designed to be a more direct and shorter route to the Missouri River than that shown by the location made under the act of 1856; further, that the location shown upon the map of 1865, satisfies

the terms for the modified main line, and that the location shown upon the map filed in 1867, was intended for, and should be held to be the "connecting branch," provided for in the act of 1864, for which a new grant was made, but which must be satisfied from the lands within twenty miles thereof.

It is true that the supreme court, in the Herring case (*supra*), held that the map of 1865 showed only a part of the modified line and that it was not completed until the filing of the map on December 1, 1867 (evidently meaning the map filed December 19, 1867), and the company urges that this holding is conclusive upon the Department, and that the line between Missouri Valley and Council Bluffs must be recognized as a part of the modified line and not as the connecting branch.

The question before the court in said case involved the recognition of certain entries made after the location of 1865.

As before stated, the act of 1864 had two objects, viz., the building of a more expeditious line to the Missouri River and the connection of this line with the Mississippi and Missouri River Railroad so as to form a running connection with the Iowa branch of the Union Pacific Railway; further, it coupled the two together so as to require that both objects be accomplished.

This is clearly shown from several provisions of the act of 1864.

To provide against the abandonment of the main line west of the point at which the connecting branch might be established, the act of 1864 provided, that the lands should not be conveyed on account of the connecting branch except upon the condition that—

When the governor of the State of Iowa shall certify to the Secretary of the Interior that said company has completed in good running order a section of twenty consecutive miles of the main line of said road west of Nevada, then the Secretary shall convey to said company one-third, and no more, of the lands granted for said connecting branch. And when said company shall complete an additional section of twenty consecutive miles, and furnish the Secretary of the Interior with proof as aforesaid, then the said Secretary may convey to the said company another third of the lands granted for said connecting branch; and when said company shall complete an additional section of twenty miles, making in all sixty miles west of Nevada, the Secretary, upon proof furnished as aforesaid, may convey to the said company the remainder of said lands to aid in the construction of said connecting branch.

It further provided—

That such new located or modified line shall pass through Boonsboro', in Boon county, and intersect the Boyer river not further south than a point at or near Dennison, in Crawford county.

Again, in the matter of the location of the modified line and the connecting branch, it provided—

That whenever said modified main line shall have been established or such connecting line located, the said Cedar Rapids and Missouri River Railroad Company shall file in the General Land Office of the United States a map definitely showing such modified line and such connecting branch aforesaid.

As the act requires that the company shall file a map of the modified line and connecting branch before a withdrawal was to be made, it was perhaps this fact, viz., the coupling of the two, that led the court to hold that until the filing of the map in 1867, the whole line of the road was not established.

While the court uses the term "modified line," it does not seem to have been used in the restricted sense as relating to the modified main line, but rather the entire line necessary to accomplish the full purposes of the grant.

That the portion of the road between St. John and Council Bluffs was not considered by the company as a part of the modified main line, is clearly shown from a brief filed by William T. Steiger in 1873, as attorney for the company, before the committee of public lands in the United States Senate, relative to a bill affecting the grant for the Onawa branch of said road, copy of which is found in the papers on file in your office relative to said road.

In this brief he states, on page eight, under the fourth objection to the proposed legislation, as follows:

The Onawa City branch *was built*, and the best connection—indeed for engineering reasons the only one—thereby made between the company's new line of road and the city, which branch, with that required by the law to connect with the Mississippi and Missouri road, secured to Onawa City almost a direct connection, not only with the Cedar Rapids line of road, but also with Council Bluffs, and that important point in the great through line of the Mississippi and Missouri, (now Chicago, Rock Island, and Pacific road,) as will be seen on inspection of the maps on file in the Department of the Interior.

In order that the attorney's position may be fully understood I have attached a reduced copy of a map that accompanied the report.

As to the previous position of the Department on the question I have but to refer to letter written by Commissioner Burdett to Hon. Addison Oliver, House of Representatives, dated January 19, 1876, in which it is stated:

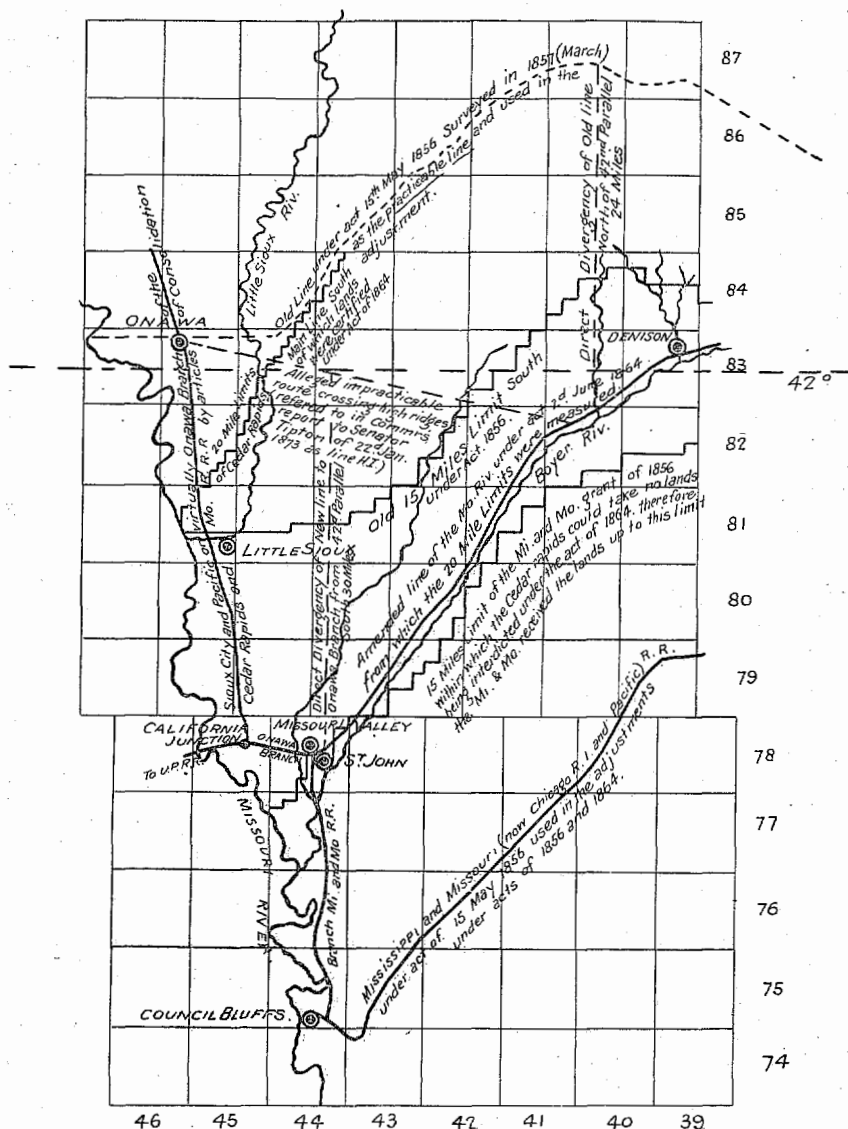
Your second question is, "Where does the 'modified line' of said company, under act of June 2d, 1864, begin, and terminate? How long is it and how much land has it received therefor?"

The modified line begins at Cedar Rapids, or near there, at the western terminus of the line built prior to 1864, and terminates at Missouri Valley, indicated on the map by the letter D.

From what has been said it is apparent that the approvals heretofore made on account of this grant for the modified main line, are in excess of that granted by the acts named, and that suit will be necessary.

I have therefore to modify the previous decision of this Department in so far as to direct that the portion of the road between Missouri Valley and Council Bluffs be not considered as a part of the modified main line, but as the "connecting branch," for which a new grant was made by the act of 1864, but which must be satisfied from the lands within twenty miles thereof.

This branch is all within the fifteen mile limits of the grant for the Mississippi and Missouri River Railroad, and the act of 1864 provides that "no land shall be conveyed to said company situate and lying within fifteen miles of the original line of the Mississippi and Missouri Railroad, as laid down on a map on file in the General Land Office."



I learn upon inquiry at your office that limits were never established upon this line and presumably for the reason above given.

This, however, is not the question before the Department, as the company does not seem to be now claiming anything on account of the "connecting branch," as such.

This disposes of the first three assignments of error.

The fourth assignment is—

The finding and holding that the 2,569.75 acres erroneously certified to the railroad company, they having been theretofore disposed of by the United States being outstanding must remain a charge to the grant unless reconveyed to the United States by said company.

It is clear that certifications made on account of this grant after patents had issued to other parties conveyed no title, and strictly speaking cannot be considered as a charge upon the grant, but as the grant was in process of adjustment, if the company claimed the lands a final adjustment would be impossible until the rights of the company, not under the certifications but under its grant, had been determined.

If the company lays no claim to these lands, a simple release or quit claim would remove the cloud from the title of the first patentees, and thereupon the company would be relieved of the charge made in part satisfaction of its grant.

The fifth and last assignment of error is—

The finding and holding that the 76,916.75 acres certified to the State and sold by the Iowa Central Air Line Railroad Company out of the grant of 1856, prior to resumption by the State of Iowa, and to the enactment of the grant of 1864, should not be deducted from the grant made for the modified line by the act of June 2, 1864.

The company's contention in support of this assignment rests upon the assumption that the act of 1864 made an entirely new grant for the unconstructed part of its road free from any charge on account of the grant of 1856, to which I am unable to accede.

As stated in the opinion under review—

These lands were certified on account of the grant made by the act of 1856, and this claim for deduction seems to rest upon the ground that the company receiving the lands did not earn the same, and that the present company never received any benefit from such certification, and therefore should not be charged with the same.

Having held that the purpose of the act of 1864 was merely to enlarge the source from which the amount of lands granted by the act of 1856 might be satisfied, it follows that indemnity can not be allowed for lands certified under the act of 1856 and prior to the passage of the act of 1864, and this claim for deduction must be denied.

After a very thorough investigation and careful consideration of the legislation upon the subject of this grant and of the decisions of the court and this Department relative thereto, I see no reason to depart from the previous decision of this Department, except in the particulars herein named, and the motion is therefore accordingly denied, and you are directed to revise the adjustment in accordance with the directions herein given.

The excess in approvals should be identified, after which formal demand should be made upon the company for reconveyance of the lands, or, in the event that they have been disposed of to *bona fide* purchasers, for their value.

HOMESTEAD ENTRY—AMENDMENT—ADVERSE CLAIM.

CALLICOTTE v. GEER.

The right to amend an entry to correspond with the settlement, may be awarded as against an intervening entryman if priority of settlement is shown by the applicant, and it does not appear that he is estopped by his own acts from setting up his right as against the adverse claimant.

Secretary Francis to the Commissioner of the General Land Office, January 18, 1897. (I. H. L.) (C. J. W.)

On September 27, 1893, plaintiff Callicotte made homestead entry, No. 947, for the SE. $\frac{1}{4}$ of Sec. 12, T. 27 N., R. 1 W., Perry, Oklahoma, under the mistaken apprehension, as he alleges, that this was the proper description of the quarter section on which he had made settlement on the day of the opening, September 16, 1893. On September 23, 1893, defendant Geer made homestead entry, No. 607, for the NE. $\frac{1}{4}$ of Sec. 12, T. 27 N., R. 1 W., which turned out to be the quarter section on which Callicotte made settlement on the day of the opening. After the discovery of the mistake, on November 18, 1893, Callicotte made application to amend his entry, so as to substitute the land entered by defendant, to wit, the NE. $\frac{1}{4}$ of Sec. 12, T. 27 N., R. 1 W., for that entered by himself through mistake, and on the same day he filed affidavit of contest against defendant's entry, alleging prior settlement. By direction of your office, action on the application to amend Callicotte's entry was withheld to await final disposition of his contest, and a hearing ordered for that purpose on February 23, 1895, both parties being present. The plaintiff closed his testimony on February 25, 1895, and defendant, without offering any testimony, moved to dismiss the contest. The local officers overruled the motion, and thereafter rendered a decision in favor of contestant, and recommended the cancellation of defendant's entry. From this decision Geer appealed, and on September 18, 1895, your office affirmed the decision of the local officers, and held defendant's entry for cancellation. Defendant made further appeal to the Department, and the case is now to be considered.

The following allegations of error are made:

1st. That it was error to hold that the initial acts of settlement claimed by Callicotte were followed within a reasonable time by residence and improvements.

2d. Error in not holding that contestant had exhausted his homestead rights, in making homestead entry upon the adjoining tract of land.

3d. Error in awarding to contestant preference right of entry over defendant and holding this entry for cancellation.

4th. Error in not holding that plaintiff was estopped by his acts in making out defendant's application to enter from setting up a prior claim against defendant.

It appears from the record that Callicotte's entry, No. 947, made by mistake for the wrong land, was contested by a man named Sherer, and that without pecuniary consideration Callicotte relinquished this entry.

Since your office decision was rendered, and pending the consideration of the case here, defendant Geer has filed an affidavit, under date of March 17, 1896, in which he charges that plaintiff has since the hearing abandoned the land, and asking for leave to submit proof as to the same, and that the case be re-opened for that purpose. This motion can not be entertained, and the case will be disposed of on the record as it exists.

The evidence shows that a little before one o'clock P. M., on September 16, 1893, the plaintiff reached the land in controversy, with a valise, canteen, coffee-sack of provisions, frying pan, blanket, umbrella, a spade and axe; that there was no one on the land at the time, and that he set his umbrella up as a stake and left his other things with it, and went over to a crowd of men a fourth of a mile away and introduced himself and took their names; that while talking to these men, he saw a wagon drive up about a fourth of a mile north and west of his stake; that a man got out of the wagon and came to where they were talking; that plaintiff took his name and gave his, and called attention of the men to witness that he claimed the land where his stake (umbrella) was standing, and that if the man who was on the wagon was on his tract, they knew that plaintiff was there first. The man gave his name as Geer (defendant in this case); that defendant replied that he did not come there to make trouble, and that if he was on plaintiff's claim, he would not cause him trouble. This occurred thirty to fifty minutes after plaintiff set his stake. The question of wood and water then arose, and there being no spade or axe, except plaintiff's, it was arranged to go to the creek half a mile east and dig for water and get wood. Defendant drove his team by plaintiff's stake, and got his spade and axe, and drove to the creek, where they dug for water, and got a load of wood, and went back to where Geer had first stopped with his wagon, and camped all night. Next morning plaintiff and Geer attempted to locate the lines and corners of the tracts, and came to the conclusion that plaintiff was on the SE. $\frac{1}{4}$ of Section 12, and that defendant was on the NE. $\frac{1}{4}$; plaintiff threw up a mound, three feet in diameter and a foot and a half high, on which he planted a stake, with a white flag attached, and then he and defendant started to the land office to file, arriving there Sunday night, September 17, 1893. Plaintiff formed a company (No. 181), consisting of himself (No. 1), defendant next, and then others, until the number reached ten. Plaintiff being a lawyer, made out his own and defendant's papers. Defendant left his place in company No. 181, and got a place in another company, and was thereby enabled to file on September 23, 1893, four days earlier than he could have filed if he had remained in company No. 181. About October 1, 1893, plaintiff first learned that he had made a mistake, and had filed on the SE. $\frac{1}{4}$ of Sec. 12, instead of the NE. $\frac{1}{4}$, where his stake was still standing, and when he made out defendant's papers he did not know it was for the land on which he (plaintiff) had settled. About October 1,

1893, plaintiff plowed one acre near his stake on the land, and about the 1st of November following he plowed around the whole tract, and built a sod house. On December 14, 1893, he went upon the land, with horses, wagons, plows, harrow, cooking utensils, stove, and bedding, and proceeded to build a house, in which he and his eldest son resided, until he built a six-room house, into which he moved, with his family, January 15, 1894. He has fenced the whole of the tract, dug a well, and plowed and cultivated fifty acres. The improvements are worth seven or eight hundred dollars. Upon this state of facts the defendant insists that the plaintiff is not entitled to the land, and that it was error to so hold. There can be no question under the record but that plaintiff was the prior settler on the land. His acts of settlement were sufficient to segregate the land, and were followed in due time by residence and valuable improvements.

Unless the plaintiff has done something which will operate against him as an estoppel, he is entitled to all the rights of a prior settler upon the land. Two things are insisted upon by way of estoppel: First. That plaintiff has exhausted his homestead right, notwithstanding his relinquishment, without compensation, of the entry made by mistake. Second. That having assisted defendant in preparing his entry papers, he is estopped from attacking the entry. It is perfectly apparent that this controversy grows out of the mutual mistake of the parties as to the proper description of the quarter-section on which their respective settlements were made. There is no fraud connected with the acts of either, and it is clear that the mistake in the description of the land entered by each was an honest mistake upon the part of both. It was mutual, and neither can be either benefited or injured by it, in reference to the other. The entry by plaintiff of the SE. $\frac{1}{4}$, upon which he had not settled, and upon which another party was, at the time, a settler (plaintiff's entry being the result of a mistake), did not exhaust his homestead rights, and upon relinquishment of such mistaken entry, without any benefit, it ceased to be a legal hindrance to a second entry. There is, therefore, no reason why the rights of these two parties should not be made to depend upon the priority of their origin. As defendant has introduced no testimony, and shown no actual settlement, it is a mere question of whether plaintiff's settlement antedated defendant's entry. This fact appears from the evidence, your office so found, and your office decision is affirmed.

RAILROAD GRANT—PATENT—SUCCESSOR IN INTEREST.

NORTHERN PACIFIC R. R. Co.

Under the grant to the Northern Pacific Railroad Company patents should issue to that company and not to a grantee thereof.

In the preparation of lists of lands granted to aid in the construction of railroads, the lands should be listed to the grantee company or corporation when it is in existence.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897. (J. I. P.)

From time to time there have been transmitted from your office for the consideration and approval of this Department various lists of lands selected by the Northern Pacific Railroad Company as inuring to the Northern Pacific Railway Company as the successor of the Northern Pacific Railroad Company under the grant to that company of July 2, 1864, and the joint resolution of May 31, 1870.

It has been invariably held by this Department that a right to a patent from the United States will not be traced beyond the original grantee. *Re Harrison* (2 L. D., 767); *re Tower* (2 L. D., 779; 12 L. D., 116). There are obvious reasons for this ruling of the Department. If the duty of examining into the sufficiency of transfers made from time to time by the railroad corporations, of the country, or by the settlers upon the public lands after a right of disposition shall have accrued, be assumed by this Department, a mass of *quasi* judicial work must be disposed of which will seriously embarrass the ordinary administration of its affairs.

Moreover, under the law as it now stands, if this Department erroneously certifies lands to a railroad corporation, which are not included within the grant, the certification is void; but if the list be certified in favor of a bona fide grantee the title of the grantee is good and the only recourse of the government is against the corporation. In many cases such recourse would be unavailing. I therefore conclude, for administrative reasons, that it will be unwise to certify lists in favor of the Northern Pacific Railway Company.

Upon careful consideration of the language of the grant to the Northern Pacific Railroad Company, I do not think it my duty to patent lands to a grantee of that company. The act provides in terms that patents shall be made to the Northern Pacific Railroad Company, and although the grant is to said company, its successors and assigns, yet I do not believe that the Department can be required to depart from the ordinary course of business heretofore followed in other cases.

In view of the foregoing I am of the opinion that in the preparation of lists of lands, granted to aid in the construction of railroads, the lands should always be listed to the grantee company or corporation when it is in existence. If the grantee company or corporation has

ceased to exist or has been absorbed or amalgamated or identified with another company or corporation, then it might be proper to list the lands to the latter company as successor of the grantee company or corporation. But when the lands are so listed the preamble of the list should clearly set forth the character of the evidence upon which that action is based, for the information of the Secretary of the Interior, whose approval of such lists may be asked.

You are therefore directed to be governed in the future by these instructions in preparing for my approval list of lands granted to aid in the construction of railroads.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891—PATENT.

SMITH ET AL. *v.* MURPHY'S HEIRS.

As between a purchaser from the entryman and one holding under a subsequent tax sale of the land, the benefit of the confirmatory provisions of section 7, act of March 3, 1891, must be accorded to the holder of the tax title.

Under an entry confirmed by said section, patent should issue in the name of the entryman, though his death may be disclosed by the record.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897. (I. H. L.) (P. J. C.)

The land involved in this controversy is the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 32, Tp. 20 S., R. 65 W., Pueblo, Colorado, land district.

There being but a single question involved in this stage of this controversy, it is not necessary to recapitulate all the record facts in relation to the history of this tract. It is only necessary to state such facts as will give a clear understanding of the single issue.

It appears that on November 9, 1873, James Clark made pre-emption cash entry of the tract, and on the same day, for a valuable consideration, transferred the same to Margaret Murphy; that Murphy died February 1, 1879; that Clark also departed this life during that year.

As the result of a contest against the entry of Clark, by one T. F. McAllister, which was finally dismissed by your office, and no appeal taken, the heirs of Margaret Murphy, pending the contest, applied to have the entry confirmed and passed to patent under section 7, act of March 3, 1891 (26 Stat., 1095). Daniel L. Smith and B. Sweet also made a similar application, on the ground that they were transferees of the title of Margaret Murphy, by reason of the fact that they had purchased the land from Pueblo county, which had bid it in at a tax sale, and subsequently transferred it to Smith, who deeded to Sweet an undivided half interest in the tract.

In deciding these questions presented, your office held that:

From the abstract of title covering the above land and filed in this case, and the affidavits of James Murphy and the heirs of Margaret Murphy, deceased, as far as heard from, I find that said land has not been reconveyed to said James Clark, nor

to his heirs, that the heirs of Margaret Murphy notified, ask for confirmation of said entry under the seventh section of the act of March 3, 1891. I further find that final receipt was issued to said James Clark November 9, 1878, and that he disposed of the same after final entry to a *bona fide* purchaser, for a valuable consideration, before the first day of March, 1888. Said entry will, therefore, be approved for patent by virtue of the 7th section of the act of March 3, 1891, and the same will be passed to patent for the heirs of James Clark, deceased. The contest of McAllister is dismissed.

Notify the parties of this decision, and McAllister and Smith and Sweet of their right of appeal.

Whereupon, Smith and Sweet prosecute this appeal, alleging error in holding that they were not transferees within the meaning of said section 7, and error in holding that the heirs of Murphy had any interest whatever in the land.

It is clear that the heirs of Clark have no interest in this tract. He had conveyed all his interest prior to his death, and there was therefore nothing to descend to his heirs. The decision of your office, therefore, that the entry "will be passed to patent for the heirs of James Clark," is clearly erroneous. I take it that this order was made in view of the doctrine announced in Clara Huls (9 L. D., 401), wherein it was decided that "where the death of the homesteader is disclosed by the record, patent should issue in the name of the heirs generally." But that ruling was modified subsequent to the decision of your office in Joseph Ellis (21 L. D., 377), wherein it was held that patent should issue in the name of the entryman, though his death be disclosed by the record.

The entry of Clark comes clearly within the confirmatory provisions of section 7. But the question is, whether it should be confirmed in the interest of the Murphy heirs, or the transferees of the land under the tax sale by Pueblo county. It is assumed by counsel, both in the specifications of error and the brief, that the judgment of your office was in favor of the Murphy heirs.

Section 12, Chapter XCIX, General Statutes, State of Colorado, 1883, provides:

Lands entered by pre-emption, final homestead, at public or private sale, or otherwise, shall be subject to taxation, whether patent for the same shall have been issued or not, etc.

It appears by the abstract of title to the record that the land was sold for taxes for the year 1879, on October 9, 1880, and by the treasurer or Pueblo county conveyed to the county, March 10, 1886; that by order of the county commissioners the land was sold and conveyed to Smith, December 11, 1888, who subsequently conveyed an undivided one half of it to Sweet.

The legality or regularity of this sale is not questioned by the heirs of Murphy. It therefore follows that it must be assumed that it was legal and regular.

In *Carroll v. Safford* (3 How., 441), the United States supreme court

held that land upon which final certificate was issued is taxable property, notwithstanding patent has not issued, and may be sold for taxes. This doctrine is followed with approval in *Witherspoon v. Duncan*, 4 Wall, 210; *Wisconsin Central R. R. v. Price Co.*, 133 U. S., 496; and *Northern Pacific v. Patterson*, 155 U. S., 130.

It is clear, therefore, that the heirs of Murphy have been divested of their title to and interest in the land by reason of this tax sale, and it follows that the entry can not be confirmed in their interest.

The title to the tract, having passed by a procedure and conveyance recognized as sufficient to divest the Murphy heirs of their right, would seem to be in Smith and Sweet, as contemplated by section 7; that is, they are bona fide purchasers for a valuable consideration, and the tract had been transferred by the entryman prior to March 1, 1888, after final entry.

Your office judgment is therefore modified; the entry of James Clark will be confirmed and passed to patent in his name.

RAILROAD GRANT—LANDS EXCEPTED—RELINQUISHMENT.

NORTHERN PACIFIC R. R. CO. *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

An expired pre-emption filing of record, at the date a railroad grant takes effect, excepts the land covered thereby from the operation of the grant.

The grant of March 3, 1871, was not one *in presenti*, but *in futuro*, taking effect on the delivery and filing of the relinquishment required under the terms of the grant.

Report called for from the General Land Office as to alleged excess indemnity selections in the second indemnity belt in the State of Minnesota.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897. (I. H. L.) (E. M. R.)

On June 20, 1895, your office took up for adjustment list No. 24, indemnity, of the Northern Pacific Railroad Company, filed in the local office on November 5, 1883. This list did not designate tract for tract the lost land for which indemnity selections were made, but on June 16, 1892, the company filed re-arranged lists No. 24 A, 24 B, and 24 C, describing the lost lands tract for tract.

From your said decision the St. Paul, Minneapolis and Manitoba company filed three appeals: the first involving the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 29, T. 128 N., R. 35 W., St. Cloud land district, Minnesota; the second, involving the SE. $\frac{1}{4}$ of Sec. 31, T. 128 N., R. 4 N., same land district, and the third, involving the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of Sec. 13, T. 128, R. 34, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 1, same township and range; the NE. $\frac{1}{4}$ of Sec. 5; the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 11, same township and range, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 15, same township and range.

The ground of error in the first appeal is that your office erred in holding that the tract in question was excepted from the operation of its grant by the pre-emption declaratory statement of one William Belcher. Upon this point your office decision says:

This tract is also within the primary limits of the grant for the St. Vincent Extension company and was excepted from the grant by the pre-emption filing of Wm. Belcher, made September 26, 1870, settlement alleged September 24, 1870 (19 L. D., 215), the Northern Pacific Railroad Company's application to select this tract was accordingly allowed.

It is urged in the appeal that the pre-emption filing in question could have no effect as against the grant to the Manitoba company "because it had ceased to be a subsisting claim at the date the grant to said company became operative."

It is alleged further—

In this case Belcher settled September 24, 1870, and filed his declaratory statement September 26, 1870. His pre-emption claim therefore expired and the land became subject to entry as other public land on September 24, 1871, which was prior to the time when appellant's grant became operative.

This Department recently, in considering the case of *Whitney v. Taylor* (158 U. S., 85), determined that the doctrine therein laid down applied equally to expired as to unexpired declaratory statements. The contention of the appellant is therefore not well taken.

In the second appeal it is urged that your office erred in holding that the SE. $\frac{1}{4}$ of Sec. 31, T. 128 N., R. 34 W., was excepted from the operation of the grant by the homestead entry of one Allen D. Bond. Upon this land your office decision held:

This tract was excepted from the grant to the said company by the homestead entry of Allen D. Bond, made November 1, 1865, and canceled December 14, 1871 (19 L. D., 215). The application of the Northern Pacific Railroad Company to select this land is allowed and the St. Paul, Minneapolis and Manitoba Railroad Company's list No. 8, is held for cancellation to the extent thereof.

This land is within the indemnity limits of the grant for the Northern Pacific Railroad Company. It is also within the place limits of the St. Paul, Minneapolis and Manitoba Railway Company, and the question for consideration is: Did the rights of the said last named company become operative from the date of the passage of the act of March 3, 1871, which authorized the St. Paul, Minneapolis and Manitoba Railway Company to relocate its St. Vincent extension?

Your office decision in citing the case of *Hastings and Dakota Railroad Company v. Grinnell et al.* (19 L. D., 215), which was based upon the case of *Bardon v. Northern Pacific Railroad Company* (145 U. S., 535), evidently assumed that the grant to this company was similar to that of the Northern Pacific Railroad Company and was one *in presenti* while in fact it was one *in futuro*, and became operative when the relinquishment was made as required by that act. *St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company* (139 U. S., 1-16).

On December 13, 1871, the St. Paul and Pacific Railroad Company, through its president and secretary, made, sealed, and signed the release required by the proviso of the act aforesaid and this instrument was filed in the Department on December 19, 1871, and was thereupon accepted by this Department as a compliance with the requirements of the act.

The rights of the St. Paul, Minneapolis and Manitoba Railway Company to this tract of land depend upon a determination of the question as to when that relinquishment became effective. Was it effective on the date of its being signed or on the date of its delivery and filing in this Department? If it was effective on the date of its being signed, the land is excepted from the operation of the grant on behalf of this railroad company, as on that day the homestead entry of Bond was uncanceled. If it became effective, on the other hand, only on delivery, then the grant became operative on that date, to wit, December 19, 1871, and as the map of definite location was filed in your office on December 20, 1871, it appears that at both dates the record was clear, the entry of Bond having been canceled on December 14th.

In the recent case of St. Paul, Minneapolis and Manitoba Railway Company and Northern Pacific Railroad Company *v.* Bergerud, on review (23 L. D., 408), it was held, that the relinquishment became effective only with delivery, inasmuch as the relinquishment was in effect a deed under the well-recognized rule of the law. Such being the case, it would appear that your office decision was in error in reference to this tract and that it should have been awarded to the St. Paul, Minneapolis and Manitoba Railway Company.

In reference to the third appeal taken by the appellant, consisting of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$, of Sec. 13, T. 128, R. 34 W.; the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 1; the NE. $\frac{1}{4}$ of Sec. 5; the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 11; and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 15, same township and range, it is urged that your office decision erred in holding that the land in question was subject to the selection of the Northern Pacific Railroad Company; second, in not holding that said company has selected within its forty miles second indemnity limits, a quantity in excess of the quantity it is entitled to select under the provisions of the joint resolution of May 31, 1870, and the attention of the Department is called to the fact that under the terms of the joint resolution of 1870, the Northern Pacific Railroad Company was authorized to select within such indemnity belt in any State, an amount of land equal to the amount which it had failed to secure in its granted limits within said State, subsequently to the passage of the act of July 2, 1864, and prior to the definite location of its road, and it is asserted that an adjustment of the grant for the Northern Pacific Railroad Company made by your office in 1886 or 1887, shows that the company had made within such indemnity limits in this State, selections of 40,000

acres in excess of the quantity sold or otherwise disposed of subsequently to July 2, 1864, and prior to the definite location of its road, and that this excess is in addition to the further acreage of 84,000 acres awarded to said Northern Pacific Railroad Company by the supreme court of the United States in the case of said St. Paul and Pacific Railroad Company *v.* The Northern Pacific Railroad Company (139 U. S., 1).

This raises for consideration a very serious question upon which the Department is unable to pass on the record now before it. The case is returned to your office and you will report to the Department all the facts shown by the records of your office bearing upon this question, and a decision upon the question involved is reserved pending action by the Department upon such report.

The decision appealed from is accordingly modified.

TIMBER AND STONE ACT—ADVERSE CLAIM.

BATEMAN *v.* CARROLL.

The timber and stone act does not allow the purchase of land that is inhabited by a bona fide settler.

Secretary Francis to the Commissioner of the General Land Office, February 6, 1897. (I. H. L.) (A. E.)

On June 16, 1893, John W. Carroll filed declaratory statement for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 26, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 26, T. 67 N., R. 19 W., Duluth, Minnesota, alleging settlement December 22, 1890.

On June 23, 1893, Edward J. Batemen applied to purchase the same land under the timber and stone act. On November 29, 1893, notice of Bateman's application to purchase was executed by the register of the land office, and on December 11, 1893, a copy of said notice was served upon Carroll's attorney. On January 6, 1894, publication of the same was begun in a newspaper, the last publication being on March 10, 1894.

Action on the declaratory statement of Carroll, filed by him on June 16, 1893, when the township plat was first put on record, appears to have been suspended, but on November 3, 1893, your office allowed the declaratory statement to be filed without prejudice, and on November 25, 1893, Carroll's declaratory statement went of record.

On March 14, 1894, Carroll and Bateman each submitted final proof. At this time Bateman moved to dismiss defendant's proof on the ground of illegality of pre-emption filing. This motion was denied because of your office instructions of November 3, 1893, allowing the pre-emption filing to go of record without prejudice as of the time when first filed.

A hearing was had on November 15, 1894. The register recommended in favor of the timber claimant, and the receiver that the timber filing be canceled. On appeal, your office held that:

The weight and nature of the evidence incline to the position that there are forty or fifty acres of stone, thirty to forty acres of swale, and 1,200,000 feet of pine timber

worth \$1.50 per thousand. In its present condition it is wholly unfit for agricultural purposes, and is valuable chiefly for the timber upon it.

While Carroll claims to have selected the land for a home, I am satisfied that the contrary is true, and that the meager improvements were made only in order to lend color to his claim.

Your office then held the declaratory statement of Carroll for cancellation.

From this Carroll has appealed to the Department.

On June 23, 1893, when Bateman made his sworn statement that he had personally examined the land in controversy, and that it was uninhabited, Carroll was a resident upon the land, and your office so finds. This alone is sufficient to warrant the rejection of Bateman's application to purchase the land under the timber and stone act, as the act does not allow the purchase of land which is inhabited by a settler. The residence and improvement of Carroll can not be presumed to be in bad faith simply because they were made in the wilderness. Many populous communities throughout the western country were begun by a pioneer making a settlement in what was then an almost inaccessible locality. There is no evidence to show that Carroll's settlement was made in bad faith, and you will therefore allow his final proof and reject the application of Bateman.

BLACK TOMAHAWK *v.* WALDRON.

On the report submitted under the investigation directed October 20, 1894, 19 L. D., 311, the former departmental decisions are adhered to, and judgment rendered in accordance therewith, by Secretary Francis, February 8, 1897.

RAILROAD GRANT—INDEMNITY SELECTION—ABANDONMENT.

HASTINGS AND DAKOTA RY. CO. *v.* BERG ET AL.

The failure of a railroad company to perfect an indemnity selection, within a reasonable time after notice of final decision recognizing the right of selection, must be held to work an abandonment of its prior right, where the withdrawal has been revoked, and an adverse claim intervened.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (L. H. L.) (F. W. C.)

The Hastings and Dakota Railway Company appeals from your office decision of March 2, 1893, involving the S. $\frac{1}{2}$ of Sec. 3, T. 118 N., R. 45 W., in Marshall land district, Minnesota.

This land is within the twenty mile indemnity limits of the grant made by the act of July 4, 1866 (14 Stat., 87), to aid in the construction

of the Hastings and Dakota Railway, and was free from any adverse entry or right at the time of the withdrawal (May 11, 1868), on account of said grant.

In 1884 Albert McFarlane applied to enter the SW. $\frac{1}{4}$ of said section, and William Fraser the SE. $\frac{1}{4}$; both of which applications were refused by the local officers because in conflict with said withdrawal for railroad purposes.

From this denial the applicants appealed.

July 12, 1886, said railway company applied to select both tracts, specifying a basis for the selection and tendering the required fees for said selection.

This application was also rejected by the local officers because in conflict with the pending homestead applications aforesaid, and the company appealed.

October 5, 1888, your office decided in favor of the company and that it was entitled to select said lands, and refused the said homestead applications. Fraser did not appeal. McFarlane appealed, and on March 13, 1891, this Department affirmed your office decision (12 L. D., 228), holding that the railroad company had the right of selection in said lands.

May 22, 1891, the indemnity withdrawals to said railway grant were revoked by departmental order (12 L. D., 541), as authorized by act of September 29, 1890 (26 Stat., 496).

It is not claimed, after the decision by this Department of March 13, 1891, said railway company ever made any effort to perfect its selection tendered in 1886, by making payment of selection fees or by making new selection for the land.

February 26, 1892, Elling O. Berg made homestead entry No. 12,269 for the SE. $\frac{1}{4}$ (the Fraser quarter).

May 7, 1892, Hans O. Berg applied to make homestead entry for the SW. $\frac{1}{4}$ (the McFarlane tract), which was refused by the local office because the tract applied for had been selected by said railway company July 20, 1886, as being within the twenty miles indemnity limits of said road.

Hans O. Berg appealed, alleging that the railroad company had never paid the selection fees nor completed its attempted selection of July, 1886, and that as the company had failed to complete its selection, and said land had been opened to settlement by the order of revocation of May 22, 1891, his homestead application should be accepted.

It does not seem that notice of this appeal to the General Land Office was served upon the railway company, but that defect has been waived by its appearance herein by brief both before your office and this Department.

The railway company does not seem to deny that it received notice both of the decision of your office and this Department, but urges, in effect, that it was incumbent upon your office to advise the company

what steps should be taken in order to secure the acceptance of its selection. Its resident counsel in his brief says:

When the Department found the land subject to selection on the company's appeal, it became the duty of the Secretary or Commissioner to notify the company thereof, and that the fees which it had previously tendered to the local officers would now be received, upon the payment of which the selection would be approved.

The company had exercised due diligence in the prosecution of its case by taking its appeals in apt time, and it was entitled to notice of the action of the Department as well as directions from it as to further requirements. The bounden duty of the Department was manifestly to advise the railway company that the money would now be accepted and its application to select allowed.

The records of the General Land Office show that notice of your office decision of October 5, 1888, was, on that date, given to all parties, and that an office letter dated April 7, 1891, gave resident counsel for said company notice of the promulgation of the decision of this Department in the McFarlane case.

The company was therefore duly and seasonably advised both of the action of your office and this Department in its favor, and was bound to take proper steps within a reasonable time after said decisions to perfect its right under its proffered selection of this land, and I cannot agree with counsel that it was necessary that you should advise the company as to the proper steps to be taken in order to complete its attempted selection.

Your office decision in favor of the company became final, as to the Fraser tract, in 1888, and as to the McFarlane tract, in the spring of 1891, but to the date of your office decision, March 2, 1893, the company had taken no step to secure the acceptance of its proffered selection of 1886.

In the meantime the withdrawal made of its indemnity lands had been revoked, and after the lapse of a year from the date of the last decision in its favor Elling O. Berg was permitted to make homestead entry of the Fraser tract and Hans O. Berg applied to enter the McFarlane tract.

By its failure to complete its selection within a reasonable time after decision in its favor, the indemnity withdrawal having been revoked, it must be held that its laches worked an abandonment of its rights under its list presented in 1886, in the presence of an adverse claim.

Your office decision is therefore affirmed.

SWAMP LANDS—EVERGLADES—SCHOOL LANDS.

STATE OF FLORIDA.

A patent may issue to the State of Florida under the swamp land act for the unsurveyed tract known as the "Everglades," subject to the right of the State under its grant of school lands.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (I. H. L.) (W. M. W.)

The Department is in receipt of a communication, dated December 22, 1896, from the Commissioner of Agriculture and State Land Agent

for the State of Florida, wherein he asks that patents issue for certain lands in Florida known as the "Everglades," under the act of September 28, 1850 (9 Stat., 519).

On October 10, 1894, my predecessor found that the unsurveyed body of lands lying within the State of Florida known as the "Everglades" is in fact swamp land, and that a survey thereof is not practicable, and he held that a patent may issue to the State under the swamp grant, upon an estimated area designated by metes and bounds, the State to furnish a meander survey of said "Everglades," accompanied by satisfactory proof that said meander line does not include within its limits lands not of the character granted. See 19 L. D., 251. See also State of Florida, 18 L. D., 26; State of Florida, 8 L. D., 65; Id., 369.

On the 13th day of February, 1895, the United States Senate passed a resolution, as follows:

Resolved that the Secretary of the Interior be, and he is hereby, directed to inform the Senate whether it is proposed to issue a patent to the State of Florida for that portion of the State known as the "Everglades," and if so whether the Seminole Indians of Florida will be thereby dispossessed of their occupancy of said lands or any portion thereof.

This resolution was referred to your office and also to the Commissioner of Indian Affairs for reports.

On February 23, 1895, the Commissioner of Indian Affairs reported:

That the "Everglades" as laid down upon the map of Florida comprise large portions of the counties of Monroe and Dade. From a report made by Special Agent Wilson, December 30, 1887 (see Senate Ex. Doc. No. 139, 50th Congress, 1st session), it appears that there were then fifty Indians in Monroe county, and one hundred and twenty-six Indians in Dade county. Whether these Indians are located within the "Everglades" which it is proposed to patent to the State of Florida, I am unable to determine. It also appears that there are Indians located in sections 1 and 2, township 53 south of range 41 east, in Florida, but whether these sections will fall within the "Everglades," as they may be surveyed by the governor of Florida, is a matter of doubt.

If the Indians now have the right of occupancy of the lands within the "Everglades," and the United States should convey such lands by patent to the State of Florida, I am of the opinion that the State would take title subject to the right of occupancy of the Indians (see *Beecher v. Wetherby*, 95 U. S., 517, and the authorities therein cited).

On February 16, 1895, your office reported on said Senate resolution, showing that in compliance with the departmental directions given in 19 L. D., 251, letters were sent from your office to the governor of Florida and to the United States surveyor-general for Florida, inclosing copies of said departmental decision embodying instructions how to proceed to execute the "meander survey giving the exterior metes and bounds of 'The Everglades,'" and requesting the governor of Florida

to submit satisfactory proof that said meander line does not include lands which do not come within the description of swamp and overflowed lands as defined in the act of September 28, 1850.

On February 28, 1895, the Department, in response to said Senate resolution, transmitted to the President of the Senate copies of the reports of your office and the Indian office.

On January 9, 1896, your office submitted Florida swamp land list No. 87, embracing the lands designated on the maps as "The Everglades," and containing an estimated area of 2,942,600 acres. In your office letter it is said:

The estimate includes all the lands within the meander given in the list; and what would be school sections (16) in the several townships, if surveyed, are therefore, included in the total area submitted for approval under the swamp land grant; this is on the theory that although the school grant is of earlier date than the swamp land grant, the latter being a grant *in presenti*, takes precedence in the case of unsurveyed lands. The approval of the list is respectfully recommended.

On February 3, 1896, my predecessor, referring to said list, requested your office to prepare and forward for consideration

an abstract of the evidence in your office, submitted by said State, going to show that the meander line of the survey of the "Everglades" does not include within the original limits thereof any lands which do not fall within the description of swamp lands under the act of 1850 above mentioned, as required by my decision of October 10, 1894 (19 L. D., 251).

Pursuant to said request, your office, on the 6th day of February, 1896, transmitted to the Department a résumé of the evidence submitted by the State of Florida in support of its claim, as follows:

In addition to certified copies of the field-notes of survey of certain townships bordering on the "Everglades," the State submitted the affidavits of a number of persons having knowledge of the land, two of whom, J. W. Newman and Charles F. Hopkins, were engineers in charge of expeditions crossing the "Everglades," one from Fort Shackleford to Miami, and the other from Lake Okeechobee to the mouth of Shark River. The two persons mentioned are the only ones appearing to have any real knowledge as to the character of the interior portion of the "Everglades," and I inclose their affidavits as they are too concise to bear abridgment.

Eleven persons testified as to the general character of the land near the gulf of Mexico, or the southern portion of the "Everglades." They testified that, with the exception of a few "islands" or "hammocks" of from two to twenty acres in extent, the whole country is one vast marsh, impracticable to drain, or land utterly worthless for agricultural purposes. It is not stated that the land is rendered worthless by reason of its wet condition. The State refers to the report of Mr. Frank Flynt, which report is fully set forth in 19 L. D., 251.

The field-notes of survey of the townships bordering on the "Everglades," the lines of which surveys form the principal meanders mentioned in said list No. 87, show the lines to have been run through swamps or marshes for almost its entire length. It is the opinion of this office that the public land surveys were extended into the "Everglades" as far as was practicable and, in many instances, the border townships were found to be almost entirely swamp-land.

In Newman's affidavit he states, that as engineer in charge of a party of twenty persons, he traveled across the peninsula of Florida from Fort Myers to the place marked on maps as Fort Shackleford, and thence in a southeasterly direction across the "Everglades" to Miami on Biscayne Bay; "that he does not think or believe that along the route from a point ten miles southeast of Fort Myers to a point four

miles west of Miami one single tract of forty acres of land can be found fit for cultivation without artificial drainage."

The affidavit of Charles F. Hopkins shows that in November, 1883, he was the engineer of an expedition through the "Everglades;" that the expedition entered Lake Okeechobee and proceeded due south from the southern extremity of the lake for nearly eighty miles, and then deflected to the "W. S. W." to the head of Shark River, and proceeded down that river to its mouth. The party traveled in small boats, "paddling, pushing and dragging them alternately through the shallow water and saw-grass." He further states:

I took soundings, with an iron rod, eight feet long, through the mud and muck, occasionally, for about sixty-five miles; after which the rock cropped out on the surface.

At a distance of fifteen miles we found rock at a depth of eight and one-half feet, and afterwards at varying depths of from three to five feet for a total distance from the lake of sixty miles. The muck throughout this distance appeared very rich. The rock kept rising nearer the surface, until in the vicinity of the head of Shark river it cropped out on the surface.

There are several streams with a slow current running southerly out of Okeechobee, which are about ten feet deep, and about one hundred and fifty feet wide at the mouth, gradually growing smaller, until at the end of two or three miles they spread out over the country.

These streams run through a custard apple swamp. We then encountered a plain with a stunted growth of Myrtle and "yama" grass, with water about a foot deep, at that time, which was at the end of a dry season. We continued through this for a few miles and then entered thick and tall saw-grass.

This saw-grass extended almost uninterruptedly for about forty or fifty miles, and then broke up into small saw-grass islands separated by small channels and bayous of water.

When we arrived in the vicinity of the head of Shark river, these islands changed into innumerable small hammock islands, mixed with the saw-grass islands, and strange enough all arranged in rows extending S. S. E., so one could stand and look down between the rows, as far as the eye could see.

These hammocks vary in size from one to twenty-five acres, and a few of them are above ordinary over-flow. The soil of these islands is rich.

Not over one in one hundred of these islands are susceptible of cultivation, in their present state, as they are overflowed during the rainy season, and moreover are inaccessible until the surrounding marsh is drained.

The country for about sixty miles south of Okeechobee is susceptible of drainage, being elevated at Okeechobee twenty-two feet above the sea, and gradually declining to the sea level. South of this limit the rock crops out at the surface, and, except the islands before mentioned, the land is worthless even if drained.

Drainage would be impracticable here as the gulf waters back up so as to destroy the fall.

The country in its present condition is a vast marsh covered with water at all seasons and for forty miles south of Okeechobee is devoid of all animal life, even to birds and alligators, on the line we traversed.

Our expedition passed down the median line of the State, which is the summit or water-shed line. On each side of us, four or five miles away, the water was deeper, in the saw-grass being from two to three feet deep; and for the first fifty miles after passing the custard apples there was no land in sight, the waving saw-grass extending as far as the eye could see in all directions, except on the west. A hazy outline of the land could be seen in that direction.

Shark river is about four and one-half to five feet deep and about two hundred and fifty feet wide, with rock bottom. Water very clear; depth of water at mouth twelve feet; mud bottom.

The cruise occupied twenty-eight days from Lake Okeechobee to the gulf; during which time we slept in boats every night, there being no dry land to camp on. By meridian altitude of the sun (using artificial horizon), I find the extreme south end of Lake Okeechobee to be in latitude $26^{\circ} 41' 19''$ south.

The judgment of your office, that the swamp land grant "takes precedence in the case of unsurveyed lands," is not concurred in, for reasons that will hereinafter be given.

Section 1 of the act of March 3, 1845 (5 Stat., 788), provides:

That in consideration of the concessions made by the State of Florida in respect to the public lands, there be granted to the said State eight entire sections of land for the purpose of fixing their seat of government; also, section number sixteen in every township, or other lands equivalent thereto, for the use of the inhabitants of such township, for the support of public schools.

This act was passed over five years before the swamp land act, and was based upon express concessions made by the State respecting the public lands, and in its nature rests in a solemn compact, which the government of the United States should maintain, sacredly keep and carry out on its part. It is clear that Congress intended by this act to invest the State with title to every sixteenth section of land in that State that had not been disposed of, just as soon as such sections should be identified by proper surveys of the public lands. Whenever such sections shall be identified, the title thereto will pass to the State under the granting act; no patent will be necessary. *Warren et al. v. State of Colorado*, 14 L. D., 681; *McCreery v. Haskell*, 119 U. S., 327-331.

These views find support in the decisions of the supreme court of the United States, as well as those of this Department.

In *Cooper v. Roberts*, 18 How., 173, it was said:

We agree that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title.

See also *Heydenfeldt v. Daney Gold and Silver Mining Company*, 93 U. S., 634.

In *Beecher v. Wetherby*, 95 U. S., 517, in speaking of the school grant to the State of Wisconsin, it is said, p. 523:

It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in the future, or as operating to transfer the

title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the State.

On November 20, 1855, Secretary McClelland held that the swamp grant of September 28, 1850, did not embrace lands in Illinois which were included in the railroad grant of September 20, 1850. See 1 Lester, 521-523.

Secretary Schurz declined to recall his opinion in a similar case rendered on May 2, 1878. See Copp's Public Land Laws, 1071.

In State of Mississippi, 10 L. D., 393, Secretary Noble held (syllabus):

Swamplands, included within the alternate sections reserved to the United States from the grant to the State for railroad purposes, did not pass under the subsequent act of September 28, 1850.

In State of Ohio (on review), 10 L. D., 394, Secretary Noble held (syllabus):

The swamp lands, included within the alternate sections reserved to the United States from the grant to the State for canal purposes, did not pass under the subsequent grant of swamp lands, and no indemnity can be allowed therefor.

It does not follow that because a survey of the "Everglades" is impracticable, that the State should be deprived of its rights under its school grant. The "Everglades" of Florida present conditions that are exceptional in character, inasmuch as it would seem that the body embraced therein can not now be surveyed in such a manner as to mark out and specifically define the township and section lines. It is possible, however, that such survey may hereafter be made, and under the circumstances, and for the reasons hereinbefore given, it is deemed proper that the State's rights under its school grant should be preserved to it. It is accordingly held that a patent may issue to the State of Florida for the "Everglades" under the swamp land act, subject to the right of the State under its school grant, for the land embraced in the swamp list No. 87, as approved by me. With this modification, said list is approved, and you are directed to issue a patent accordingly.

The views of the Commissioner of Indian Affairs respecting the rights of any Indians occupying the lands in question are concurred in.

PRE-EMPTION—FINAL PROOF—PAYMENT.

ODETT v. DAVIS.

The submission of pre-emption final proof, without payment of the purchase price of the land as required by law, will not protect the pre-emptor as against an intervening adverse claim.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (W. M. W.)

The case of Frank Odett v. John C. Davis has been considered on the appeal of the former from your office decision of August 24, 1895, holding for cancellation said Odett's pre-emption declaratory statement for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 33, T. 30 N., R. 11 E., Susanville, California, land district.

The record shows that on November 1, 1888, Odett filed his pre-emption declaratory statement covering the land in question. On September 11, 1891, he submitted final proof in support of his claim, but did not pay or tender the purchase money for said land.

On August 7, 1893, John C. Davis made homestead entry for said land.

On August 15, 1893, Odett appeared at the local land office, and offered to pay the government price for said land and asked that final receipt be issued to him therefor. This the register and receiver refused to do. There is nothing in the record to show upon what grounds this refusal was based.

It appears from the decision of the register and receiver in the case that upon

affidavit filed by said Odett citation was issued to said Davis to show cause why his said homestead entry should not be canceled. Hearing was set for October 12, 1893.

The case was continued until December 22, 1893, when it was submitted on an agreed statement of facts.

On April 10, 1895, the register and receiver rendered their opinion, in which they held that Odett's pre-emption filing should be held intact, and that Davis's homestead entry should be canceled without prejudice to his right to make another homestead entry.

Davis appealed.

On August 24, 1895, your office reversed the judgment of the local officers, and held Odett's filing for cancellation.

Odett appeals.

His specifications of error are as follows:

1. In holding that the record herein "fails to disclose any reason for giving him (plaintiff) a hearing, or in any way recognizing his claim to said land."

2. In holding that "failure to make proof and payment (on a pre-emption claim) as provided by law entails a forfeiture of all rights in the presence of an adverse claim."

3. In holding that the "intervention of the Davis entry while Odett was in default obliterated the latter's claim."

4. In holding the plaintiff's declaratory statement filing for cancellation.

5. In holding Davis's homestead entry intact.

The case was submitted to the register and receiver upon an agreed statement of facts, on which it was decided by them and by your office. Said agreed statement of facts recites the record showing Odett's pre-emption filing, his final proof, failure to tender or pay the purchase money at the time of proof, Davis's entry, and thereafter Odett's offer to pay for the land, as hereinbefore set out. In addition to these matters, the agreed statement shows that Odett is a laboring man, dependent upon his labor for a living; that at the time he made final proof he did not have the money to pay for the land, but it was his *bona fide* intention to secure the money to pay for the land as soon as he could; that on August 14, 1893, he borrowed the required amount of money to pay for said land, and on the 15th day of said month he offered to make payment for the land embraced in his pre-emption filing; that at the time Davis made his homestead entry of the tract Odett had on said land "a good substantial house, fence inclosing about three or four acres, and said garden." Said statement contains many other facts that can have no bearing on the questions to be determined.

Counsel for appellant calls attention to Hugh Taylor, 9 L. D., 305, and contends that it sustains his allegations of error.

That case involved the right of a pre-emptor, after the statutory life of his filing had expired, and while proceedings under his final proof were pending, to transmute his filing under section 2289 of the Revised Statutes. His application to transmute was in its nature and effect a pending application to make homestead entry of the tract in question. It follows that the case at bar does not come within the rule announced in the Hugh Taylor case.

Referring to Odett's failure to make payment for the land in question, your office held that:

While this delinquency would not necessarily defeat his right to make entry, in the absence of an adverse claim, it did, from the moment his delinquency began, render the land subject to entry by any other qualified applicant. In other words, failure to make proof and payment, as prescribed by law, entails a forfeiture of all rights in the presence of an adverse claim.

This holding is concurred in.

The judgment of your office appealed from is accordingly affirmed.

On the 17th of January, 1896, counsel for Odett filed what he calls "Petition for Rehearing," in which he recites that the claims of each of the parties have been under investigation by a special agent, who has reported against them. He also charges that Davis has abandoned the land in question, and asks that another hearing be ordered. Said petition does not allege newly discovered evidence, but simply relates

to matters of fact arising since the trial which might be the basis of a contest, if the entry were in such a condition that it would be subject to contest under the law.

If the alleged government proceedings shall be discontinued or terminated without canceling Davis's entry thereafter, I see no reason why Odett may not, if he desires to do so, contest Davis's entry on any grounds sufficient to warrant a cancellation thereof. If said proceedings result in canceling Davis's entry, the land will be subject to entry by the first legal applicant. If Odett is qualified, and desires to enter it, and makes the first application after it shall become subject to entry, there is nothing to hinder him from doing so.

The petition is dismissed.

HOMESTEAD ENTRY—ALIENATION—COMPROMISE.

MEAL v. DONAHUE.

An agreement to convey part of the land covered by a homestead entry after final proof, with possession given under such contract, calls for cancellation of the entry, although the agreement may have been made in the compromise of a prior contest against the entry in question.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (I. H. L.) (E. B., Jr.)

Alfred H. Meal appeals from your office decision of December 9, 1895, in his case against John J. Donahue, involving lots 1 and 2 and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 5, T. 17 N., R. 2 W., Guthrie, Oklahoma, land district, for which the latter made his homestead entry April 27, 1889, and final proof April 9, 1895.

On May 3, 1895, Meal filed a protest against Donahue's entry alleging that the same was fraudulent for the reason that about May, 1891, Donahue had sold to one John T. Phillips thirty-four acres of the land embraced therein, and thereafter held the land fraudulently for the purpose of acquiring title thereto in order "that he might convey title to a portion thereof to said John T. Phillips under his contract of sale"; and further, that the said John J. Donahue fraudulently attempted to convey title to said land to his sister-in-law, Mrs. Temple, immediately after making final proof thereon: wherefore Meal prays that a hearing be ordered "to determine the truth of the allegations herein"; and that the entry be canceled and he be awarded the preference right to enter the land.

These charges are supported by Meal's affidavit and the affidavit of said Phillips. The latter swears that for some time prior to about May, 1891, he had a contest pending against Donahue's entry affecting—

the E. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section 5; that about May 1891, he withdrew his said contest against said homestead entry in consideration that the said John J. Donahue should prove said land up, and acquire title thereto from the government of the United States, and thereafter should deed to this affiant thirty four acres off the east

side of said NE. $\frac{1}{4}$ of said section 5; that at said time last mentioned, the said John J. Donahue, entered into an agreement with this affiant by which said Donahue agreed to acquire title to said land, and thereafter as soon as title was so acquired by him, make a good and sufficient deed to this affiant to the thirty four acres above set forth; that said Donahue also agreed that this affiant might have the use of said thirty four acres from the time said agreement was entered into free of charge, and that this affiant might have and own all improvements of whatever kind and character affiant could place upon said thirty four acres; that in pursuance of said agreement and in consideration of the withdrawal by affiant of his contest above referred to, this affiant went into possession of said thirty four acres, and has continued in said possession up to the present time; that in pursuance of said agreement and promise so entered into by said John J. Donahue, this affiant proceeded to plant and raise upon said thirty four acres of land an orchard and vineyard consisting of about three hundred fruit trees and about two hundred grape vines, and that affiant also planted and has continuously cared for about fifty ornamental and forest trees and other shrubbery on said thirty four acres on and about a building site selected and enclosed as such by affiant and his family; . . . that said Donahue continued to re-affirm said agreement as to said thirty four acres until after he had made final proof upon his said homestead entry, which was done on April 9th, 1895, but that since about the 15th of April 1895, said Donahue has refused to comply with the said agreement and has refused to make a deed to said thirty four acres to this affiant; but that said Donahue did on the — day of April 1895, make a deed of said land together with the balance of his said homestead entry to Mrs. Trimble, a sister-in-law of said Donahue, and that his said sister-in-law has as affiant is informed and believes, mortgaged said land for the sum of \$700.00.

In said decision upon consideration of this protest your office held (1) that a conveyance of the land by Donahue after final proof would not be sufficient ground for contest; and (2) that—

The contract between Donahue and Phillips pursuant to which the contest was dismissed, was in the nature of a compromise, and was not, therefore, such an illegal agreement as would justify the cancellation of Donahue's entry.

A hearing was therefore denied and the protest dismissed. Meal thereupon prosecutes this appeal, contending that your office erred in its holdings and action adverse to him as above stated.

It is well settled that after due final proof and entry a homesteader, having then acquired the equitable title to the land entered, may contract to convey, or may at once convey the same without infracting any provision of the homestead law. A conveyance at such time is not *per se* evidence of bad faith on the part of the entryman. Your decision as to the alleged conveyance to Mrs. Trimble is therefore correct. With the alleged fraud of Donahue against Phillips in connection with that conveyance the land department is not concerned. That is a matter between themselves.

I do not concur, however, in the conclusion of your office that such a contract as is alleged to have been entered into between Donahue and Phillips is in the nature of a compromise such as to be permissible under the homestead law, and therefore not an illegal agreement. As a means of ending vexatious litigation, compromises between claimants to public land may properly be and generally are favored by the land

department, but to be favored they must, as an essential condition precedent, be within the law, and not involve and require as a necessary sequence, or as part of the contract on which they are founded, the violation of law. The government is to a certain extent a party to every valid compromise between adverse claimants to public land; or, to state the proposition in another form, no such compromise can be effected without the knowledge and consent or subsequent ratification and approval of the United States. The alleged contract, or compromise, whereby the contest between Phillips and Donahue was brought to an end, could not have received the consent, and cannot now receive the approval, of the United States speaking through this Department; for such a contract or compromise would involve a violation of law on the part of said Donahue, then an entryman, and one of the parties thereto.

It was said by the Department in the recent case of *Walker v. Clayton* (24 L. D., 79), wherein Clayton, prior to final proof, had made a contract with one May to convey to the latter his (Clayton's) homestead—

In his homestead affidavit he had sworn that the entry was made for his exclusive benefit and not directly or indirectly for the benefit or use of any other person or persons whatsoever, and he knew that in his final affidavit he would be required to make oath, subject to an exception not here in point, that he had not alienated any part of the land (Sections 2290 and 2291, Revised Statutes). It was evidently implied, if not expressed, in his contract with the United States, that he would continue to hold, reside upon and cultivate the land for his exclusive use and benefit until the time should arrive, when, after the submission of final proof as required by law, he had earned his right to receive patent therefor.

It is no adequate defence that May could not enforce specific performance of the contract. Clayton might, of his own volition, have carried it out, and it is this mischief that the statute is designed to remedy (*Molinari v. Scolari*, 15 L. D., 201).

In the case of *Tagg v. Jensen* (16 L. D., 113), it was laid down as the settled construction of the pre-emption law relative to alienation "that any agreement to convey any part of an entry or claim to another made prior to final proof will defeat the claim." While the language of the pre-emption law was more explicit than that of the homestead law as it stood at the date of this entry, the spirit and intent of each on the point at issue was the same; and section 2290 of the Revised Statutes, as amended by the act of March 3, 1891 (26 Stat., 1095), was made to conform substantially to the language of the former. See in this connection *Bashford v. Clark et al.* (22 L. D., 328).

The Department directed the cancellation of Clayton's entry because of the unlawful contract made by him, although no conveyance was ever made in pursuance thereof, nor any possession of the land, apparently, ever given. In this case not only is a similar contract alleged, but it is also charged that possession was given Phillips thereunder and continued by him up to the date of this protest.

Meal's allegations as to this contract and its partial execution by Donahue, are amply sufficient to require that a hearing be ordered in the premises. The decision of your office upon this point is reversed and you are directed to order a hearing, in accordance with the foregoing.

HOMESTEAD CONTEST—PRIORITY OF SETTLEMENT.

BEHAR *v.* SWEET.

The general rule that a settler claiming priority over one having an entry of record must establish his claim by a preponderance of the evidence, may be so far departed from, in a special case, as to reach an equitable conclusion, where, on the facts shown, justice and equity require a division of the land between the parties.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (I. H. L.) (A. E.)

On July 25, 1896, your office transmitted a motion filed by Sweet for review of departmental decision rendered in the above entitled cause on June 9, 1896. The land involved is the NW. $\frac{1}{4}$ of Sec. 23, Tp. 26 N., R. 1 W., Perry, Oklahoma.

This motion being entertained, on August 25, 1896, you were directed to notify Sweet that to insure consideration by the Department, he will be required to serve a copy of the motion upon the opposing party, and return evidence of such service within thirty days, that then each party would be allowed to file briefs in accordance with Rule 114 of Practice.

On October 10, 1896, your office retransmitted the papers, with evidence of service and briefs of counsel.

The matter is now before the Department for examination.

The facts in the case are as follows: The land is divided by a creek, running from the northwest corner southeasterly. About one-third of the land lies north of this creek, and the timber along the creek obstructs the view from either side. Behar settled on the north side of the creek, and Sweet on the south side. A conclusion drawn from the evidence is that each settled at the same time, on September 16, 1893, and neither knew the other was there, each having traveled about the same distance going to the land. Each man has built a house and improved the land. Over two years ago, when the hearing was had, Behar had twenty-one acres broken, fourteen of which were in wheat, had built two houses, kitchen, stable, chicken house, dug a well, set out fruit trees, and had forty or fifty acres fenced. One month after Behar settled on the land a child was born to him. Sweet's improvements consisted of a house, twenty-five acres fenced, hen house, hog pen, and twenty-five or thirty acres planted to crops. Each man has a family, and has been a continuous resident upon the land since his settlement, more than three years ago.

When Behar settled upon the land, his wife was sick, and there was urgent necessity for a habitation for her to dwell in. He appears therefore to have devoted himself to the improvement of the claim, and did not apply to make entry until November 7, 1893, which, however, was within time under the homestead law. Sweet, however, not having a sick wife, for whom improvements were necessary, went

to the local office and made entry on September 25, 1893, which was sixteen days before the birth of Behar's child.

It is contended by attorneys for Sweet that Sweet should have an advantage by reason of having made this entry before Behar, in that the burden of proof should be placed upon Behar to show that he was the prior settler.

The local officers found in favor of Behar, but your office and the Department agreed in finding that it was impossible to determine that either Sweet or Behar had the superior claim, or that either had settled prior to the other, and that, owing to a line of woods which divided the tract of land in controversy, each settled unknown to the other.

Each man had made valuable improvements, and had continuously resided upon the land, with his family, from date of settlement, and the Department deemed it unjust to do other than divide the land between the parties.

While the ruling that a settler claiming prior settlement over one having an entry of record must establish his claim by a preponderance of evidence, will be adhered to in most cases, the Department will, where justice and equity require it, and great hardship would result were the rule applied, depart so far from the rule as to reach an equitable decision in the case. If the rule were applied in the case under consideration, it would be depriving Behar of his land and improvements, because he remained on the land, building a habitation for his sick wife, to whom a child was born on the land twenty-five days after his settlement.

Deeming that it would be a great hardship to Behar to disturb the decision in the case under consideration, rendered June 9, 1896, the same will stand.

The motion is denied.

PRICE OF LAND—INDEMNITY LIMITS—REPAYMENT.

THOMAS FOSTER.

Lands falling within the indemnity limits of a railroad are not raised to the double minimum price.

There is no statutory authority for the return of a double minimum excess in fees and commissions erroneously required on a homestead entry of lands in fact single minimum, where such money has been covered into the United States Treasury.

Secretary Francis to the Commissioner of the General Land Office February 13, 1897.

(I. H. L.)

(J. L.)

On February 8, 1889, Thomas Foster made homestead entry No. 6479 of the SW. $\frac{1}{4}$ of section 14, T. 27 N., R. 32 E., W. M., Spokane Falls land district, Washington. He was required to pay and did pay to the receiver the sum of twenty-two dollars for fees and commissions, the land being rated at double minimum price. On November 20, 1895, Foster filed an application for the repayment of six dollars, alleging

that the land was "minimum priced land, upon which the fees and commissions payable when application for homestead entry is made" could lawfully amount to only sixteen dollars.

On December 3, 1895, your office rejected the application, saying, that the records of this (your) office show that said land is within the limits of the grant to the Northern Pacific Railroad Company, branch line. Hence the land is double minimum land (Section 2357 R. S.), and the fees and commissions collected on said homestead entry, \$22.00, was the proper amount.

From said decision Foster has appealed to this Department, respectfully traversing the fact found by your office as aforesaid.

A re-examination of the records of your office shows, that the quarter section of land aforesaid lies within the indemnity limits of the grant to the Northern Pacific Company for its main line, and does not lie within the granted limits for the branch line.

The act of July 2, 1864, incorporating the Northern Pacific Railroad Company (See section 6 on page 369 of 13 Statutes), and section 2357 of the Revised Statutes referred to in your office decision, do not extend the double minimum price to lands lying within indemnity limits. Only reserved alternate sections lying within the limits *granted* by act of Congress, are required to be sold for not less than two dollars and fifty cents per acre (19 L. D., 381).

According to the list of fees and commissions published on page 34 of the General Circular of October 30, 1895, it seems that Foster paid six dollars too much.

Therefore the reason assigned by your office for rejecting Foster's application is erroneous.

But the relief desired by Mr. Foster cannot be granted, because the six dollars which he overpaid on February 8, 1889, and demanded back on November 20, 1895, were in due course of business covered into the treasury; and there is no statute which authorizes your office or this Department to take it out. The Constitution provides that: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law."

For this reason, your office decision rejecting the application is hereby affirmed.

OKLAHOMA LANDS—SETTLEMENT—RESERVATION FOR HIGHWAY.

HARDING *v.* MOSS.

A settlement on land reserved for a public highway, along a section line, as provided under section 23, act of May 2, 1890, prior to the actual location and use of such highway, is valid and extends to the adjacent quarter section on which settlement is intended to be made.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (I. H. L.) (C. J. W.)

On September 20, 1893, Albert W. Moss made homestead entry No. 339, for SW. $\frac{1}{4}$ Sec. 10, T. 26 R. 2 E., Perry land district, Oklahoma.

On October 26, 1893, Harding filed his affidavit of contest against said entry alleging prior settlement.

The hearing was set for October 26, 1894.

On motion of Harding the case was continued to January 2, 1895. On January 2, 1895, Harding made application to take the depositions of absent witnesses and the case was continued to March 11, 1895. On March 11, 1895, Harding asked for a further continuance of thirty days on account of absent witnesses which was denied, but he was allowed another day, to wit: until 12th of March to get his witnesses.

On March 12, 1895, the hearing was had, both parties being present and represented by counsel. On March 15, 1895, the local officers rendered their decision in which they found that Moss was the prior settler, and recommended the dismissal of the contest. Harding appealed, and on October 24, 1895, your office considered the case and rendered an opinion, in which it was, in substance, found that the evidence left the fact in doubt as to which was the prior settler, and directed a division of the land between them in such way as to leave each in possession of the half upon which his improvements had been placed. From this decision both Moss and Harding have appealed, each alleging, in substance, the same errors of law, and each alleging that it was error not to have found him to have been the prior settler. Harding alleges two errors of law not covered by the allegations of Moss.

1. That it was error to deny his motion for continuance.
2. That it was error to hold that a settlement upon the four rods reserved for a public highway around the section was a valid settlement.

The land in controversy is a part of what is known as the Cherokee Outlet, and was opened to settlement on the 16th of September, 1893. Each of the parties claims to have made the race to, and settlement upon, the land on the day of the opening. The two distinct legal propositions submitted by Harding will be first considered, since, if he is correct in either, an examination of the other questions would be unnecessary.

1st. Was it error on the part of the local officers to deny the motion of Harding for further continuance? The record indicates that ample opportunity was offered Harding to prepare his case for trial, and there was no abuse of discretion on the part of the local officers in denying his last motion for continuance.

As to the insistence, that a settlement upon that part of a quarter-section reserved for a public highway along section lines, as provided by section 23, act of May 2, 1890 (26 Stat., 81), it must be held that before such highway is actually located and in use, such settlement must be regarded as valid and extends to the quarter-section contiguous, upon which such settlement was intended to be made. The highway provided for by the act is a mere easement, and does not prevent title to the entire quarter-section from passing to the patentee, subject to the easement.

Said section twenty-three is as follows:

That there shall be reserved public highways four rods wide between each section of land in said territory, the section lines being the center of said highways; but no deduction shall be made, where cash payments are provided for, in the amount to be paid for each quarter-section of land by reason of such reservation. But if the said highway shall be vacated by any competent authority, the title to the respective strips shall inure to the then owner of the tract of which it forms a part by the original survey.

Where, as in this instance, the initial act of settlement performed by a settler is upon, or partially upon, the land thus reserved, it will nevertheless be deemed settlement upon the quarter-section to which it appertains and is intended to be settled upon. Your office did not err in so holding.

The remaining questions are—1st. Was it error upon the part of your office to direct a division of the land between the two claimants; and 2d. Was it error to make no ruling as to which one of the parties was the prior settler. As to the first of these propositions it was held here, in the case of *Sumner v. Roberts* (23 L. D., 201)—

In case of a contest against an entry on the ground of a prior settlement right, the burden of proof is on the contestant to show that his settlement antedates both the entry and settlement of the contestee, and if he fails to thus show such priority, the entry must stand.

In a contest of such character, doubt as to the fact of priority, or a finding of simultaneous settlement, does not justify an arbitrary division of the land between the parties, or an award thereof to the highest bidder.

Your office decision as to this proposition is without support either in law or the evidence, and must be held to be erroneous. The question remains is the evidence of such character as to admit of a specific finding of priority of settlement upon the part of one or the other of the parties. An examination of the record is all that is necessary on this subject. The fact is not left either in doubt or uncertainty. The evidence unmistakably indicates that Moss reached the land and set his stake at least thirty minutes before Harding reached the tract. The local officers found Moss to have been the prior settler, and the record amply supports that finding. In fact, it is not seriously disputed by contestant that Moss was first on the land, and the gravamen of his contention is that, when he reached it, he performed no act of settlement for a long time thereafter; that such as he did perform was in the public highway, and that was thereafter abandoned. The record does not support this contention. Upon the contrary, it warrants the specific finding that Moss reached the land at least half an hour in advance of Harding, and staked it, setting a stake with his name over it and a handkerchief on it as a flag. This stake was still standing on the 23d of September, and presumably it remained undisturbed from the 16th until that time. It was sufficient notice that the land was taken and claimed by Moss, and as an initial act of settlement it was followed within a reasonable time by permanent improvements of value and by

residence. The finding of the local officers on these questions was proper. Your office decision is reversed, and the decision of the local officers affirmed. The contest is dismissed, and the entry of Moss held intact.

RAILROAD GRANT—LANDS EXCEPTED—SWAMP SELECTION.

DORN v. ELLINGSON.

The notation of a swamp land selection, appearing of record at the date a railroad grant becomes effective, will not operate to except the land covered thereby from the grant, where prior thereto the approval of such selection has been revoked, and the selection itself superseded by subsequent lists.

Secretary Francis to the Commissioner of the General Land Office, February 13, 1897. (I. H. L.) (E. M. R.)

This case involves the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 98 N., R. 10 W., Des Moines land district, Iowa.

The record shows that these tracts are within the ten mile limits of the grant to aid in the construction of the McGregor and Missouri River Railroad under the act of May 12, 1864 (13 Stat., 72), and on June 19, 1879, were listed by the Chicago, Milwaukee and St. Paul Railroad Company, successors in interest to the above mentioned road.

On June 4, 1883, your office rendered a decision rejecting said listing of these lands, holding that the tracts in controversy, having been selected as swamp land on March 17, 1852, were by virtue of the act of March 3, 1857 (11 Stat., 251), confirmed to the State of Iowa. The railroad company filed no appeal as to this decision, but thereafter, to wit, on June 4, 1884, the said company filed an application for a reconsideration and revocation of that decision.

On September 3, 1884, your office, acting upon this application denied it, and it was further declared that the decision of June 4, 1883, was final.

The company attempted to appeal, which right was denied them by your office, and thereafter an application was made for the issuance of a writ of certiorari, and on October 17, 1884, the Department refused the issuance of the writ. In the decision refusing such issuance the Department's action was based upon the laches of the petitioner and the decision did not pass upon the merits of the case before your office, it being said (L. & R. Press Copybook 109, p. 427),

But if said decision is not well founded a review here of the rule therein adopted must be reserved until such time as a case involving swamp selections comes regularly before the Department.

Your office decision of September 10, 1895, states that the question at issue in those proceedings (the decision of June 4, 1883, and those following) was the standing of what is known in your office as the

"Sargent list", being a list of certain swamp selections in the State of Iowa which at one time had been approved by this Department, but subsequently such approval, upon the recommendation of your office, had been rescinded.

It appears that the tracts in controversy remain upon your records as "selected as swamp March 17, 1852," and the decision of your office now under consideration, for the purpose of clearing the record, "directed that the selection be noted as canceled at this date."

March 24, 1895, Elling H. Ellingson, the defendant-appellant, made homestead application and the local officers allowed the entry on a waiver by the Secretary of the State of Iowa showing that the selection above referred to did not appear among the swamp selections of the county wherein these tracts are situated.

July 5, 1895, the local officers transmitted the record in the application of David Dorn to make final proof of his right to purchase the above described land under section five of the act of March 3, 1887 (24 Stat., 557).

The local officers took no action in the case, and in your office decision upon appeal you make the following finding of facts, which the record sustains:

October 31, 1874, by deed (contract to sell) the McGregor & Missouri River R. R. Company conveyed the land in controversy to David Dorn for \$400.

June 4, 1886, Dorn and wife, conveyed to Joseph M. Watts, for \$3000; Watts, April 7, 1893, mortgaged (to secure the loan of \$2500) to Charles L. Hutchinson, and subsequently:

February 15, 1894, Joseph M. Watts and wife, conveyed the land by warranty deed to said Elling H. Ellingson for \$2600, there being also an additional twenty acres of adjoining land conveyed in same deed.

In this last mentioned trade Hutchinson executed a release of his mortgage, Ellingson (February 17, 1894) executing a mortgage to E. A. Hamill to secure \$1600, of the purchase price mentioned. By stipulation of adverse parties in this case it was agreed, that Ellingson, during February 1894, executed a mortgage, and delivered same to the First National Bank of Decorah, Iowa, together with \$1000 in money, for the benefit of Joseph M. Watts. Subsequently Ellingson made homestead entry for the land, as shown, and enjoined said bank from paying or delivering said money or mortgage to Watts, and the bank still retains the same under said proceedings.

In his pleading Ellingson claims settlement on the land March 24, 1894, nine months prior to Dorn's present application to purchase. Also that he (Ellingson) previously negotiated with Watts for the purchase of the land at the rate of \$26.00 per acre.

Ellingson found during the pendency of the trade with Watts that the title still "remained in the clouds with the swamp act, the R. R. act, and the U. S. Gov. reaching for it." Ellingson claims he proposed that Watts get a perfect title (matters remaining in *statu quo* in the meantime) "or get an adverse ruling from the U. S. Commissioner, or the proper State officers." Ellingson urges that Dorn's interferences, by applying to purchase under Sec. 5, act March 3, 1887, is, under the circumstances a questionable proceeding, and alleges that Dorn in his preliminary affidavit to purchase swore that no person had settled on the land subsequent to 1882, while on cross examination he admitted he heard that Ellingson "had received a homestead filing."

As has been set out, this case is before the Department upon the

application of Dorn to purchase under the fifth section of the act of Congress of March 3, 1887 (24 Stat., 557), which is as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

Counsel for the appellant argues in his well-considered brief that in order that one may be entitled to purchase, it must appear that he acted in good faith in so purchasing from the railroad company, and that in this case it cannot be said that he acted in good faith, inasmuch as it is claimed by counsel that an examination or review of the proceeding had in reference to this tract discloses that the railroad company had, and could have had, no title in the tracts in controversy; the record showing that from 1852 up to the date of the decision appealed from this land appeared of record as selected as swamp. In this connection it is proper to state that unless the land was excepted from the grant to this railroad company, the right to purchase under the act *supra* does not exist. This brings up that question.

On October 30, 1891, by letter "K" your office decision was rendered upon the authority and effect of the "Sargent list", hereinbefore referred to. From the facts therein set forth it appears that this list was filed in your office on March 17, 1852, by George B. Sargent, surveyor general. In filing said list the surveyor general did not state that the State of Iowa had determined through its proper agents to accept his field notes as a basis of adjustment, but subsequently, on March 21, 1852, he so stated, but forwarded no agreement to this effect. And thereafter, by act of the State legislature, January 13, 1853, the swamp lands were granted to the various counties and provision was made for survey and selection by county surveyors. So it appears that if the agreement was entered into as reported by letter from Mr. Sargent, this action upon the part of the legislature was a repudiation of it.

Upon representation made to your office, on February 19, 1855, a communication was by your office addressed to the Department, asking that the former approval of the "Sargent list" made by the Depart-

ment upon the recommendation of the Commissioner of the General Land Office, be revoked, and thereafter, to wit, on March 1, 1855, said approval was revoked. Prior to this time other lists had been filed showing the swamp lands claimed by the State under the swamp act.

As a matter of history, it may be stated in this connection that about 1700 tracts were included in the "Sargent list," and the county surveyors under the authority of the act of the legislature, *supra*, selected about 1300 of these tracts, leaving 400 tracts. And in your office, for a period of nearly thirty years after the revocation of the approval of the "Sargent list", it was treated as superseded by other lists filed. And your decision of October 30, 1891, *supra*, states that this view was acquiesced in by the State, it not having ever set forward the claim that the lands specified therein were confirmed to the State by the act of 1857.

The tracts in controversy were included in the "Sargent list", but have not been enrolled in any subsequent list filed in the place of and superseding that list. It was under these facts that the then Commissioner of the General Land Office, on June 3, 1883, held that this list was confirmed under the act of March 3, 1857 (11 Stat., 251). And thereafter, as has been set out, the Department refused to disturb that decision on account of the laches of the Railroad Company.

Was the land now in controversy excepted from the operation of the grant to aid in the construction of the McGregor and Missouri River Railroad under the act of May 12, 1864 (13 Stat., 72)?

At that time there existed upon the records of your office, opposite these tracts, "selected as swamp March 17, 1852;" this record being made on account of the "Sargent list." The approval of that list had been revoked and it had been superseded by others when the grant was made. Under these facts it is clear that the land was not excepted from the operation of the grant by an invalid and repudiated selection. The clearing of the records in your office was a ministerial act, the failure to do which can in no wise affect the rights of the company.

In the case of *Anderson v. Northern Pacific Railroad Company et al.* (7 L. D., 163) it was held (syllabus):

The cancellation of an entry by the order of the Commissioner of the General Land Office takes effect as of the date when the decision is made, and the fact that such order was not noted on the records of the local office until after the definite location of the road, though made prior thereto, would not operate to defeat the operation of the grant.

So also in the case of *Sioux City and Pacific Railroad Company v. Wrich* (22 L. D., 515), in which it was held (syllabus):

A school indemnity selection made prior to statutory authority therefor does not reserve the land covered thereby from the operation of a railroad grant.

The Secretary of the Interior is charged with the adjustment of railroad grants, and should withhold from other disposition lands granted for such purposes, even though the grantee may fail to appeal from an erroneous adverse decision of the General Land Office.

And also *Knight v. United States* (142 U. S., 191).

My conclusions are that there was no existing claim at the date of the attachment of the railroad's right to these tracts that could operate to prevent the railroad company from acquiring title, and therefore that David Dorn, the defendant herein, is not entitled to purchase under the said section of the said act, but that the land involved passed to the railroad company.

The purchasers from the company are amply protected by this decision.

The decision appealed from is accordingly reversed.

TIMBER CUTTING—STATUTORY PROVISIONS.

INSTRUCTIONS.

In construing the provisions contained in the two acts of June 3, 1878, and the act of August 4, 1892, with respect to timber cutting, it must be held that the first of said acts of 1878 (20 Stat., 88), relates to all mineral lands of the United States, but to none of any other character, and permits the cutting of timber on such lands for building, agricultural, mining, and other domestic purposes, but not for the purpose of sale or commerce, and that the second of said acts (20 Stat., 89), as amended by the act of 1892, relates to all non-mineral lands of the United States, in all public land States, and prohibits the cutting of timber on such lands, except as therein otherwise provided.

Secretary Francis to the Commissioner of the General Land Office, February 23, 1897. (I. H. L.) (W. C. P.)

I am in receipt of your communication of May 25, 1896, asking to be advised as to the proper construction of the acts of Congress of June 3, 1878 (20 Stat., 88), June 3, 1878 (20 Stat., 89), and of August 4, 1892 (27 Stat., 348), all of which contain provisions relating to the cutting of timber on the public lands.

The act of June 3, 1878 (20 Stat., 88), which may be designated as act No. 1, is entitled:

An act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes—

and the first section reads as follows:

That all citizens of the United States, and other persons, *bona fide* residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, the provisions of this act shall not extend to railroad corporations.

The second section provides that the register and receiver of local land offices in whose district any mineral land may be situated shall ascertain from time to time whether any timber is being cut upon any such land, except for the purposes authorized by said act, and if so, to report the fact to the General Land Office, and section three provides penalties for the violation of the provisions of the act.

The other act of June 3, 1878, which may be designated as act No. 2, is entitled:

An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

The first section of this act authorizes the sale of public lands in "the States of California, Oregon and Nevada and in Washington Territory" which are valuable chiefly for timber and stone thereon, but unfit for cultivation; the second and third sections specify the mode of procedure in such cases, and section four prohibits the cutting of timber on the public lands. It reads as follows:

That after the passage of this act, it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said States and Territory or remove, or cause to be removed, any timber from said lands, with intent to export or dispose of the same; and no owner, master or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars: *Provided*, That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until ninety days after the passage of this act.

The fifth section provides for relief from prosecutions under Sec. 2461 of the Revised Statutes, and the sixth section repeals all acts or parts of acts inconsistent with the provisions of this act.

The third act spoken of in your letter is that of August 4, 1892 (27 Stat., 348), and is entitled:

An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

The first section of this act provides for the entry of lands chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims, and the second section, which relates to the subject now under consideration, reads as follows:

That an act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory" approved June third, eighteen hundred and seventy-eight, be, and the same is hereby, amended by striking out the words "States of California, Oregon and Nevada, and Washington Territory" where the same occur in the second and third lines of said act, and insert in lieu thereof the words "public land States," the purpose of this act being to make said act of June third eighteen hundred and seventy-eight, applicable to all the public land States.

The proper construction of the two acts of June 3, 1878, was considered by the United States circuit court in the case of *United States v. Smith* (11 Fed. Rep., 487), particularly as to their operation within the State of Oregon. It was there held that act No. 2 was operative in that State to the exclusion of act No. 1. It was said in the course of that decision that the provision in act No. 2, making it unlawful to cut any timber on any public land in Oregon, except that cut by a miner or agriculturist in the ordinary working or clearing of his mining claim or farm is inconsistent with and repugnant to the license to cut contained in act No. 1; that both provisions could not be in full force in the same place. This decision was cited in the decision in *United States v. Benjamin* (21 Fed. Rep., 285), and it was held that the provisions of the act (No. 1) authorizing the cutting of timber on the public lands was not applicable to California.

These decisions were rendered on April 21, 1882, and August 18, 1884, respectively. This Department on May 25, 1882, considered a number of cases of trespass in cutting timber on mineral lands in the Territory of Dakota, and gave certain instructions in the case of *Frank P. Hardin et al.* (1 L. D., 597). Secretary Teller then said:

The act of Congress approved June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada, and the Territories, to fell and remove timber from the public domain for mining and domestic purposes" clearly authorizes the cutting of timber on the mineral lands of the United States for domestic use.

It has been alleged that the act of June 3, 1878, does not apply to persons cutting timber on the mineral lands for sale, and that to enable any person to have the benefit of that act, he must cut the timber for his *personal* use, and not for sale. Such a construction defeats the very intent of the act, which was to allow the settler on the mineral lands to have the benefit of the timber thereon growing for use within the Territory or State where it grew.

The purpose and scope of the act were discussed at some length, and the conclusion reached is that expressed in the foregoing quotation. These views were incorporated in a circular upon said act issued by your office June 30, 1882, and approved by this Department (1 L. D., 697), it being said:

All citizens and *bona fide* residents of the States and Territories mentioned therein are authorized to fell and remove or to purchase from others who fell and remove, any timber growing or being upon the public mineral lands in said States or Territories: *Provided*

1. That the same is not for export from the State or Territory where cut.
2. That no timber less than eight (8) inches in diameter is cut or removed.
3. That it is not wantonly wasted or destroyed.

The attention of this Department was in that same year specifically directed to the apparent conflict in the provisions of said acts of June 3, 1878, by a letter from your office requesting instructions in regard to the administration thereof. In departmental letter of August 7, 1882 (1 L. D., 600), it was held in substance that the words "all other mineral districts of the United States" appearing in act No. 1 brought within the provisions of said act not only the mineral lands in the States

and Territories named but also those in all mineral districts outside such States and Territories, it being specifically said that—

all privileges granted to inhabitants of mineral districts of the States and Territories named in the act were granted to the inhabitants of such mineral districts of California.

It was held that the two acts could apply in the same State upon the theory that act No. 1 related to mineral lands and to that class of lands only. That this was recognized as the proper construction is further evidenced by a circular of October 12, 1882 (1 L. D., 695), wherein it was said that the cutting of mesquite on the public mineral lands of the United States was allowable under the provisions of said act No. 1, while the cutting of such trees upon non-mineral lands was prohibited. This holding seems to have been modified to a certain extent by later circulars. In the circular of May 7, 1886 (4 L. D., 521), it is said in regard to act No. 1—

The act applies only to the States of Colorado and Nevada, and to the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho and Montana, and other mineral districts of the United States not specifically provided for, and does not apply to the States of California or Oregon nor to the Territory of Washington.

That is act No. 1 was held to apply to mineral lands in all States and Territories therein mentioned, also to all mineral districts outside of the States specifically named in act No. 2, but not to mineral lands in the States expressly named in act No. 2 except those in Nevada, which is named in both acts.

Further on in this circular it is said:

4th. Timber felled or removed shall be strictly limited to building, agricultural, mining and other domestic purposes.

All cutting of such timber for sale or commerce is forbidden. But for building, agricultural, mining and other domestic purposes each person authorized by the act may cut or remove for him or her own use, by himself or herself, or by his, her or their own personal agent or agents only.

The two acts of 1878 having been passed upon the same day should be treated as one act and so construed, if possible, as to give each provision of each act effect.

Act. No. 1 permits the cutting of timber for certain purposes upon mineral lands of the United States in the "States of Colorado or Nevada or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho or Montana and all other mineral districts of the United States"; and act No. 2 prohibits the cutting of timber on any lands of the United States in "the public land states", with the proviso, however, that nothing therein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim or preparing his farm for tillage, or from taking the timber necessary to support his improvements. This statement presents the apparently conflicting provisions of the two laws, the existence of which necessitates construction. If the conclusion of the circuit courts, as announced in the decisions hereinbefore cited, that the two acts cannot

operate in the same place, is to be accepted as correct, then it will be necessary to determine which of the two is to prevail.

This Department has held, however, that both acts apply in Nevada, and if this holding is to be adhered to, it would necessarily follow that both acts are to be held operative in the other public land states brought within the provisions of act No. 2 by the amendatory act. This rule, so long followed in the administration of these laws, should not be changed, unless it is clearly erroneous. It has been the policy to regard the mineral lands in a different light from other public lands of the United States, and the result has been a separate and distinct system of laws in relation to them. It was evidently this consideration that led to the conclusion by the Department that the two acts might stand, and both have effect in the same State. This theory seems to be the only reasonable one to explain the enactment of two laws upon the same day, which are apparently contradictory. This construction gives effect to both laws, allowing to each operation in its peculiar sphere, and should be adhered to if there be nothing to show a contrary intention upon the part of Congress.

The statement in instructions of August 7, 1882 (1 L. D., 600), in regard to act No. 2:

By the express provision of section 2 the mineral lands in the broadest sense of that term are excluded from the provisions of said chapter

is true because the primary object of that legislation was to provide for the sale of lands that were not mineral in character and were at the same time unfit for agricultural purposes. It may be said the insertion of the provision in said act allowing the cutting of timber upon mining claims negatives the proposition that the general prohibition against cutting was not intended to apply to mineral lands. There is some force in that statement, but the inference has not sufficient weight to overcome the other express statements.

In the instructions issued under act No. 1 June 30, 1882, it was held that timber might be cut from mineral lands for sale to citizens and *bona fide* residents of the States and Territories named in said act. In the instructions of May 7, 1886 (4 L. D., 521), the cutting of timber for sale or commerce was forbidden, but in those of August 5, 1886 (5 L. D., 129), the right to cut timber for sale was recognized. I cannot agree with this latter position. The express provision is that timber may be cut "for building, agricultural, mining or other domestic purposes." If it had been intended to make the timber on the public lands an article of trade and commerce there should have been inserted therein such a provision as "or for sale to *bona fide* residents for such purposes."

The license given under this provision is in derogation of the rights of the public and must therefore be strictly construed and limited to the cases clearly and unequivocally specified in the act. The words used do not include a license to cut timber for the purpose of sale, and such a license cannot properly be included by implication.

The proper construction of these laws would seem to be, No. 1 relates to all mineral lands of the United States, but to none of any other character, and permits the cutting of timber on such lands for building, agricultural, mining and other domestic purposes, but not for the purpose of sale or commerce, while act No. 2, as amended by the act of 1892, relates to all non-mineral lands of the United States in all public land States, and prohibits the cutting of timber upon such lands, except as therein otherwise provided.

The effect of this act No. 1 as construed by the Department having, as you state, "resulted in wholesale devastation of timber on such lands for purposes of speculation and personal gain" affords sufficient reason for reconsidering the matter for the purpose of correcting the evil if possible. Furthermore a change of the ruling as to the construction of said act could not affect any vested rights as it would simply operate as a revocation or limitation of the restricted license to cut recognized under the construction heretofore given said act. There seems therefore to be good reasons for changing the instructions under said act, and no valid reason against such action at this time.

You will at once prepare instructions in accordance with the views herein set forth to take effect upon such future date as may seem proper, and submit the same for approval.

RAILROAD GRANT—MINERAL LANDS—ACT OF MARCH 3, 1887.

WALKER v. SOUTHERN PACIFIC R. R. Co.

Prior to the approval of a railroad indemnity selection the land included therein, if mineral in character, is open to exploration and purchase under the mining laws of the United States.

The existence of a mineral location raises the presumption that the location has been made in conformity with law, and that the land covered thereby is mineral in character.

Where mineral is found, and it appears that a person of ordinary prudence would be justified in further expenditures, with a reasonable prospect of success in developing a mine, the land may be properly regarded as mineral in character.

Section 5, act of March 3, 1887, does not confer upon a purchaser from a railroad company, where the title of the company fails, the right to purchase from the government land known to be valuable for its mineral.

Secretary Francis to the Commissioner of the General Land Office, February 23, 1897.
(I. H. L.) (E. B., Jr.)

This is an appeal by the Southern Pacific Railroad Company and J. T. McGrath, in the case of S. E. Walker against the said company and McGrath, from your office decision of December 21, 1895, holding so much of the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 9, T. 6 S., R. 3 W., S. B. M., Los Angeles, California, land district, as is embraced in the Green Mountain and Lucky Boy quartz mining claims "to be mineral land, and therefore excepted from the grant to said

railroad company," and the company's indemnity selection per list No. 13 for cancellation to that extent, and that McGrath had no right to purchase the land thus decided to be mineral, under the fifth section of the act of March 3, 1887 (24 Stat., 556).

It appears that said Walker duly instituted a contest December 19, 1891, against said company, alleging that the tracts above described contained veins and lodes of rock in place bearing gold and were more valuable as mineral than as agricultural land. In due course of proceedings, which are recited in said decision, but not necessary to be set out here, the case came before the Department on appeal December 5, 1894, unreported, and it appearing that the testimony was insufficient as a basis for a judgment, the case was remanded for a further hearing. Said McGrath was allowed to intervene at the second hearing as the purchaser from the company of the NE. $\frac{1}{4}$ of said section.

The second hearing which was begun April 23, 1895, and ended May 7th, following, resulted in a decision July 22, 1895, by the local office, in favor of Walker, which was affirmed by your office as already indicated, whereupon McGrath and the company prosecute here their separate appeals. Both appellants assign error (1) in not holding that the company's right to the land vested at once upon its selection thereof, and that its right could not be defeated by the subsequent discovery of mineral thereon, and (2) if the company's right did not then vest, in holding that the land was shown to be valuable for its minerals; and said McGrath assigns error (3) in holding that he was not entitled to purchase the land from the government by reason of his alleged purchase from the company, under the fifth section of the act of March 3, 1887 (*supra*).

The land in controversy is within the indemnity limits of the grant by act of March 3, 1871 (16 Stat., 579), to the said company, to aid in the construction of its branch line, the location of which was definitely fixed April 3, 1871 (*Duncanson v. Southern Pacific R. R. Co.*, 11 L. D., 538), and is embraced in the company's selection filed July 13, 1885, as per indemnity list No. 13; but this selection, as to such land, has not been approved by the Secretary of the Interior. This grant by the 23d section of the act is made—

with the same rights, grants, and privileges and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty six.

Section 3 of the act last mentioned (14 Stat., 294) expressly reserved "all mineral lands" from the operation of the act, and provided for the selection "by said company," "under the direction of the Secretary of the Interior" of indemnity lands for lands lost to the company within the primary limits by reason of any grant, sale, reservation, occupation by homestead or pre-emption settlers, or other disposition, prior to definite location.

In the case of the Wisconsin Central Railroad Company *v.* Price

County (133 U. S., 496), involving the question as to when the title to indemnity lands granted by Congress passed to the State of Wisconsin to aid in the construction of a certain line of railroad, in which the provisions of the grant as to selection of such lands were similar to those in the case under consideration, Mr. Justice Field, speaking for the Supreme Court, said:

For such lands no title could pass to the company not only until the selections were made by the agents of the State appointed by the governor, but until such selections were approved by the Secretary of the Interior. The agent of the State made the selections, and they had been properly authorized and forwarded to the Secretary of the Interior. But that officer never approved them. Nor can such approval be inferred from his not formally rejecting them. . . . The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. . . . There could be no indemnity until a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts.

The doctrine thus authoritatively declared has been recognized in other decisions of the same court and stands to-day as law upon the point under discussion. In this case no approval of the Secretary has been given to the company's selection. The land, if mineral in character, is now and heretofore has been open to exploration and purchase under the mining laws of the United States—the grant to the company having expressly excepted mineral lands from its operation.

It is practically conceded by the defendants in this case that the land contains some mineral—gold and silver. The soil is shown to be poor and thin and the land at best to be of very little value for agricultural purposes. Whether gold and silver have been shown to exist in such quantities as to render the land chiefly valuable for mining purposes is a disputed question. The testimony upon this question is somewhat conflicting. Both the local office and your office found in the affirmative, that is, that the land is chiefly valuable for its minerals; and the testimony is set out at some length in your office decision. I find, upon careful examination of the testimony, no warrant therein to dissent from the conclusion on this point reached by your office. Although the best evidence of Walker's alleged location of said mining claims—duly certified copies of the location notices—was not filed, the

testimony is ample to show that such locations existed, that of the Green Mountain having been made in 1891, and of the Lucky Boy in 1892. No objection was made to the admission of this testimony.

The presumption then was, at the date of the hearing, that these locations had been made conformably to law and that the land was mineral in character. This was a rebuttable presumption, but until overthrown by competent and sufficient evidence it fixed the burden of proof upon the defendants (*Sweeney v. Northern Pacific R. R. Co.*, 20 L. D., 394). They not only failed to carry successfully the burden of proving the non-mineral character of the land, but *per contra*, the testimony of their own witnesses, taken as a whole, is rather favorable than otherwise to the mineral claimant. Samples of ore taken from the dumps at various shafts and open cuts on the claims which are upon the same vein extending from northeast to southwest diagonally through the legal subdivisions described above, showed upon assays, as testified by a mining engineer and expert for the defendants, various values in gold and silver from a trace to nearly \$24.00 per ton. These claims are shown to be but little developed as yet. It is also shown that their mineral value increases as their development is extended.

The fact that a milling test of thirteen tons of ore taken from a development shaft on the Lucky Boy, comparatively near the surface, in 1892, ran about \$6.50 per ton in gold and silver, although scarcely enough to pay for the milling by the inadequate process employed, as testified by another of defendant's witnesses, is not wholly unfavorable to the contestant, to say the least. The contestant has expended about \$800 on the two claims, and from the testimony introduced by him the present value of the Lucky Boy, which is the better developed claim—although some of the richest ore has recently been found on the Green Mountain—is from \$4,000 to \$5,000, and the Green Mountain from \$1,000 to \$3,000. I am well satisfied that the rule laid down by the Department in the case of *Castle v. Womble* (19 L. D., 455), "that where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success, in developing a mine, the requirements of the statute have been met" applies in this case in favor of the contestant.

Section 5 of the act of March 3, 1887, *supra*, under which McGrath claims the right to purchase from the United States, reads:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That

all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

I am convinced, after careful examination and consideration of this section in the light of the laws relative to the acquisition of title to mineral lands, and the decisions of this Department and the supreme court of the United States, bearing upon the question, that this section was not intended to confer upon the purchaser therein indicated from "any said company" the right to purchase from the United States lands known to be valuable for their minerals. Such lands are subject to disposition by the United States under the mining laws only. (Sections 2318, 2319 Revised Statutes; *Deffebach v. Hawke*, 115 U. S., 392; *Davis's Administrator v. Weibbold*, 139 U. S., 507.)

The company's objection urged against the proposed cancellation of its selection as to the land embraced in said mining claims to the effect that, inasmuch as no record evidence of the locations is on file in the case, the boundaries and area of the claims are not definitely shown, segregation of these claims from the tracts in which they lie can not be made, is without force in this proceeding. Segregation is not necessary to the judgment of cancellation. The necessity for segregation will not arise until in connection with favorable action looking to the approval and patenting of these tracts, in whole or in part, under the company's selection, or in connection with other proceedings to secure title to these tracts or some portion thereof. It is shown, as already stated, that due locations of these claims have been made, and from these locations the boundaries and area of the claims can be determined whenever necessary so to do. The parol evidence which shows these locations was admitted without objection by the parties defendant and is sufficient for purposes of this decision. Objection to such evidence comes too late, therefore, on appeal.

The decision of your office is affirmed in accordance with the foregoing views. The company's selection will be canceled as to land embraced in said mining claims.

THE STATE OF FLORIDA.

Motion for review of departmental decision of August 27, 1896, 23 L. D., 237, denied by Secretary Francis, February 23, 1897.

RELINQUISHMENT—AGENT—ADVERSE CLAIM.

WOOD *v.* WOOD.

A relinquishment executed for the benefit of one holding a confidential and fiduciary relation to the entryman, can not be recognized as of any validity in the presence of a just and equitable adverse claim.

Secretary Francis to the Commissioner of the General Land Office, February 23, 1897. (I. H. L.) (J. L.)

This case involves the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 33, T. 6 N., R. 21 W., Gainesville land district, Florida. On May 29, 1888, Robert E. Wood made homestead entry No. 18,658 of said tract, claiming settlement on September 15, 1887, and improvements consisting of dwelling-house, kitchen, stable, crib, cotton-house, wagon-shelter, and twenty acres in cultivation. On March 24, 1894, Willis C. Wood filed in the local office a paper, dated February 19, 1894, purporting to be Robert E. Wood's relinquishment of said tract to the United States. Thereupon Robert E. Wood's entry was canceled, and Willis C. Wood made homestead entry No. 24,504 of said tract.

Robert E. Wood died on April 11, 1894. On June 19, 1894, his widow, Alice Wood, filed her affidavit of contest against Willis C. Wood's entry in the following words:

To the Register & Receiver of the United States Land Office, at Gainesville, Fla.

Your petitioner, Mrs. Alice Wood, being over the age of twenty one years and a native born citizen of the United States, brings this her petition of contest against Willis C. Wood and for cause says—

That one B. F. Cockcroft about the year A. D. 1874 settled upon, improved and cultivated certain public lands to-wit:—

The S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 33, T. 6 N., R. 21 W., situated in Walton county, Florida.

That about the year A. D. 1884 Robert Johnson, the petitioner's father, purchased for a good and valuable consideration the claim and improvements of the said B. F. Cockcroft in and to said land.

That your petitioner and her father, the said Robert Johnson, after the purchase aforesaid took possession of said land and continuously resided upon and cultivated the same until about the year A. D. 1887 when the said Robert Johnson died.

That the said Johnson left beside your petitioner one other heir and the said heirs amicably divided the estate, your petitioner receiving as a part of her share the claim and improvements on said land.

That about the year A. D. 1886 your petitioner was married to one Robert E. Wood who until his death resided with your petitioner on said land.

That the said Robert E. Wood about the year 1888 made application for homestead entry on said land which application was granted on the 29th day of May, A. D. 1888.

That on the 10th day of April, A. D. 1894, the said Robert E. Wood died, and shortly after his death your petitioner duly applied to Hon. Alex. Lynch, register, Gainesville, Florida, for permission to make final proof as widow of Robert E. Wood deceased.

That your petitioner was informed by the said register that the homestead entry of Robert E. Wood had been relinquished to Willis C. Wood and that the entry of

the said Robert E. Wood was canceled on March 24th, A. D. 1894 and that Willis C. Wood had entered the same.

That the said Willis C. Wood is not in possession of said land but your petitioner is in possession of, resides on, and cultivates the same and has ever since the purchase by her father from the said B. F. Cockcroft.

That your petitioner is advised, informed and believes that her husband, the said Robert E. Wood, never relinquished said entry to the said Willis C. Wood and that the said relinquishment was only gotten up to defraud your petitioner out of said land.

That your petitioner is poor and wholly dependent upon the products of said land for support.

Wherefore your petitioner asks that she be permitted to prove the foregoing allegations, and that said pretended relinquishment by Robert E. Wood be canceled, and that the entry of Robert E. Wood be reinstated, that your petitioner be allowed to make final proof as widow of Robert E. Wood deceased.

That you name a day and place where she will be permitted to prove the foregoing allegations; that the proper notice be given the said Willis C. Wood of said hearing that you grant such other or further relief as to you will seem just and right and that she pay the expenses of this contest.

After a hearing at which both parties were present in person and by counsel, the local officers, on October 19, 1894, found as matter of fact, "that the relinquishment on file was not executed by Robert E. Wood, but by Willis C. Wood." And thereupon they recommended that Willis C. Wood's entry No. 24,504 be canceled; that Robert E. Wood's entry No. 18,658 be reinstated; and that Alice Wood, the widow of Robert E. Wood be permitted to make final proof thereon.

Willis C. Wood appealed; and on March 23, 1895, your office reversed the decision of the local officers and allowed his entry No. 24,504 to stand, subject to further appeal.

Alice Wood appealed to this Department; and on April 24, 1896, the Department affirmed the decision of your office. On June 10, 1896, the Department entertained a motion for review filed by Alice Wood. On August 28, 1896, said motion was dismissed. And on September 4, 1896, Alice Wood by her attorney filed here, her petition for a re-review and re-examination of the case, and a revocation of the former departmental orders therein. Said petition was entertained on October 6, 1896, and the case is now before the Secretary for further consideration.

At the hearing, the chief controversy between the parties was, whether the signature to the relinquishment was genuine or not? Whether the relinquishment was or was not a forgery, "only gotten up to defraud the petitioner out of said land"? The local officers favored the "hypothesis of forgery", and found as hereinbefore stated "that the relinquishment on file was not executed by Robert E. Wood but by Willis C. Wood." This finding of the local officers was overruled by your office, and also twice by this Department. The present Secretary of the Interior will not disturb the finding of his predecessor as to this point.

But it is obvious that the minds of the officers who rendered the previous decisions in this case, were chiefly occupied with considera-

tion of the testimony as it related to the question of forgery. Consequently other facts and matters clearly established by the evidence, and involving questions of law and equity material to a just judgment in this case, were not fully considered.

From and after the year 1880, the time of the recognized development of the cancerous disease which terminated in Robert E. Wood's death, Willis O. Wood sustained towards his elder brother Robert, an intimate and confidential fiduciary relation. He was Robert's nurse, his protector, his adviser, his agent, his attorney-at-law, the keeper of his accounts and the manager of his finances. Robert's confidence in Willis was absolute, and Willis's influence over Robert was unbounded. This relation imposed upon Willis the duty of protecting Robert against himself; against the consequence of any act that might be prompted by a sense of helplessness and dependence, and by fraternal gratitude and affection. It matters not whether the proposition for a relinquishment of the homestead, was initiated by Willis or by Robert, Willis was not authorized to accept it. Neither law nor equity will permit advantage to be taken of such confidence and influence. (See Story's Equity Jurisprudence Sections 307, 311 and others.) In view of the testimony showing the relations between the parties as herein set out, the burden was upon Willis to prove the legality and righteousness of the relinquishment in question by clear and convincing evidence. The testimony falls far short of this requirement of law and equity.

On February 19, 1894, Robert E. Wood went as usual to his brother's mill to have his face dressed. Then and there, in the presence of Willis, and of his niece and her husband (who were also employees of Willis), the relinquishment was executed and attested. It was not filed until March 24, thirty-three days afterwards. Robert E. Wood lived until April 11, eighteen days after that. During those fifty-one days Willis made no attempt to take possession of his alleged homestead. The whole transaction was carefully concealed from Mrs. Alice Wood. When after the lapse of a decent interval, she applied at the local office to make final proof of her deceased husband's homestead entry, she was told by the register what had been done, so far as shown by the records of his office.

From the year 1882, Mrs. Wood lived upon the land with her father Robert Johnson until his death in September, 1887, a period of five years. In January, 1887, Robert E. Wood married her, and moved upon the land, and lived there with her and her father until the father's death. Being then a married woman, and so disqualified to make entry in her own right, her husband Robert E. Wood made entry in his own name on May 29, 1888, claiming settlement on September 15, 1887, the date of the wife's father's death. Mrs. Wood lived upon the land with her husband from September 15, 1887, until the day of his death, April 11, 1894; another period exceeding five years. But for the intervention of the relinquishment aforesaid, Mrs. Wood would have been

clearly entitled to make proof under her husband's entry, and thus acquire title to the whole tract.

This Department after mature consideration of all the facts and circumstances, will not permit Willis C. Wood to appropriate to his own use the whole real estate of his trustful and dependent brother, under color of a relinquishment to the United States.

For the foregoing reasons, the judgment of this Department awarding the land in controversy to Willis C. Wood is hereby revoked. The judgment of your office of March 23, 1895, is reversed; the alleged relinquishment by Robert E. Wood filed in the case, is declared null and void; Willis C. Wood's entry No. 24,504 is hereby canceled; Robert E. Wood's homestead entry No. 18,658 will be reinstated; and Mrs. Alice Wood, his widow, will be permitted to make final proof thereon.

RAILROAD GRANT—LATERAL LIMITS—UNSURVEYED LANDS.

COLLETT *v.* NORTHERN PACIFIC R. R. CO.

The maps, tract books, and official plats of survey, on file in the General Land Office, must determine the location of railroad lines, and the distances therefrom of lands in dispute between railroad companies and settlers.

The fact that lands are unsurveyed does not except them from the operation of a railroad grant on definite location.

Secretary Francis to the Commissioner of the General Land Office, February 23, 1897. (J. H. L.) (J. L. M'C.)

Your office by letter of November 19, 1895, transmitted to the Department the record in the case of Presley S. Collett *v.* Northern Pacific Railroad Company, involving lot 9 of Sec. 9, T. 16 N., R. 8 W., Olympia land district, Washington.

Counsel for said company have filed a motion to dismiss the appeal, for the reason that the same was not served upon F. M. Dudley, the general land agent of the company, and the person designated by the company as the attorney upon whom all notices should be served, but upon the local land agent of the company at Tacoma.

In the essentially similar case of Boyle *v.* The Northern Pacific Railroad Company (22 L. D., 184), it was held that service upon Thomas Cooper, the land agent of said company at Tacoma, was sufficient service.

The motion to dismiss, in so far as it is based upon insufficiency of service, must therefore be denied, and the case considered upon its merits.

The tract in controversy is opposite that portion of the road of said company extending from Portland, Oregon, to Tacoma, Washington, the grant for which was made by the joint resolution of May 31, 1870 (16 Stat., 378). It is within the withdrawal on map of general route of

August 13, 1870, and on definite location of the road, September 13, 1873, it fell within the primary limits of the grant. The records show no entry or filing covering the land at the said dates, or at the date of the grant, nor does Collett allege settlement prior to May 15, 1886.

The allegations of error are as follows, in substance:

(1) In holding that said tract was within the primary limits of the grant to said company, for the reason that it is more than forty miles from the main line of its road.

(2) In not holding that, the land being unsurveyed, the appellant had a prior right to the land under the act of May 14, 1880.

Respecting the above allegations of error it may be said:

(1) The maps, text-books, and official plats of survey on file in your office must be the guide—there can be no other or better guide—as to the locations of railroad lines, and the distances therefrom of lands in conflict between railroad companies and settlers. A careful examination of such maps and plats of survey shows that the tract in controversy is considerably less than forty miles from the line of the Northern Pacific Railroad, at its nearest point.

(2) If the third section of the act of May 14, 1880 (21 Stat., 140), gives the appellant in this case a superior right to the land, it would render it necessary to award settlers upon all surveyed lands as well, the tracts upon which they have settled—thus at once deciding all conflicting claims (where settlement has been made at any time) against the railroad company. For the language of said act is that it is intended for the relief of “any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed.”

The question, however, has been repeatedly and uniformly decided by the Department adversely to the appellant's contention in this respect. Thus in the case of *Olney v. The Hasfings & Dakota Railway Company*, it was held (10 L. D., 136, syllabus):

Definite location of the line of road excludes the subsequent acquisition of settlement rights on unsurveyed lands subject to the grant.

The decision of your office was correct, and is hereby affirmed.

HOMESTEAD—SETTLEMENT RIGHT—WIDOW—REMARRIAGE.

BELLAMY v. COX.

The settlement of a homesteader, who dies prior to the expiration of the time given for the assertion of his right, without having made application to enter, inures to the benefit of his widow; and her subsequent remarriage will not defeat her claim as the successor to the right of her deceased husband.

Secretary Francis to the Commissioner of the General Land Office, February 23, 1897. (I. H. L.) (W. A. E.)

On September 25, 1893, John H. Cox made homestead entry for lots 1 and 2 and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 3, T. 20 N., R. 4 E., Perry, Oklahoma, land district.

On November 15, 1893, Lou B. Crawford filed homestead application for the same land. With her application, she filed an affidavit alleging, substantially, that on September 16, 1893, she was the wife of William C. Crawford, since deceased; that Crawford went upon the land in controversy on that date and made settlement thereon prior to the settlement of the entryman and prior to the time of his entry. Affiant further alleged that her husband died October 20, 1893, and at the time of his settlement he was fully qualified to make entry of the land.

A hearing was ordered, and the case came up for trial on March 12, 1895. The plaintiff in the meantime had changed her name by marriage to Bellamy.

On March 18, 1895, the local officers rendered their decision in favor of the plaintiff. From this action Cox appealed, and on October 11, 1895, your office sustained the action of the register and receiver and held the entry of Cox for cancellation.

The entryman's further appeal brings the matter before the Department.

The testimony shows that William C. Crawford made the run on September 16, 1893, from the south side of the "Cherokee strip," and that he was the first person to reach the land in controversy and stick a stake. His wife followed in a wagon, arriving on the land the same afternoon. About three o'clock in the afternoon Crawford left, but his wife remained on the tract. The following Tuesday he came back, remained until Wednesday, was then taken sick, and died the following month. Before he left the land he had a well dug, a foundation laid for a house, and about a quarter of an acre broken. Mrs. Crawford returned to the land in December and spent one day and night there. The following May she was on the tract two days and nights. Her improvements at the date of the hearing consisted of nine acres broken and a box house, ten by twelve.

Cox settled on the same tract on the afternoon of September 16, 1893, subsequent to Crawford's settlement. He cut four small poles for a foundation, then left the claim about sundown and did not return until September 23, when he plowed one furrow around the land. In October, 1893, he built a small house and furnished it. The greater part of his time during the winter of 1893-4 was spent in old Oklahoma, but in the spring of 1894 he established his permanent residence on the land. At the date of the trial he had about one hundred and thirty acres enclosed with a wire fence and about fifty acres broken.

It thus appears that Crawford was the first settler and consequently had the superior right to the land. He had three months from date of settlement in which to assert his rights by making entry or by initiating a contest against an intervening entry. Before that time expired he died.

In the case of Prestina B. Howard, 8 L. D., 286, it was held that

since the passage of the act of May 14, 1880, the right given the widow, heirs, or devisee of a deceased homesteader by section 2291 of the Revised Statutes to fulfill the law, make proof, and receive patent, inures to them as well when the homestead right rests on settlement under said act as when founded on formal application to enter. See also the case of Tobias Beckner, 6 L. D., 134.

Mrs. Crawford, having thus succeeded to the rights of her deceased husband, immediately took steps to protect those rights. She filed her formal application to enter and continued the cultivation and improvement of the tract. It was not necessary for her to reside on the land. *Tauer v. The Heirs of Walter A. Mann*, 4 L. D., 433.

The principal question we have to consider, then, is what effect her remarriage had on her rights.

It was held in the case of *Prestina B. Howard*, above cited, that while a married woman is not authorized to initiate or make a homestead entry in her own right, she may, as the heir of a deceased homestead claimant, make application, submit proof, and receive patent.

The plaintiff here claims this land, not in her own right, but by virtue of her succession to the rights of her deceased husband. She did not, by her remarriage, forfeit those rights.

Your office decision is accordingly affirmed, Cox's entry will be canceled, and the plaintiff will be allowed to perfect her homestead application.

OIL LANDS-PLACER ENTRY.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 25, 1897.

REGISTERS AND RECEIVERS,
U. S. Land Offices.

SIRS: Your attention is directed to the act of Congress, approved on February 11, 1897, as follows:

[PUBLIC—No. 57.]

AN ACT to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided,* That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim or improvement were subsequent to the date of the passage hereof.

It is to be observed that though the provisions of the placer mineral land laws are by said act extended so as to allow the location and entry thereunder of public lands chiefly valuable for petroleum or other mineral oils, yet the substances named are not expressly stated to be mineral, in view of which it would appear that the prior assertion of a legal adverse claim to land valuable for petroleum or other mineral oils would preclude the acquisition of any rights thereto under the provisions of the mineral land laws.

Claims to lands of the character mentioned, heretofore initiated under the mineral land laws are by said act expressly confirmed, but this confirmation must, of course, be construed as applying only to cases where, prior to February 11, 1897, no valid adverse claim to lands involved had been acquired under other than the mineral land laws.

In proceeding under this law, you will act in accordance with the views herein set forth.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

DAVID R. FRANCIS,
Secretary.

GREER COUNTY, OKLAHOMA—ACT OF JANUARY 18, 1897.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 25, 1897.

REGISTER AND RECEIVER,
Mangum, Oklahoma Territory.

GENTLEMEN: Your attention is called to the provisions of the act of Congress, entitled "An Act To provide for the entry of lands in Greer County, Oklahoma, to give preference rights to settlers, and for other purposes", approved January 18, 1897 (Public No. 15), a copy of which is hereto attached.

Sec. 1 provides that every person qualified under the homestead laws of the United States; who on March 16, 1896, was a bona fide occupant of land within the territory established as Greer county, Oklahoma, shall be entitled to continue his occupation of such land with improvements thereon, not exceeding one hundred and sixty acres, and shall be allowed six months preference right from the passage of this act within which to initiate his claim thereto.

A party desiring to make a homestead entry under this section, must present his formal application with the usual affidavits accompanied by the fee and commissions required in an entry of minimum land, and a special affidavit showing that he was on March 16, 1896, a

bona fide occupant of the land he applies to enter. Title may be perfected at the expiration of five years from date of entry or within two years thereafter, under the provisions of the homestead law, or such person may receive credit for all time during which he or those under whom he claims have continuously occupied the land prior to March 16, 1896. Every such person shall also have the right for six months prior to all other persons to purchase at one dollar an acre, in five equal annual payments, any additional land of which he was in actual possession on March 16, 1896, not exceeding one hundred and sixty acres, which prior to said date had been cultivated, purchased or improved by him.

A party wishing to avail himself of the above privileges, must present his application to purchase (form 4-001) together with the prescribed amount of purchase money for the land desired, which need not be contiguous to his homestead entry, together with evidence showing that he had prior to March 16, 1896, cultivated, purchased, or improved the same; evidence of cultivation or improvement must consist of the affidavit of the applicant corroborated by the testimony of two or more witnesses: or in case the claim is based on purchase, an abstract of title, or other documentary evidence, showing the transfers under which the party claims as purchaser. No certificate can be issued until the entire amount of the purchase money shall have been paid: but the receiver will issue his receipt (form 4-140, a) properly modified, for the amount paid and deliver a duplicate thereof to the purchaser.

When any person entitled to a homestead or additional land as above provided, is the head of a family, and though still living, shall not take such homestead or additional land, within six months from the passage of this act, any member of such family over the age of twenty-one years, other than husband or wife, shall succeed to the right to take such homestead or additional land for three months longer, and any such member of the family shall also have the right to take, as before provided, any excess of additional land actually cultivated or improved prior to March 16, 1896, above the amount to which such head of the family is entitled, not to exceed 160 acres to any one person thus taking as a member of such family.

Application for homestead or additional entry under this provision, must be made in the same manner as heretofore prescribed.

In case of the death of any settler who actually established residence and made improvement prior to March 16, 1896, the entry may be made by the party in interest, according to section 2291 U. S. R. S.

Section 2 provides for the disposal of all land in said county not occupied, cultivated or improved, as provided in section 1, or not included within the limits of any townsite or reserve, to actual settlers only, under the provisions of the homestead law.

Any person applying to make entry under this section prior to the expiration of the preference right granted by section 1 will be allowed to

make entry, subject to any valid adverse right under said section 1, on filing his affidavit that the land applied for is not occupied, cultivated or improved by any other person.

Section 3 provides that the inhabitants of any town located in said county shall be entitled to enter the same as a townsite under the provisions of section 2387, 2388, and 2389 of the Revised Statutes. Instructions relative to entry of townsites under said sections of the Revised Statutes are found in circular of this office dated July 9, 1886 (5 L. D. 265).

Under the proviso to this section of the law, the corporate authorities of the town, or the judge of the county court, who shall enter the townsite, shall accord to all persons a preference right to the town lots upon which they have made or own improvements.

By section 4, sections numbered sixteen and thirty-six are reserved for school purposes as provided in laws relating to Oklahoma, and sections thirteen and thirty-three in each township are reserved for such purpose as the legislature of the future State of Oklahoma may prescribe. That whenever any of the lands reserved for school or other purposes under this act, or under the laws of Congress relating to Oklahoma, shall be found to have been occupied by actual settlers or for town site purposes or homesteads prior to March 16, 1896, an equal quantity of indemnity lands may be selected as provided by law.

Under section 5, the right of entry to land within said county, which on March 16, 1896, was occupied for church, cemetery, school, or other charitable or voluntary purposes, not for profit, is given to the proper authorities in charge thereof.

In each case the maximum area to be so entered is two acres. Sections numbered 16 and 36, within each township, within said county, are reserved by section 4 of this law for school purposes, and are exempted from the operations of this section.

It will not be practicable for you to locate land applied for under this section with the certainty required for an entry. You will, then, upon the presentment of such an application, forward the same to this office for appropriate action.

Section 7 provides that all laws authorizing commutations of homesteads in Oklahoma shall apply to Greer county. This makes applicable section 22 of the act of May 2, 1890 (26 Stat., 81), where the commutation of a homestead entry for townsite purposes is sought.

Instructions relative to procedure under said section 22 of the said act are found in circular of this office, dated November 30, 1894 (19 L. D., 348).

Commutation of homestead entries under section 7 of this act, except for townsite purposes, will be governed by the provisions of section 21, act of May 2, 1890 (26 Stat., 81), which requires the payment of \$1.25 per acre and proof of compliance with the homestead law for not less than twelve months from date of locating upon said homestead.

It is expected that the above instructions will be found sufficient for

your guidance, but should any case arise which is not covered thereby, you will transmit the papers in such case to this office for instructions.

Very respectfully,

E. F. BEST,
Assistant Commissioner.

Approved:

DAVID R. FRANCIS,
Secretary.

[PUBLIC—No. 15.]

AN ACT to provide for the entry of lands in Greer County, Oklahoma, to give preference rights to settlers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person qualified under the homestead laws of the United States, who, on March sixteenth, eighteen hundred and ninety-six, was a bona fide occupant of land within the territory established as Greer county, Oklahoma, shall be entitled to continue his occupation of such land with improvements thereon, not exceeding one hundred and sixty acres, and shall be allowed six months preference right from the passage of this act within which to initiate his claim thereto, and shall be entitled to perfect title thereto under the provisions of the homestead law, upon payment of land office fees only, at the expiration of five years from the date of entry, except that such person shall receive credit for all time during which he or those under whom he claims shall have continuously occupied the same prior to March sixteenth, eighteen hundred and ninety-six. Every such person shall also have the right, for six months prior to all other persons, to purchase at one dollar an acre, in five equal annual payments, any additional land of which he was in actual possession on March sixteenth, eighteen hundred and ninety-six, not exceeding one hundred and sixty acres, which, prior to said date, shall have been cultivated, purchased, or improved by him. When any person entitled to a homestead or additional land, as above provided, is the head of a family, and though still living, shall not take such homestead or additional land, within six months from the passage of this act, any member of such family over the age of twenty-one years, other than husband or wife, shall succeed to the right to take such homestead or additional land for three months longer, and any such member of the family shall also have the right to take, as before provided, any excess of additional land actually cultivated or improved prior to March sixteenth, eighteen hundred and ninety-six above the amount to which such head of the family is entitled, not to exceed one hundred and sixty acres to any one person thus taking as a member of such family.

In case of the death of any settler who actually established residence and made improvement on land in said Greer county prior to March

sixteenth, eighteen hundred and ninety-six, the entry shall be treated as having accrued at the time the residence was established, and sections twenty-two hundred and ninety-one and twenty-two hundred and ninety-two of the Revised Statutes shall be applicable thereto.

Any person entitled to such homestead or additional land shall have the right prior to January first, eighteen hundred and ninety-seven, from the passage of this act to remove all crops and improvements he may have on land not taken by him.

SEC. 2. That all land in said county not occupied, cultivated, or improved, as provided in the first section hereof, or not included within the limits of any town site or reserve, shall be subject to entry to actual settlers only, under the provisions of the homestead law.

SEC. 3. That the inhabitants of any town located in said county shall be entitled to enter the same as a town site under the provisions of sections twenty-three hundred and eighty-seven, twenty-three hundred and eighty-eight, and twenty-three hundred and eighty-nine of the Revised Statutes of the United States: *Provided*, That all persons who have made or own improvements on any town lots in said county made prior to March sixteenth, eighteen hundred and ninety-six, shall have the preference right to enter said lots under the provisions of this act and of the general town-site laws.

SEC. 4. Sections numbered sixteen and thirty-six are reserved for school purposes as provided in laws relating to Oklahoma, and sections thirteen and thirty-three in each township are reserved for such purpose as the legislature of the future State of Oklahoma may prescribe. That whenever any of the lands reserved for school or other purposes under this act, or under the laws of Congress relating to Oklahoma, shall be found to have been occupied by actual settlers or for town-site purposes or homesteads prior to March sixteenth, eighteen hundred and ninety-six, an equal quantity of indemnity lands may be selected as provided by law.

SEC. 5. That all lands which on March sixteenth, eighteen hundred and ninety-six, are occupied for church, cemetery, school, or other charitable or voluntary purposes, not for profit, not exceeding two acres in each case, shall be patented to the proper authorities in charge thereof, under such rules and regulations as the Secretary of the Interior shall establish, upon payment of the government price therefor, excepting for school purposes.

SEC. 6. That there shall be a land office established at Mangum, in said county, upon the passage of this act.

SEC. 7. That the provisions of this act shall apply only to Greer county, Oklahoma, and that all laws inconsistent with the provisions of this act, applying to said territory in said county, are hereby repealed; and all laws authorizing commutations of homesteads in Oklahoma shall apply to Greer county.

SEC. 8. That this act take effect from its passage and approval.

Approved, January 18, 1897.

HOMESTEAD CONTEST—SETTLEMENT RIGHT—BURDEN OF PROOF.

IRWIN *v.* NEWSOM (ON REVIEW).

No right can be secured under the contest of one attacking an entry on the ground of prior settlement, in the absence of some special equity shown, if the charge as made is not established by a preponderance of the evidence.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (C. W. P.)

On July 18, 1896, you transmitted the motions of John W. Irwin and Charles H. Newsom, for review of the decision of the Department of April 28, 1896, in the case of said John W. Irwin against the said Charles H. Newsom (22 L. D., 577). Upon examination of said motions, the same, under date of September 5, 1896, were entertained by the Department for argument, as provided for by rule 114 of practice.

The land involved is the NW. $\frac{1}{4}$ of Sec. 34, T. 23 N., R. 2 W., Perry land district, Oklahoma.

On September 16, 1893, the day on which the land was open to settlement, these parties made settlement on said land.

On September 25, 1893, Newsom made homestead entry of said land.

On October 25, 1893, Irwin filed affidavit of contest, alleging prior settlement.

A hearing was had; the local officers recommended the cancellation of Newsom's entry, and that Irwin be allowed to make homestead entry of the land. Newsom appealed.

Your office rendered a decision to the effect, that you were unable to determine who was the prior settler, and thought the case should be settled between the parties, and that each of them should make entry of such legal subdivisions of the land as they may agree upon, and your office reversed the judgment of the local officers, and ordered that, in case of the failure of the parties to compromise, as suggested, within sixty days, Newsom's entry be canceled as to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the section, and the right of entry for the E. $\frac{1}{2}$ be awarded to Irwin. The Department, on appeal, said:

I agree with your office that the evidence is so conflicting that it is impossible to decide which of the two claimants was the prior settler; but I can not agree with that part of your office decision which directs that, in case of failure of the parties to agree to a compromise, the land be divided between them. I think in such a case as this, if the parties can not agree, the land should be sold to the highest bidder of the two. And your office decision was modified accordingly.

In the case of Sumner *v.* Roberts, 23 L. D., 201, it was held by the Department that

in cases where entries have been made and contests thereafter instituted upon the ground of prior settlement, unless the contestant shall successfully carry the burden of showing by proof that his settlement antedates the entry and the settlement of the entryman, the rule that the entry will stand will be adhered to. The cases in which this rule would seem to have been disregarded will no longer be regarded

as precedents to be followed. The fact of prior settlement is lawful authority for the cancellation of an entry of record, but evidence which leaves the question in doubt as to which settled first, the entryman or the contestant, and is without some degree of preponderance in favor of the contestant, will leave the entry intact. Even if the evidence should show that settlement was made simultaneously by a contestant and an entryman, this will not authorize the cancellation of an entry properly of record as was held in the recent case of *Perry et al. v. Haskins* (23 L. D., 50).

In the more recent case of *Behar v. Sweet* (24 L. D., 158), it is said:

While the ruling that a settler claiming prior settlement over one having an entry of record must establish his claim by a preponderance of evidence, will be adhered to in most cases, the Department will, when justice and equity require it, and great hardship would result were the rule applied, depart so far from the rule as to reach an equitable decision in the case.

As there does not appear to be any particular equity in favor of Irwin, both parties having shown good faith in their settlement, the rule must be applied in the present case. Your office and the Department have impliedly found that Irwin failed to show by a preponderance of evidence that he was the prior settler, and I see no reason to reverse that finding.

In his brief, the attorney for Irwin calls the attention of the Department to the fact that two of Newsom's witnesses, Shaw and Barnhisel, were impeached upon the trial of this contest, and that no recognition of this fact was made by the decision of the Commissioner, and says:

This fact, no doubt, was the turning point in the minds of the register and receiver in deciding for plaintiff and against the defendant. The testimony of these witnesses, taken in connection with the testimony of the plaintiff, Irwin, wherein he swears that he saw the defendant come on to this tract of land from the west side after he, the plaintiff, was already located thereon, should certainly leave no doubt in the mind of the reviewing court that plaintiff was first to reach the land, and that the decision of the local office should be upheld and the preference right of entry awarded to the plaintiff.

Two witnesses were called to impeach the credit of the witness Shaw—one Raybourn and one Holeman. Raybourn testified that he knew nothing of Shaw's reputation for truth and veracity. Holeman testified that it was bad. But, on the other hand, two witnesses for the defendant testified that it was good. The witness Barnhisel's credit for veracity was impeached by one witness, the said Raybourn, and sustained by the testimony of the defendant and one witness.

It was by the rejection of the testimony of Shaw and Barnhisel that the local officers arrived at the conclusion that Irwin had proved his case by a preponderance of the evidence. But I can not think that much credit should be given to the impeaching witnesses.

The decision of the Department of April 28, 1896, is, therefore, revoked and Irwin's contest dismissed.

MINING CLAIM—NOTICE—PARAGRAPH 29, MINING REGULATIONS.

GOWDY ET AL. *v.* KISMET GOLD MINING CO.

The notice of an application for a mineral patent should, in stating the names of adjacent claims, include unsurveyed as well as surveyed claims.

Failure to include in the posted and published notice of a mineral application the names of the nearest or adjacent claims, in strict accordance with paragraph 29, of mining regulations, will not render new notice necessary, where the notice as given is substantially in conformity with the practice heretofore observed under said paragraph.

Paragraph 29, of mining regulations, amended, and directions given for due promulgation thereof.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (P. J. C.)

A petition for re-review of departmental decision of May 23, 1896 (22 L. D., 624), and for the exercise of the supervisory powers of the Secretary of the Interior, has been filed in this Department by the Kismet Gold Mining Company. On examination thereof the same was entertained, and under direction of the Department a copy thereof served on W. H. Gowdy *et al.* The matter now comes up regularly for consideration.

So far as material to the question now involved, it appears that during the period of publication of notice of application for patent for the Kismet Mining claim, survey No. 8868, Pueblo, Colorado, land district, the owners of the Chicago Girl Mining claim, which it is alleged conflicts with the Kismet, did not file a protest and adverse as required by section 2325 of the Revised Statutes against the Kismet. Subsequently, Gowdy *et al.* did file a protest, in which it was alleged that the notice of application was not conspicuously posted on the Kismet, and that the published notice did not contain the names of adjoining claims.

When the matter reached the Department, three questions raised by the appeal were decided. First: That Gowdy *et al.*, having failed to file their protest and adverse as provided by statute, the Department could afford them no relief if there had been a substantial compliance with the law in the matter of giving notice; that the question as to whether proper notice had been given was one in which only the government and the applicant were interested. Second: That the notice posted on the claim was conspicuously posted in contemplation of the regulations, and, Third: That the notices posted and published did not contain the names of adjoining claims, or state where the record of the claim might be found. The order was, therefore, that the entry should be suspended, and new publication be made in conformity with the rules.

A motion for review of this decision was denied September 11, 1896 (23 L. D., 319).

It is not deemed necessary to give in full the errors assigned.

The Department has no intention of receding from the position taken in this case originally as to the status of the protestants. In the case presented at that time it was not charged or shown that they did not have notice of the application for patent, and the *ex parte* affidavits now presented, alleging that they did not have notice, come too late for consideration, under the doctrine announced in *Peacock v. Shearer's Heirs*, 20 L. D., 213, and *Tennessee Coal, Iron and Railroad Company et al.*, 23 *id.*, 28.

It is not conceived how it can be seriously contended that the ruling in the case at bar is in violation of the regulations. It is not understood that counsel on either side, either in their briefs or in the oral argument, insist on that position, but the complaint of the petitioner is that the construction placed on the regulations by the Department is contrary to the practice that has prevailed in your office, and that the rigid enforcement thereof at this time is a serious hardship on the petitioner, as well as the multitude of others who have followed the form of notice published and posted in this case, and if adhered to will cause doubt and uncertainty as to titles secured, as well as cause great expense in re-advertising. And, it is insisted, that if an unbending rule is to be announced and adhered to, those who have proceeded in this manner, and have made a substantial compliance with the regulations, should not be summarily required to republish and repost, and thus give those who have been inattentive to their own interests an opportunity to harass the applicants with adverse proceedings.

An informal inquiry at the mineral division in your office discloses the fact that a large proportion of the notices of the character under discussion are not strictly in conformity with the regulations, and some of the features might on strict construction be subject to the same criticism as the one at bar. It has been considered by your office that these notices are a substantial compliance with the regulations.

In view of this, your office, on the promulgation of the decision in this case, deemed it advisable to issue a circular to the local officers, in which was quoted paragraphs 29, 34, and 35 of the mining circular, and then following this:

By departmental decision of May 23, 1896, in the case of *Gowdy v. Kismet Gold Mining Company*, it was held that a strict compliance with said paragraph 35 will be insisted upon, and in that case republication was required by reason of the fact that the published notice failed to contain a reference to the names of adjoining or nearest claims.

In view of the fact that most published notices fail to comply in some particular with the above-quoted regulations, your special attention is called to said decision, and you are enjoined to comply with said regulations in the preparation of notices for publication.

After mature deliberation on this subject, I am convinced that there is much force in the proposition that if the rule announced by the Department in this case, if enforced, would effect a material change in

the practice theretofore prevailing in your office, which, by reason of its long standing, may be regarded as having become a rule of property, and that the summary enforcement of such rule as to pending applications, in which notice has been given under the former practice, is not only calculated to cause much confusion, but great expense, both of which should be avoided.

It is conceded on all hands that there should be a uniform practice, and that the fullest and most accurate notice should be given, so that the parties interested adversely may be able to fix the locus of the claim, and thereby determine whether or not there is any conflict. The language used in this case, and cited with approval in *Parsons v. Ellis* (23 L. D., 504), as to the necessity of this notice, meets my views.

It is not improbable that some confusion may have arisen by reason of the somewhat vague and indefinite wording of paragraph 29, and the different constructions that might be placed thereon. It will be observed that the language in regard to adjoining claims is:

The name or names of adjoining claimants on same or other lodes, or, if none adjoin, the names of the nearest claims, etc.

Before commenting on this language, it may be well to state that all official surveys of mining claims are made by a deputy mineral surveyor, who is regularly appointed by the surveyor-general of the district. He is, therefore, an officer of the land department, and as such is strictly under the highest obligations to perform his duties in accordance with instructions. Being such officer, his reports and acts must be accepted as *prima facie* true. It is upon his report, made from actual observation in the field, that the data are obtained from which the register must prepare the publication notice. The surveyor, therefore, must act impartially in making his report. His connection with the survey is only that of an officer of the Department, and any further acts, especially in connection with securing a patent, are in direct violation of his duties and his instructions. I may add that this discussion is suggested by reason of the fact that it is charged that the deputy surveyor exceeded his duties in this matter by preparing "the notices of application for patent."

Recurring now to the language quoted from paragraph 29, the difficulty of rigidly enforcing this requirement in all its detail is clearly apparent. To give the names of "adjoining claimants" would require a search of the records to ascertain who were the claimants of any such claim, which in itself entails a task that is burdensome and may be expensive, especially where there have been numerous transfers of fractional interests. And it is not clear how any better results so far as notice is concerned would be obtained by strictly construing this. It would seem as if simply giving the name of the claim would answer every purpose. The claimants would then have all the notice that can reasonably be required. It is a fact, as I am informed by your office,

that this requirement is very rarely fulfilled, and under the practice that has obtained has practically fallen into disuse.

The practice has been simply to name adjoining claims, and in this some confusion has arisen. The almost universal practice is that only claims of which official surveys have been made are named. It is true that these are the only claims of which the government, in any of its departments, has any official knowledge, but the fact may be, and not infrequently is, that claims of the greatest notoriety in the mining district may never have had an official survey, and may be near, or "the nearest claim," to that applied for. It seems to me that it is the duty of the deputy surveyor in all cases where it is practicable to do so, to give the names of such claims. As said in this case originally, it is primarily the duty of the applicant himself to give such information as he is possessed of in regard to adjoining, or conflicting claims, as he is presumed to know more about these matters than a stranger.

It is not improbable that my predecessor, in deciding this case as he did, and holding that a strict construction should be given to this paragraph, especially in regard to adjoining claims, had in view the necessity of naming all such claims and was not cognizant of the fact that the practice had almost uniformly been to include in the notices only such claims as had been officially surveyed.

It seems to me that paragraph 29 should be amended so as to remove any doubt of its meaning, and make as clear and adequate provision for future guidance as is possible. It will be readily understood that it is practically impossible to make any regulation that will cover all possible cases that may be presented. The most that can be done is to formulate such rule as will be best adapted to meet all contingencies that may arise, and leave the question as to whether there has been a compliance therewith to be determined as the emergency may be presented. The government has the mineral lands for sale to those who are entitled to the same by reason of compliance with the law. The Secretary of the Interior is clothed with power to make such rules and regulations in regard to the disposal thereof as are not inconsistent with law. The purpose of giving notice of the application for patent for mining claims is to notify all who may have conflicting locations that they may protect their interests as provided by law. With this end in view, and to make more definite what the practice should be in the future in such cases, I have had prepared the following as a substitute for the present paragraph 29:

29. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim; the mining district and county; whether or not the location is of record, and, if so, where the record may be found, giving the book and page thereof; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well-defined place on the claim; the names of all adjoining and conflicting claims, or, if none exist, the notice should so state.

Your office is directed to immediately send to the local officers a copy of this rule, with instructions that the same will be in full force and effect on and after the first day of June, 1897, and all publications made thereafter must be in conformity with this. All publications made or started prior to that date will be treated under the rule as it was interpreted prior to the original decision in this case.

I am constrained to believe that in the case at bar there was a substantial compliance by the applicants with the rules as then administered and construed, and that the decision should be modified to this extent. The order requiring republication and suspending the entry during that period is hereby revoked.

It is so ordered.

RAILROAD GRANT—INDEMNITY SELECTION—CONFLICTING LIMITS.

GRUNEWALD ET AL. v. NORTHERN PACIFIC R. R. CO. ET AL. AND
NORTHERN PACIFIC R. R. CO. v. ST. PAUL, MINNEAPOLIS AND
MANITOBA RY. CO.

An indemnity selection unaccompanied by a specification of loss is no bar to the attachment of other rights.

An unanceled pre-emption filing of record, at the date a railroad grant becomes effective, excepts the land covered thereby from the operation of the grant.

The establishment of indemnity limits on the definite location of the Northern Pacific, and action taken thereon, did not amount to a finding on the part of the Department that all the lands in said limits would be required to satisfy the grant to said company.

At the time of the filing and acceptance of the map of definite location of the St. Vincent extension of the Manitoba road, there was no reservation of lands for the benefit of the Northern Pacific outside the withdrawal on general route, and the primary limits adjusted to definite location, that would defeat the grant to the Manitoba company.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (F. W. C.)

This case is somewhat complicated, due to the many claimants to the tracts involved, August Grunewald, Peder J. Skaar and the Northern Pacific Railroad Company having each appealed from your office decision of February 2, 1895, making disposition of the lands involved as hereinafter stated.

The case seems to have arisen upon an application tendered by Grunewald on December 6, 1887, to make homestead entry covering the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lot 4, Sec. 3, T. 134 N., R. 43 W., St. Cloud land district, Minnesota.

This land is within the primary limits of the grant for the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Railway, made by act of March 3, 1871, the rights under which attached upon the acceptance of the map showing the line of definite location of the company's route on December 19, 1871. It is also within the thirty mile

or first indemnity belt of the grant to the Northern Pacific Railroad, as adjusted to the map of definite location of said road filed November 7, 1871. It was not within the limits withdrawn upon the map showing the line of general route of the said Northern Pacific Railroad.

The NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 3 had, prior to the tender of Grunewald's application, been applied for by Knudt Johnson, and Grunewald's application was rejected on account of the pending application by Johnson; from which he duly appealed to your office.

The case arising upon Johnson's application was duly prosecuted to this Department, final decision being rendered in Johnson's favor April 10, 1891.

Following this decision it appears that Grunewald tendered a second application, covering only the land in conflict with Johnson's entry, namely, the said NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$; but on July 13, 1891, he waived any claim as to the said forty, electing to stand upon his application presented in 1887 as to the said S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lot 4 of Sec. 3.

On April 5, 1893, one Peder J. Skaar tendered his homestead application for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 3. He did not allege prior settlement, but the local officers, having misconstrued Grunewald's action and supposing that he had withdrawn all claim under his application, instead of only eliminating the tract before referred to, held the application by Skaar for allowance and notified both railroad companies of such action; from which they duly appealed.

As to the claims made by the companies to the tracts involved, the record discloses that on December 2, 1873, the St. Paul, Minneapolis and Manitoba Railway Company listed the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 4 of said section 3, and on July 31, 1884, listed the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section. The last mentioned tract was selected by the Northern Pacific Railroad Company on October 29, 1883, without specification of bases, but the same was applied in the amendatory list filed April 26, 1892. The local officers rejected the attempted selection by the Northern Pacific Railroad Company for conflict with the prior selection by the St. Paul, Minneapolis and Manitoba Railway Company; from which said company duly appealed.

The record further shows that the said SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, involved in the claim made by both railroad companies and by both Skaar and Grunewald, was embraced in the pre-emption declaratory statement of F. J. Grunewald filed June 19, 1871, alleging settlement on the 7th of that month. This filing was never completed but was still of record, uncanceled, both at the date of the attachment of rights under the Manitoba grant and at the date of withdrawal and selection on account of the Northern Pacific grant.

The conflicting claims of all parties were considered in your office decision of February 2, 1895, before referred to, wherein the homestead applications of both Grunewald and Skaar were rejected as to the said SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$; the same being held to have been excepted from

the grant for the Manitoba company, and was awarded to the Northern Pacific Railroad Company under its selection, before referred to, of October 29, 1883. As before stated, this selection was not accompanied by a designation of losses as a basis therefor, and not being protected by the order of May 28, 1883, the same was no bar to the attachment of other rights. (*Northern Pacific R. R. Co. v. Miller*, 12 L. D., 428.)

The action of your office in awarding said tract to the said Northern Pacific Railroad Company is therefore reversed. This tract was, however, excepted from the grant to the St. Vincent Extension by the filing before referred to, and to that extent the holding of your office decision as against the grant for the Manitoba Company is affirmed.

Between Grunewald and Skaar, Grunewald was the prior claimant under his application presented December 6, 1887, which I find he has not waived, and said tract is awarded to him, the conflicting application of Skaar being rejected.

The tract remaining for consideration is the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 4 of said section 3.

As before stated, this tract is within the primary limits of the grant for the Manitoba Railway Company, the rights under which attached December 19, 1871, and is also within the indemnity limits of the grant for the Northern Pacific Railroad Company, on account of which application was made to select this land April 27, 1892; the same being rejected because of conflict with the Manitoba grant.

Your office decision sustains the rejection of the attempted selection by the Northern Pacific Railroad Company upon the ground that the lands were withdrawn, on account of the Manitoba grant, at the time of the presentation of the list of selections by the Northern Pacific Railroad Company.

It is urged by the company that the rights of these parties within this conflict are determined by the decision of the United States Supreme Court in the case between said companies reported in 139 U. S., page 1. It is admitted that the Department has ruled otherwise in its decision of December 4, 1895, between said companies, reported in 21 L. D., 462, but it is urged that this holding is clearly in conflict with the decision of the court.

Just what was intended to be held by the court in the case referred to is a matter of some doubt.

The lands involved in said case were all within the limits of the withdrawal upon the map of general route of the Northern Pacific Railroad Company, which withdrawal became effective before the attachment of rights under the Manitoba grant.

As stated by the court (page 17)—

The withdrawal made by the Secretary of the Interior of lands within the forty-mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific Railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises.

This would seem to effectually dispose of the claim of the Manitoba Railway Company as to such lands.

It is true that it was also stated in said opinion—

The act of March 3, 1865, as already stated, is expressly restrained from in any way interfering with any lands previously reserved by Congress or any competent authority to aid in any work of public improvement. Consequently, under that act no claim could be asserted that would in any way interfere with the grants to the Northern Pacific Railroad Company.

But I do not believe it was the intention of the court to enlarge upon the case in hand, nor do I think that it should be construed to include, as involved in this case, lands outside of the withdrawal on the general route of the Northern Pacific Railroad Company, and which were shown, upon the acceptance of the map of definite location of the Manitoba grant, to be within the primary limits of said grant, and so far as the records showed, free from adverse claims.

This was on December 19, 1871, and prior to this time, to wit, on November 20, 1871, the map of definite location of the Northern Pacific Railroad Company opposite this land had been filed.

Upon the lands reserved on December 19, 1871, the Manitoba grant could not operate, but these were only such as had been withdrawn upon the line of general route of the Northern Pacific Railroad Company and such as fell within the primary limits adjusted to its line of definite location.

As to the lands within the indemnity limits of the grant for the Northern Pacific Railroad, outside of the withdrawal on general route, what were the rights of the Northern Pacific Railroad Company?

Since the decision of this Department in the case of Northern Pacific Railroad Company *v.* Miller (7 L. D., 100), it has been uniformly ruled that the sixth section of the act of July 2, 1864 (13 Stat., 365), prohibited the withdrawal of indemnity lands on account of the Northern Pacific grant, so that there was no reservation thereof on account of the grant.

In the case in 139 U. S., 1, it is stated, on pages 8 and 9:

After a map of general route of the road of the plaintiff was filed, as above stated, and the line of the road in Minnesota was definitely fixed, the commissioner of the general land office designated, upon maps and records in his office, the limits of the lands granted by Congress to the plaintiff, according to the provisions of the act of 1864, and the above joint resolution, namely, the twenty, thirty and forty-mile limits on each side of the line of definite location, the first named being the limits of the lands in place; the second, the limits of the indemnity lands; and the third, or forty-mile limit, the limits of the further indemnity granted by the joint resolution of May 31, 1870. And upon such designation it was found that there was not in the State, within those limits, at the time of the final location of the road, an amount of lands intended by the grant of Congress for the plaintiff, not previously granted, sold, occupied by homestead settlers, pre-empted or otherwise disposed of.

Again on page 19—

As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found

in the lands within the place limits, it is sufficient to observe that all lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selection from them, for they were all appropriated.

This is urged as being, in effect, a reservation of all lands within the indemnity limits of the Northern Pacific grant in Minnesota, as against the grant under the act of 1871 for the Manitoba Company.

The language used by the court was perhaps influenced by the admissions of the companies, said case having been tried upon an agreed statement of facts.

The records of this Department show that upon the filing of the map of definite location of the Northern Pacific Railroad Company on November 20, 1871, the limits of the grant were established, the map being forwarded to the local office by letter from your office dated December 12, 1871, which letter was received December 21, 1871.

While this diagram showed the forty mile or second indemnity belt, yet the letter forwarding it to the local office does not show that, as stated by the court,

Upon such designation it was found that there was not in the State, within those limits, at the time of the final location of the road, the amount of lands intended by the grant of Congress for the plaintiff, not previously granted, sold, occupied by homestead settlers, pre-empted or otherwise disposed of.

The letter states as follows:

You will observe by reference to the act of 31 May 1870, that the additional indemnity lands therein granted are only for making up deficiency caused within their granted or 20 mile limits, by the disposal of lands in odd sections *since* the passage of the act of 2nd July 1864, and upon the contingency that such deficiency lands cannot be obtained within the 10 mile indemnity limits prescribed by the act of 2nd July 1864. Nor can the company make selection of any lands heretofore reserved for the Lake Superior or Mississippi railroad or reserved or granted for any other purpose and which were still reserved at the date of definite location of the road and map thereof filed in this office.

Therefore in the examination of any lists of lands selected by the company you will require that those in the 20 mile or granted limits and those in the 30 mile or first indemnity limits shall be presented in separate lists and you will eliminate or reject therefrom any lands to which the United States had not full title or which were "reserved, sold, granted, or otherwise appropriated, and" not "free from pre-emption or other claims or rights at the time the line of said road" was "definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office" which was 21st November 1871.

It will be seen that said letter clearly contemplated the exhaustion of the first indemnity belt before the second was to be resorted to, but makes no finding on that contingency, the action amounting only to the establishment of the limits within which selections might be made if necessary, which were ordered withdrawn, as was the practice then prevailing.

As to the lands involved in the case before the court, the decision therein made is of course binding, but in the administration of these grants the facts gathered from the records and files of the Department

are our guide, and in making disposition of the public grants we must be governed accordingly.

I am therefore of opinion that no such reservation was created on account of the Northern Pacific Railroad grant outside the limits of the withdrawal upon general route at the time of the filing and acceptance of the map of definite location of the St. Vincent Extension of the Manitoba Railroad, as would prevent the grant to the last mentioned company from taking effect.

Your office decision, in so far as it awards the tracts under consideration to the Manitoba Railway Company, is accordingly affirmed.

PATENT—INADVERTENT ISSUE—VACATION.

COOK *v.* TAYLOR.

Snit for the recovery of title will be advised where a patent, through inadvertence and mistake, is issued in contravention of departmental directions.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (J. L. McC.)

Counsel for John F. Cook has filed a motion for review of departmental decision of January 19, 1895, affirming the decision of your office, dated April 6, 1893, dismissing his protest against the delivery to William A. Taylor of patent for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, T. 6 S., R. 8 W., Las Cruces land district, New Mexico. (See 300 L. and R., 439.)

The record facts of the case are in brief as follows:

Taylor made pre-emption filing for the tract on February 16, 1884.

On August 12, 1886, Cook filed an affidavit, alleging that the land was mineral in character, and that he (the affiant) was owner of a mining claim thereon.

Taylor made final proof August 26, 1886; and on September 27, same year, was allowed to make entry of the tract in controversy.

A hearing on the affidavit was had October 30, 1886.

The matter came in due course of appeal before the Department, which, on December 24, 1891, held that the land was agricultural in character, but that the testimony failed to show that the entryman had complied with the law as to residence, improvements, and cultivation.

Your office, by letter of February 22, 1892, promulgated said decision, and stated further that Taylor would be allowed sixty days from notice "within which to submit supplemental proof showing full compliance with the pre-emption law as to residence, improvements, and cultivation, if such is the fact; otherwise his entry will be held for cancellation." No supplemental proof was ever submitted, and no motion for review was filed. The case was declared closed by your office letter of April 8, 1892.

The entry papers were filed in division "G" (the pre-emption division) of your office, with the endorsement, "Land adjudged agricultural and contest closed. Sent to R. & R. April 8, 1892." The final proof (made August 26, 1886, *supra*.) showed compliance with the pre-emption law. The testimony adduced at the hearing (had on October 30, 1886, *supra*.) was not with the entry papers. No note on the papers referred to the call made by division "N" (the mineral division) of your office, for supplemental proof. In other words, division "G" was wholly unaware of the action that had been taken by your office, the record of which was in division "N." Therefore, upon report by division "G" that decision had been rendered and the case closed, patent was issued to Taylor on May 4, 1892.

Counsel for Cook, learning of the issuance of patent, filed a protest against its delivery; but your office, by letter of April 6, 1893, held:

It is not necessary to question whether the patent in this case was issued inadvertently or not. It has been issued, signed, sealed, and recorded in this office; and this office has no further right to pass upon the validity of Taylor's entry.

From the above decision of your office Cook appealed to the Department, asking that said decision be reversed, or as an alternative, that suit be instituted, for his benefit, to set aside the patent. The Department, on January 19, 1895, held that said decision was correct, and added:

The Department has no legal authority to determine the question of a duly executed patent. It has, then, no right to consider whether the patentee ought to have or receive the patent. (*United States v. Schurz*, 102 U. S., 378.) The government is under no obligation to the petitioner respecting the relief invoked, and I am not satisfied that suit should be brought by the government to vacate the patent.

In the motion for review of the above named departmental decision, counsel for Cook earnestly contend that gross fraud and wrong were committed by the entryman, or by parties whom he allowed to make use of his name. This, however, is a matter which need not be discussed. It certainly has been shown that inadvertence and mistake were committed in issuing the patent.

In the case of *Williams v. United States* (138 U. S., 514, 517), the supreme court said:

The allegations of the bill are of fraud and wrong; but they also show inadvertence and mistake in the certification to the State; and it can not be doubted that inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to divest title acquired thereby. This is equally true in transactions between individuals and in those between the government and its patentee. . . . The facts and proceedings attending the transfer of title are fully disclosed in the bill. They point to fraud and wrong, and equally to inadvertence and mistake; and if the latter be shown the bill is sustainable, although the former charge against the defendant may not have been fully established.

The above decision of the supreme court appears to me to be clearly applicable to the case at bar.

Cook's petition asks, in substance, that the government institute suit for his benefit. But, in my opinion, he makes no showing that would justify the bringing of suit for his benefit; as the Department held in its decision of January 19, 1895, "the government is under no obligation to the petitioner respecting the relief invoked." Therefore the motion for review must be denied.

In view, however, of the inadvertence and mistake committed by your office in issuing the patent in question in contravention of the departmental decision directing that Taylor's claim should not be allowed until he had furnished proof of compliance with the pre-emption law, you are hereby directed to prepare the record in the case for submission to the Department of Justice with a view to institution of suit to set aside said patent.

PRACTICE—WAGON ROAD GRANT—SETTLEMENT CLAIM.

WATSON *v.* THE DALLES MILITARY WAGON ROAD CO.

The advancement of cases on the docket in the General Land Office, is a matter resting in the discretion of the Commissioner, and will not be interfered with by the Department unless an abuse of discretion appears.

Mere occupation or use of a body of unsurveyed public land of indefinite area, without intent to acquire title to the particular portion thereof in controversy, is not such an appropriation of that portion as to except it, or the sub-division of which it is a part, from the operation of a wagon road grant.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (E. B., Jr.)

I have considered the appeal of Samuel J. Watson from your office decision of August 31, 1896, in the case of said Watson against The Dalles Military Wagon Road Company, involving the NE. $\frac{1}{4}$ of section 25, T. 20 S., R. 46 E., Burns, Oregon, land district.

Watson claims the land under his homestead entry No. 511, therefor, made January 15, 1894; said company claims it under the grant of February 25, 1867 (14 Stat., 409), to the State of Oregon, to aid in the construction of the said wagon road. This case was previously before the Department on appeal by Watson, and a hearing was then ordered March 6, 1896, to determine whether there had been such appropriation of the land under the settlement laws as to except it from the operation of the grant. The hearing was held in May, 1896, and the case now again reaches the Department in regular course of proceeding.

The land is within the primary limits of the said grant, and unless duly reserved or otherwise lawfully appropriated, the right of the company attached thereto upon the definite location of the line of the road November 1, 1869 (*McDowell v. The Dalles Military Wagon Road Co.*, 22 L. D., 599). Your office held, in effect, that the land was not so reserved or appropriated, that the right of the company attached thereto on the date last mentioned and that Watson's entry should be canceled.

The contentions of Watson on appeal may be reduced to two, viz: first, that your office erred in deciding the case "within twelve days after the arrival of the record, in violation of Rule 73 of the Rules of Practice;" and second, in not holding that the land was so appropriated by settlement thereon of one Eli Keeny, as to except it from the operation of the grant.

It appears that the record reached your office August 19, 1896, and that the case was therefore decided by your office on the twelfth day after the arrival of the record. The Rule of Practice referred to is as follows:

After the Commissioner shall have received a record of testimony in a contested case, thirty days will be allowed to expire before any action thereon is taken, unless, in the judgment of the Commissioner, public policy or private necessity shall demand summary action, in which case he will proceed at his discretion, first notifying the attorneys of record of his proposed action.

The advancement of cases in your office is discretionary with the Commissioner and will not be interfered with by the Secretary unless the discretion is shown to have been abused; and the proceeding for the correction of any alleged abuse of discretion is by certiorari and not by appeal (*Ex parte* Frank Quinn, 9 L. D., 530, and *Taylor v. Rogers*, 12 L. D., 694). Appellant's first contention is not therefore well taken.

The testimony shows that about the fall of 1865 or spring of 1866 two men, named respectively Bruce and McFarland, enclosed a tract of land of from eighty to two hundred and twenty-five acres, according to various estimates, on the west bank of the Owyhee river, some distance below its junction with Snake river in said State, and occupied and used the same chiefly as a hay ranch. A brush fence on three sides and the river on the fourth formed the enclosure. Said township was then unsurveyed. It was not surveyed until August, 1875. The precise position of this enclosure with reference to the subdivisions of the subsequent public survey does not clearly appear. According to a diagram offered in evidence, based upon the testimony of one of appellant's witnesses, the ranch embraced nearly all of the SW. $\frac{1}{4}$ of said section, part of the NW. $\frac{1}{4}$, about thirty-five acres in the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and about forty acres in the NW. $\frac{1}{4}$ of section 36. Said Keeny succeeded Bruce and McFarland in the occupancy of the ranch about July, 1867, and continued there until about 1872. According to appellant's witnesses, some hay was cut by Keeny on one or two occasions along the north side of said enclosure, upon ground now claimed to have been within the same and part of said NE. $\frac{1}{4}$. No other use thereof by Keeny or his predecessors is alleged or shown.

From the official plat and field notes of the public survey it appears that the Owyhee River enters said section 25 a few rods east of the southwest corner thereof and flows northeastward through it, passing out of the section about the same distance south of the northeast corner, and that its position in said section is considerably northwest of the position shown on said diagram. This correction of the position

of the river in said section, taken in connection with the testimony generally, would leave only very few acres in the SE. $\frac{1}{4}$ of the said NE. $\frac{1}{4}$, if any, within the boundaries of the ranch, even upon the basis of the enlarged acreage shown in the said diagram, which basis, however, as already indicated, is not correct. The buildings used as dwellings by these ranchmen were on the extreme western portion of the ranch and only a few yards within the brush fence. It is not clear, therefore, from all the evidence, that any portion of said NE. $\frac{1}{4}$ was embraced in the said ranch as occupied by the parties named, or any of them. Subsequent to the occupation of Keeny it would appear that the ranch was considerably enlarged, embracing from six hundred to eight hundred acres, which fact is immaterial except to account to some extent for the uncertainty in the minds of the witnesses as to its boundaries at and prior to November 1, 1869, when the company's rights under its grant attached.

It is not shown that any of the parties ever claimed or intended to claim said ranch or any part thereof under the pre-emption or homestead laws or to take it for the purpose of making thereon a home for themselves. It is not shown that Bruce or McFarland had any of the qualifications of a pre-emptor or homesteader, nor that Keeny was competent to exercise either a pre-emption or a homestead right at any time during his occupancy of said ranch. He was apparently a citizen of the United States and the head of a family, but none of the witnesses knew whether he had or had not exercised homestead and pre-emption rights. He could exercise such rights but once. It is familiar doctrine that in the absence of affirmative showing that an alleged settler on the public lands had the necessary qualifications of a settler, his occupancy thereof would not except the same from the operation of any such grant as is herein relied upon.

Even if it should be conceded, however, that Keeny had all the qualifications of a settler, the fact that appellant has not shown, as already indicated, that Keeny occupied any portion of the land in controversy under any claim of homestead or pre-emption settlement, would be fatal to his second contention. Mere occupation or use of a body of unsurveyed public land of indefinite area, without intent to acquire title to the particular portion thereof in controversy, directly proven or to be reasonably presumed from acts done in the premises, is not such an appropriation of that portion as to except it, and much less the larger legal subdivision of which it is a part and which Watson claims, from the operation of such a grant. The testimony most favorable to appellant, that of his witness Harris, does not tend to show that said ranch covered more than thirty-five or forty acres, at the utmost, of the land in controversy, and that testimony—from which the diagram above referred to was made—is shown to be largely guesswork and unreliable as to the size and precise location of the ranch.

The decision of your office is affirmed in accordance with the foregoing views. Watson's entry will be canceled.

PRIVATE CLAIM—ACT OF MAY 26, 1830.

FRANCISCO FERREIRA.

Private claims decided and recommended for confirmation by the commissioners, and referred to Congress by the Secretary of the Treasury January 14, 1830, are confirmed by section 1, act of May 26, 1830.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (P. J. C.)

The Department is in receipt of your office letter ("G") of January 5, 1897, in reference to the private claim of Francisco Ferreira to certain islands—or keys—in the southern part of Florida.

The attention of your office recently has been brought to this matter, as stated in your said office letter, by one Horatio Crain, who claims "present ownership of a portion of the land embraced in the claim, and desires a patent."

This matter has been the subject of consideration by your office, from time to time, for more than three-quarters of a century and is still unsettled. The purpose of your office letter is to have the matter finally settled so that those claiming the lands may secure title thereto. The facts disclosed are as follows:

The petition of Francisco Ferreira to the governor of Florida is as follows:

[Translation.]

To his excellency the Governor:

Don Francisco Ferreyra, of this city; to your excellency respectfully sheweth: That he is desirous of dedicating himself to the cultivation of the land, and, with some slaves he owns, establish himself on some place that may be advantageous, whenever he can collect funds for the purpose of obtaining hands; and as the services he has rendered, and is still rendering, to the country with his person and property, and the great losses he has suffered during the revolution of this province, are well known to your excellency, he therefore prays that you will be pleased to grant him in absolute property a key situated among those called the Florida Keys, and is known by the name of Key Bacas, and four small islands which are situated in the vicinity thereof, that he may, when he collects sufficient funds, proceed to form his establishment thereon; which may, at the same time, be very useful for those who have the misfortune of being shipwrecked near said place—a favor he hopes to obtain from the goodness of your excellency.

Saint Augustine, January 4, 1814.

FRAN'CO FERREIRA.

On the following day, January 5, Kindelan ordered: "Let there be granted to him in absolute property the Key Bacas and the small island adjacent, without injury to a third person." (Ex. Doc. No. 58, 44th Cong., 1st Session, House of Representatives.)

Congress, on May 8, 1822, passed an act (3 Stat., 709), "for ascertaining claims and titles to land within the Territory of Florida," which provided for the appointment of three commissioners by the President, before whom every person, or their heirs, etc., "claiming title to lands

under any patent, grant, concession," etc., "dated previous to January 14, 1818," shall file his claim, "setting forth, particularly, its situation and boundaries, if to be ascertained;" that the commissioners shall examine and determine on the validity of said patents, etc., but all claims must be presented prior to May 31, 1823. Section 5 defines the powers of the commissioners, and, among others, is this:

They shall not have power to confirm any claim or part thereof where the amount claimed is undefined in quantity, or shall exceed a thousand acres; but in all such cases shall report the testimony, with their opinions, to the Secretary of the Treasury to be laid before Congress for their determination.

By act of March 3, 1823 (3 Stat., 754), Congress amended the act above quoted, by providing that the commissioners therein provided for should confine their labors exclusively to West Florida, and a new commission of three was provided for East Florida, and within that district, shall "possess all the powers given by, perform all duties required, and shall, in all respects, be subject to, the provisions and restrictions of the act of the eighth of May," *supra*, "except so far as the same is altered or changed by the provisions of this act." Section 2 of this act provides, that claims in favor of actual settlers at the time of cession are to be confirmed, where the claim does not exceed three thousand five hundred acres;

and said commissioners shall have power, any law to the contrary notwithstanding, of deciding on the validity of all claims derived from the Spanish government in favor of actual settlers, where the quantity does not exceed three thousand five hundred acres.

Section 5 provided that claims not filed on or before December 1, 1823, shall be held to be void and of no effect.

By act of February 28, 1824 (4 Stat., 6), the time was again extended till January 1, 1825, and so much of the former act as made void those claims not filed before December 1, 1823, was repealed. Section 3 of this act declares that no person shall be deemed an actual settler within the provisions of the prior act,

unless such persons, or those under whom he claims title, shall have been in the cultivation, or occupation, of the land, at and before the period of the cession.

It may be remarked, at this stage of the recital of facts, that it is fairly deducible from the petition of Ferreira that he was not at the date of the grant or cession an actual settler on the land as defined by the statute just quoted. Hence, his claim would not come within the provision of the statute authorizing the commissioners to confirm the claims of actual settlers where they did not exceed three thousand five hundred acres, but would be controlled by the provisions of the first act, which limited their confirmations to one thousand acres, provided, of course, his claim exceeded the latter amount.

In Volume 3, American State Papers—Duff Green—commencing on page 658, is found the "Minutes of the Board of Florida Land Com-

missioners." It is recited that they assemble for action, under the acts of May 8, 1822, and March 3, 1823, for "ascertaining claims and titles to lands within the district of East Florida." In these minutes, under date of November 17, 1823, is found this:

Francis Ferreira presented his memorial to this board, praying confirmation of title to an island known by the name of *Bacas*, and four small islands adjoining, situated to the south of Cape Florida, and known as one of the Florida Keys, with a concession to memorialist made by Governor Kindelan, and dated the 5th of January, 1814; which are ordered to be filed.

This, so far as my research can be extended, is the first presentation of this claim.

Pursuing this subject in its chronological order, it is found that Congress from time to time extended the period within which claims should be presented to the boards. By the act of February 8, 1827 (4 Stat., 202), it was provided that all records, etc., in the possession of the "secretary of the late board" be delivered to the register and receiver of the district of East Florida, and it was made their duty

to examine and decide all claims and titles to land in East Florida, not heretofore decided by the late board of commissioners, subject to the limitations, and in conformity with the provisions of the several acts of Congress providing for the adjustment of private land claims in Florida.

In pursuance of this law the local officers, in January, 1829, submitted their final report to the Secretary of the Treasury, which was transmitted by him to the President of the Senate, January 14, 1830 (Vol. 5 Am'n St. P'rs, etc. 327). On page 420 of the same volume, and being a part of the said report, will be found "abstract No. 15 of sixteen cases sent back from Washington to the register and receiver for their report." No. 13 is that of Francis Ferreira; "date of concession January 5, 1814;" acres blank; conceded by Kindelan, "Royal order, etc., 1790," and described as Key Bacas. In referring to this claim, they say, in a note:

No. 13—Francis Ferreira, clm't.—Key Bacas. The grant to this land was made by Governor Kindelan, in January, 1814, for services. The testimony is filed in the Land Office at Washington. It was recommended for confirmation on the 19th June, 1824.

I do not find any record in the American State Papers warranting the statement here made that this grant "was recommended for confirmation on the 19th June, 1824." This is the date of the confirmation of the Key Vacas, an entirely different grant, although to a person by the same name. Key Vacas is described as containing "14 acres without the old lines, and about one and three-fourths miles north of the City of St. Augustine," while Key Bacas is located in the Florida Keys at the extreme south of the State. It may be possible that the local officers in this report have confused the two grants.

It appears that in 1874 one E. C. Howe, claiming to be one of the heirs of Charles Howe, who held the property by mesne conveyances

from the original claimant, made inquiry of your office as to the status of the claim, and he was informed, by Mr. Commissioner Burdett,

that it had always been held by this (your) office that the sixteen claims that had been omitted from the Commissioner's report, which was submitted to Congress February 21, 1825, had never been confirmed.

Howe then applied to have the claim confirmed under act of June 22, 1860 (12 Stat., 85), as extended and amended by acts of March 2, 1867 (14 Stat., 544), and June 10, 1872 (17 Stat., 378).

Action was evidently taken under these acts, for it appears by Ex. Doc. No. 58, *supra*, that Mr. Secretary Chandler, on January 6, 1876, transmitted "a report on the private claim of Charles Howe's legal representatives" to the Speaker of the House of Representatives, in the following language:

Pursuant to the requirement of the fourth section of the act approved June 22, 1860, (12 Stat., 85,) I have the honor to transmit herewith the report of the register and receiver of the land-office at Gainesville, Fla., acting as commissioners under said act, on the private land-claim of the legal representatives of Charles Howe, deceased, together with letter of the Commissioner of the General Land-Office, of the 28th ultimo, approving said report.

So far as disclosed, nothing was ever done by Congress on this, except to print the report.

Thus the matter seems to have rested, until December 8, 1896, when Horatio Crain addressed your office relative to the same. In your said office letter to the Department as a result of this letter from Crain, it is said:

I do not agree with the views held by Commissioner Burdett, that it was doubtful as to whether Ferreira's claim has been confirmed by the act of May 28, (26,) 1830. . . . I am of the opinion that the claim of Francisco Ferreira, having been recommended for confirmation, was duly confirmed by the first section of the act of May 26, 1830 (4 Stat., 405), and that no further action is necessary on the part of Congress.

The first section of the act of May 26, 1830, reads as follows:

That all the claims and titles to land filed before the register and receiver of the land office, acting as commissioners, in the district of East Florida, under the quantity contained in one league square, which have been decided and recommended for confirmation, contained in the reports, abstracts and opinions, of said register and receiver, transmitted to the Secretary of the Treasury, according to law, and referred by him to Congress, on the fourteenth day of January, one thousand eight hundred and thirty, be, and the same are hereby confirmed, etc.

It is clear that this act refers to such claims as were filed before the register and receiver,

which have been decided and recommended for confirmation, contained in the reports, abstracts and opinions of said register and receiver,

and referred to Congress by the Secretary of the Treasury January 14, 1830. This claim was referred to Congress by the Secretary of the Treasury on said date, as appears by abstract No. 15, and it was stated by the local officers that "it was recommended for confirmation on the

19th June, 1824." The local officers evidently reported the fact only of the recommendation by the former board, and do not make any recommendation themselves. While I am unable to find in the minutes of the board, contained in American State Papers, etc., any official record of its recommendation for confirmation, yet there is in the Ex. Document No. 58, this:

B.—Decree.

FRANCIS FARREIRA } Claim to an island called Key Bacas and four small islands
 vs. } adjacent.
 THE UNITED STATES. }

In this case the claimant produced a concession made to him by Governor Kindelan for the island set out in this memorial, dated January 5, 1814, the quantity undefined:

The board not being authorized to decide finally on claims of this nature, but conceiving that the claimant has made out an equitable title for the lands which he claims, it is therefore recommended to Congress for confirmation.

JUNE 19.

I, Antonio Alvarez, keeper of the public archives of East Florida, do hereby certify the following to be a true and correct extract from the registry of claims kept by the board of land-commissioners, (book A, page 250,) now on file in my office; according to law.

Witness my hand and seal of office, at the city of Saint Augustine, Territory of Florida, the twenty-fourth day of March, A. D. one thousand eight hundred and thirty-six.

ANTONIO ALVAREZ, *K. P. A.*

If the copy of this judgment is to be accepted as authentic, and I see no reason why it may not, then the statement of the local officers would seem to be verified.

The area contained in the grant is "under the quantity contained in one league square," as determined in Teresa Rodriguez (18 L. D., 64), being, as reported by the local officers and Commissioner Burdett, 4,144.15 acres.

I therefore concur in the conclusion of your office, as announced in said letter of January 5, 1897, and suggest that appropriate action be taken by your office to issue patents to the proper party or parties.

JUDGMENT OF CANCELLATION—APPLICATION TO ENTER.

GUILLORY *v.* BULLER.

Under a decision holding an entry for cancellation, if within a specified period the entryman fails to comply with certain requirements, or appeal, the judgment becomes final at the expiration of said period, if the requirements of said decision are not complied with, and no appeal is taken, and the land involved is thereafter open to entry by the first legal applicant; but during the time so accorded to the entryman an application to enter said land should not be received.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (C. J. G.)

This controversy is in relation to the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 6, T. 4 S., R. 2 E., New Orleans land district, Louisiana.

The record shows that Arcius Vidrine made adjoining farm homestead entry for this land on December 14, 1881, claiming as his original farm the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, same section, township and range. It seems that Vidrine had lived on his original farm since 1876. He continued to reside thereon until November 1, 1884, when, as he claims, finding opportunity to sell at a good price, he sold his original farm and moved away. He remained away until March 10, 1890, when he returned and established residence on the adjoining farm.

On April 25, 1892, he submitted final proof in support of his adjoining farm entry. He claims to have believed that he would receive credit for the time he lived on his original farm after making his adjoining farm entry. Vidrine's said final proof was rejected by the local office, and he appealed to your office. In your office letter of July 27, 1893, you decided as follows:

In adjoining farm homestead entries the party must fulfil the requirements of the homestead law as to residence and cultivation, but will not be required to remove from the land which he originally owned in order to reside upon and cultivate that which he thus acquires under the homestead law, since the whole 160 acres are considered as containing one farm or body of land, residence upon and cultivation of a portion of which is equivalent to residence upon and cultivation of the whole. Mr. Vidrine having disposed of his original farm, his adjoining farm homestead entry must fall as it has no basis on which to stand. Mr. Vidrine could not be allowed credit for residence on his original farm for the three years (nearly) from December 14, 1881, to November 1, 1884, and add the same to the two years residence upon and cultivation of the land from March 10, 1890, to April 25, 1892.

By your said office decision of July 27, 1893, Vidrine was allowed to make application to have the character of his entry changed to that of one for settlement and cultivation, and when he could show five years residence upon and cultivation of this land as required by law, he would be allowed to submit final proof. He was informed through said decision that in the event of his failure to appeal therefrom or make application for change of entry, the proper steps would be taken looking to the cancellation of the same.

Vidrine never appealed from your said decision, and he claims that it was impossible for him to comply with the requirements therein as to change of entry. He thereupon began looking about for some one to whom he could sell the improvements he had placed on the land. He found a purchaser in the person of Arcade Buller to whom he disposed of his improvements for the sum of about \$450.

In the mean time, on September 1, 1893, John L. Guillory filed an application dated August 30, 1890, for entry of said land. He made the proper deposit of fees, the receipt of which was duly acknowledged on same date.

On November 6, 1893, Arcade D. Buller filed his application dated September 25, 1893, for the same tract, accompanied by the proper deposit. It is stated by Buller's counsel that his application was presented at the local office prior to that date, but that the same together

with the fees was returned. This action was attributed to the change of officers at the New Orleans Office which occurred about that time. The indorsement, however shows that Buller's application was filed on November 6, 1893.

Neither of the above applications was rejected upon presentation.

On March 3, 1894, a relinquishment by Vidrine was filed in the local office bearing the note in type-writing, "To be used in the matter of homestead application of Arcade D. Buller for the land relinquished by Vidrine, and applied for at the same moment by Buller." It seems that this relinquishment was made September 5, 1893, but was not filed until above date. In view of said relinquishment, the local office on April 7, 1894, rejected the application of Guillory, for the reason that the tract applied for was embraced in the homestead entry of Arcade D. Buller.

Guillory appealed to your office, and by letter of May 22, 1894, you affirmed the action of the local office, and in said decision you stated as follows:

Since an application to enter land which is not subject to entry at the time the application is made, confers no rights upon applicant (*Hall et al v. Stone*, 16 L. D., 199), and as the applications of Guillory and Buller should have been rejected upon presentation, they could not be recognized as pending applications at the date of Vidrine's relinquishment. Therefore, Buller, by renewing his application (as appears from the note on Vidrine's relinquishment), on March 3, 1894, appeared as the first legal applicant, and it was proper that his entry was allowed.

This decision was on the principle that Vidrine's adjoining farm homestead entry was still alive, and so remained until March 3, 1894, when cancelled for relinquishment; hence, no rights were gained by filing applications prior to that date.

Under date of June 21, 1894, resident counsel for Guillory filed in your office a motion for review of your said office decision of May 22, 1894. The principal errors assigned were substantially as follows: In holding that Buller had the prior legal application on file when the land became vacant; in not holding that the land was public and subject to entry when Vidrine's final proof on his adjoining farm homestead entry was rejected by your letter of July 27, 1893; in allowing Buller's entry upon his application of September 25, 1893, when the record shows that he did not make a new application on March 3, 1894.

Resident counsel for Guillory contends, among other things, that if the land was not public until the relinquishment was filed, then Buller's entry was illegal, the application being made prior thereto, citing *Mills v. Daly* (17 L. D., 347); that, upon the theory that a new application on the part of Buller was necessary, it is insisted in the absence of an appeal by Vidrine or an application on his part for change of entry as allowed by the action of July 27, 1893, said decision of July 27, 1893, was a final judgment and took effect from that date, citing *Perrott v. Connick* (13 L. D., 598).

By your office decision of September 6, 1894, you reiterated and reasserted your conclusions of May 22, 1894, but modified said decision to the extent of saying that in the presence of the adverse claim of Guillory, your office could not allow Buller to perfect his entry by now filing an affidavit, as it were *nunc pro tunc* showing that he was qualified on March 3, 1894, to make entry. You therefore directed the local office to call upon the respective parties and allow them thirty days in which to file new applications and new affidavits, for entry of said tract. On receipt of such applications within the time prescribed, they were to be treated as simultaneously made, and the local office was then to allow said parties to bid for the privilege of perfecting entry. The right of entry was to be awarded to the highest bidder, and the local office was to allow his entry of record.

As heretofore shown, your office held that the land in question was reserved from entry until the filing of Vidrine's relinquishment on March 3, 1894. This was error. Any rights that Vidrine may have had ceased upon his failure to appeal from your office decision of July 27, 1893, or to change his entry in accordance with the instructions contained therein. He had sixty days within which to comply with the terms of said decision. Upon his failure to do so the said decision became a final judgment, and the land thereby became subject to entry by the first legal applicant. Within that time and to that extent your office was correct in holding that the land was not subject to entry, and that applications made within that time should have been rejected.

It will be observed that Guillory's application was filed September 1, 1893, which was prior to the expiration of the time allowed Vidrine by your office decision to exercise his alternative right of appeal or to change his entry, which said decision did not of necessity become a final judgment until the expiration of sixty days from the date it was rendered. Guillory never renewed his said application. Buller's application was filed November 6, 1893, after the expiration of the sixty days, when the judgment of your office had become final and the land thereby released from any rights Vidrine may have had, and subject to entry. Hence, the application of Buller to enter the land having been made after it became subject to entry, his rights are superior to those of Guillory.

As previously set out herein, counsel for Guillory contends that, under the ruling in the case of *Perrott v. Connick* (13 L. D., 598), in the absence of an appeal by Vidrine on an application on his part for change of entry, your office decision of July 27, 1893, was a final judgment and took effect from that date. This contention is not well made, for the reason that, as heretofore shown, your said office decision could not become a final judgment until the expiration of the time allowed Vidrine to appeal or change his entry. Hence, the doctrine announced in *Perrott v. Connick*, *supra*, can not be made to apply to this case.

At the same time, no rights could be secured by filing applications to

enter during the period allowed Vidrine to appeal or change his entry, as the land was thereby reserved subject to his rights, and no such applications should have been received. The proper procedure in such cases is stated in the recent case of *Cowles v. Huff et al.* (24 L. D., 81), as follows:

That no application to make entry will be received by the local officers during the time allowed for appeal from a judgment of cancellation of an entry; but in all such cases the land involved will not be subject to entry or application to enter until the rights of the entryman have been finally determined, until which time no other rights, inchoate or otherwise, can attach.

It has been determined that your decision of July 27, 1893, was a judgment of cancellation, which became final upon Vidrine's failure to appeal within the time allowed. No application to enter could attach within that time. Buller was the first to file after the land became subject to entry; hence, he was the first legal applicant.

In support of the holding that your office decision of July 27, 1893, was a judgment of cancellation, it will be observed that by said decision Vidrine was served with notice of what he might expect from your office. He was presented with the alternative of changing his adjoining farm entry to a settlement entry, to be followed by residence and cultivation sufficient to make a five years' showing, or in the event of his failure to do this, or to appeal from your said decision, he was informed that proper steps would be taken looking to the cancellation of his entry. Vidrine took no action. The language of your said office decision is construed to be equivalent to a judgment holding Vidrine's entry for cancellation, unless within sixty days from notice he should comply with the requirements contained in said decision.

It will thus be seen that there is no middle ground for these parties as suggested in your office decision of September 6, 1894. Buller's application must either be accepted or rejected. He either has rights sufficient to entitle him to entry of this land or he has none. Any rights he may have were secured by his application filed November 6, 1893. If he secured any rights whatever by his said application, they were such as to entitle him to the land *in toto*, and not merely such as would entitle him to an equal bid for it with some other party.

Your decision of September 6, 1884, is accordingly so modified as to allow Buller's application to make entry, and the same will be made of record.

INDIAN LANDS--ALLOTMENT--TRUST PATENT--CANCELLATION.

HULL ET AL. v. INGLE.

The issuance of a trust patent on an Indian allotment terminates the jurisdiction of the Secretary of the Interior over the lands covered thereby as public lands, and he consequently has no authority, in the absence of special statutory provision, to cancel such patents for the purpose of correcting erroneous allotments.

The authority conferred upon the Secretary of the Interior by the act of January 26, 1895, to cancel a trust patent, in order to correct a mistake in the allotment, is limited to cases in which the alleged error is one of those specifically named in said act.

Assistant Attorney-General Lionberger to the Secretary of the Interior,
February 15, 1897. (W. C. P.)

On October 12, 1896, Acting Secretary Sims referred to me certain papers in the matter of Sylvester Hull *et al. v. Jane Ingle*, involving the NE. $\frac{1}{4}$ of Sec. 24, T. 37 N., R. 5 W., M. D. M., California, with a request for an opinion thereon. Afterwards on November 20, 1896, the papers in regard to hearings ordered on certain approved Indian allotments involving a similar question were also referred to me for an opinion. Still later on December 3, 1896, the papers in the matter of an allotment to Lizzie Bergen involving a similar question were also referred to me for an opinion. The Commissioner of the General Land Office has since requested that all these matters be considered together.

The question involved is as to the effect of a trust patent issued upon an Indian allotment under the provisions of the act of February 8, 1887 (24 Stat., 388), and the act amendatory thereof approved February 28, 1891 (26 Stat., 794) and the jurisdiction of this Department to cancel the same.

In the case of Hull *v. Ingle* the Commissioner of the General Land Office recommended that a hearing be ordered to determine the character of the land with a view to the cancellation of Ingle's trust patent, if it should be determined it was mineral in character as alleged by Hull, reference being made to the act of January 26, 1895 (28 Stat., 641), as authorizing such action. The papers being referred to this office for an opinion my predecessor on June 8, 1896, submitted his opinion holding that the case did not come within the purview of said act of 1895.

The Commissioner resubmits the matter and states his reasons for so doing as follows:

After a careful consideration of the matter I feel constrained to direct attention to the fact that the Hon. Assistant Attorney General, in rendering the opinion referred to omitted to consider what is regarded by this office, with all deference, as the determining point in the matter, viz: the particular nature of the so-called patent in question, and it is in view of this that I venture to again direct attention to the case.

This is, as the Commissioner of the General Land Office says, a very important question, but it must be borne in mind that the interest of

the Indians, who are so often described as the wards of the government, is as much entitled to consideration as is that of white claimants or of the government itself.

The allotment act contains the following provision in regard to patents:

That upon approval of the allotments provided for in this act by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever.

The Commissioner of the General Land Office takes the position that the title held by an Indian allottee under the first or trust patent is an equitable title only, that an entryman under the public land laws after the issuance of final receipt holds also an equitable title, that this Department has authority to cancel an entry illegally allowed and therefore it must have authority to cancel an allotment trust patent illegally allowed. In other words, his position is that the Indian allottee stands in the same position during the trust period of twenty-five years as does an entryman during the period between the date of final entry and the issuance of patent thereon. If this theory is to prevail the Indian allottee is placed at a great disadvantage as compared with the citizen entryman. In the one case the period within which the title remains subject to attack is the full trust period of twenty-five years while in the other it is theoretically nothing and practically but a comparatively short time. This is not the position that one whose interests the government is bound to protect in all points should be forced to occupy.

Another fact that should be taken into consideration in this matter is, that allotments are made by the agents of the government. The allotment act contains the following provision:

That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made under such rules and regulations as the Secretary of the Interior may from time to time prescribe.

While this provision refers specifically to allotments to reservation Indians, yet in the following section it is provided that allotments to non-reservation Indians shall be made "in quantities and manner as provided in this act for Indians residing upon reservations." The responsibility is at least as strong upon the government as upon the allottee to see that the allotment is proper in all respects. While these facts may not go directly to the question of the authority of this Department, yet they should be borne in mind in the discussion of

that question because they show the peculiar position of the government in its relationship to the allottee. In these matters the government is the grantor, also the trustee, and at the same time it is the guardian of all the interests of the allottee as an Indian.

The policy of inducing Indians to break up their tribal relations and to take lands in severalty was adopted as a means of advancing them towards civilization. It was recognized, however, that they would not have an adequate conception of the value of property and would not in all probability be able to preserve their holdings if left unrestrained, and hence the salutary provision that the United States would hold the land in trust for the period of twenty-five years. The provision was made solely in the interest of the Indian, and to secure him in the possession of the land until he should become able to protect himself therein.

The act of July 4, 1884 (23 Stat., 96), provided that Indians who had located or should locate upon the public lands might avail themselves of the provisions of the homestead law "as fully and to the same extent as may now be done by citizens of the United States," and provided for patents in the same words as were afterwards used in the allotment act of 1887 hereinbefore quoted. It would certainly be most unjust and inequitable to the Indians to hold that their title under the homestead law was subject to attack before this Department for twenty-five years longer than the title of a citizen might thus be attacked, yet the language in the act of 1884 conferring upon Indians rights under the homestead law is the same as that of the allotment act, and if it be held that this Department has authority to cancel patents issued under the latter act it must necessarily be held that it has authority to cancel those issued under the homestead law. The manifest injustice in this holding is of itself a strong argument against its adoption.

These allotment or trust patents have been considered by this Department as having the same effect as other patents in ousting the Department of jurisdiction in the premises. The fact that they have been thus treated is an argument in favor of the continuance of the rule. That is, no change should be made unless it be clear that this practice is radically wrong.

We have also a legislative declaration as to the extent of authority in the Secretary of the Interior in the premises in the act of January 26, 1895, *supra*, conferring upon him power to cancel such patents in those cases where a double allotment has been made or a mistake has been made in the description of the land. If it had been understood that the power to cancel a patent, wrongly issued, existed, it would have been unnecessary to enact the law of 1895. While the fact that Congress took this view of the matter should not be considered as decisive of the question, it is entitled to consideration, and should be given weight as an argument in support of the position that the Secretary had not, before that, authority to cancel such patents even though

illegally issued, and has not now authority in that direction beyond that conferred upon him by said act.

The provision that these lands should be held in trust for the Indian was made for his benefit and protection. In his opinion of July 27, 1888 (19 Op. Atty. Gen., 161), Acting Attorney General Jenks, referring to said provision, uses the following language:

But Congress has not deemed it safe, in making the Indian a freeholder, to give him at once the same control over the land as other freeholders enjoy. The legislation above mentioned deprives the Indian settler of the right of conveying or encumbering the land, in any way, for a period stated, or provides that it shall be held by the United States for a given time in trust for the sole use and benefit of the Indian, and, at the expiration of such time, be conveyed to him by patent.

Further on in said opinion he says:

It is true that the Indian who gives up his wild life has taken a great step in the direction of becoming a citizen, but his situation as a member of a civilized community exposes him to dangers which call for the fostering care and protection of the government, without which the attempt to make him a useful citizen must fail necessarily. It is only after a considerable period of probation that he can be educated to understand the dignity and responsibilities that belong to citizenship and the ownership of property, and it is to protect him, while receiving this education, that congress has placed the above mentioned restraints upon his property rights.

If it be true, and it will not be seriously disputed, that this provision was made in the interest and for the benefit of the Indian, it should not be so administered as to operate to his disadvantage. It is the duty of those charged with the administration of such a law to so construe it as to most certainly attain the end contemplated, while, at the same time doing no violence to the language used. If the duty devolving upon the trustee in this case were simply that of executing the patent at the end of the specified period, the trust would be a simple or dry one, and it might perhaps be properly held that the full legal title vested at once in the *cestui que trust*. The trustee here has, however, other and further duties in connection with the trust. This fact is clearly set forth by Attorney General Garland in his opinion of January 26, 1889 (19 Op. Atty. Gen., 232) as to the right of the allottee to sell and cut timber standing upon the lands allotted to him. After mentioning the provisions of the act of February 8, 1887, *supra*, as to the issuance of two patents he uses the following language:

Prior to the issuing of the second patent the United States is to act as trustee of the lands. This relation as to the lands is substituted for the guardianship heretofore exercised over the tribe. For twenty-five years, or longer, the obligation exists to see that the intent of the law shall be faithfully carried out, and no unlawful waste committed either by the *cestui que trust* or any one else.

For the proper execution of the trust as thus considered it is necessary that the legal title should rest in the trustee, and it follows therefore that the allottee takes under the first patent an equitable title only. It does not necessarily follow, however, that the Secretary of the Interior has authority to cancel that first or trust patent. It

would seem that a due regard for the rights of the Indians would require that they be treated as if a third party had been named as the trustee. If that had been done this Department could have no greater authority in the premises than it has with respect to other patents. This position is in entire accord with the spirit which should govern all dealings between the government and its wards, and should be assumed and adhered to, unless the law makes it the plain duty of the Secretary to do otherwise. It should be borne in mind in the decision of this question, not only that the United States in these transactions stands as grantor, as trustee and as guardian for the Indians, and that the Indian is grantee and ward, but also that the Secretary of the Interior must act in two capacities, first, as the agent and officer of the government in charge of all business pertaining to the public lands, and second as the one in charge of Indian affairs. In his first capacity he approves the allotment selections and causes a patent to issue as provided by law. When a tract of land is selected for an allotment it is thereby reserved from other disposition pending final action upon that selection, but when that final action is taken by the issuance of the first or trust patent the land is thereby finally disposed of and is no longer in any sense public land under the control of the Secretary of the Interior in his capacity of the officer in charge of business pertaining to the public lands. His work in that capacity is completed, and he is relieved of control of the land in that capacity just as effectually as if all further duties in respect to said land had been devolved upon an entirely different officer of the executive department. From the time of selection or at least from the time of approval thereof to the issuance of the first patent the duties of the Secretary in respect to said land are mixed. He still has a certain degree of control over it as public land and at the same time he is to care for it as guardian of the Indian, but from the date of the trust patent he is vested with the care and control of the land solely as agent of the trustee and as guardian of the allottee. His duty then is to protect the Indian not only in the present use and enjoyment of the property but also as to his future use and enjoyment thereof. If the dual character of the Secretary of the Interior be borne in mind, it will be easy to determine the point at which his jurisdiction over the land as public land ceases and his control of it as the property of the Indian begins. That point of time is the date of the issuance of the first patent provided for by the law, by which the present equitable estate in the land is granted to the allottee, and the ultimate fee simple is guaranteed him.

In dealings between the government and its wards, the Indians, all matters of doubt should be resolved in the interest of the Indian. Thus, if the authority of the Secretary of the Interior to cancel the patents in question were doubtful, I should be constrained to advise against its exercise. As a rule, the powers of an executive officer are

not to be enlarged by implication in the direction of encroachment upon the functions of the judiciary. While this rule obtains generally it is especially applicable here where the enlarged powers if used at all would be in derogation of the interests of the Indians.

Many mistakes have probably been made both in the way of making allotments of land not subject to disposal in that manner and by awarding allotments to persons not entitled thereto. This work is to be done by agents of the government, and such mistakes must be due, at least to a considerable extent, to the carelessness of the agents charged with that duty. I gather from the papers before me that this fact has been recognized both by the Commissioner of the General Land Office and by the Commissioner of Indian Affairs, and that steps have been taken to prevent such mistakes as far as possible in the future. In the instructions issued by Secretary Smith on June 15, 1896 (22 L. D., 709), the respective duties of those two officers are defined, that of determining as to the status of the applicant being left to the Indian Office, and that of determining the character of the allotment and the right of the allottee being left to the General Land Office. If the machinery now entirely under the control of the government be properly handled the great evils which it is claimed the Department should have the power to correct would be prevented. It would be a dangerous policy for the executive department to assume powers properly belonging to the judiciary, in the absence of express legislative authority for the purpose of correcting evils, the existence of which could have been prevented under the authority clearly belonging to the executive.

That mistakes will occur is quite certain but such cases have been in part at least, provided for in the act of January 26, 1895, and if it be absolutely necessary to the proper administration of the law that the powers of the Secretary should be still further extended, Congress should be asked to enact such laws as may be necessary to that end.

The Commissioner of the General Land Office in his letter submitting this case says:

I have not referred herein to the act of January 26, 1895 (28 Stat., 641), as authority for this proposed action as I am of the opinion that said act was passed merely to settle any possible doubts which might have existed in the minds of some persons as to the authority of the Department to cancel such so called patents. The power to do what is authorized by said act existed before its passage, and would exist were the act repealed.

In the matter of the allotment of Lizzie Bergen subsequently submitted, which he asks to be considered in connection herewith he argues that a patent issued upon an allotment covering lands chiefly valuable for the timber thereon was erroneously and wrongfully issued within the purview of said act of 1895, and therefore should be canceled under the authority vested in the Secretary by that act. I have therefore examined that question in connection with the opinion submitted by my predecessor. The provisions of said act, and the reasons set forth for

the conclusion reached in said opinion are embodied in the following quotation therefrom:

The act of January 26, 1895 (28 Stat., 641), reads as follows:

"That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been made or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian and for which a conditional patent may have been issued, to rectify and correct such mistake and cancel any patent which may have been erroneously or wrongfully issued, whenever in his opinion the same ought to be cancelled for error in the issue thereof, or for the best interests of the Indian, and if possession of the original patent cannot be obtained, such cancellation shall be effective if made upon the records of the General Land Office; and no proclamation shall be necessary to open the lands so allotted to settlement."

The patent here in question is a trust patent and therefore of the class contemplated by said act. The mistake if any, in the issuance of said patent is not one which is specifically mentioned in said act. The authority to cancel it, if it exists at all, must be under the very general expression, "and cancel any patent which may have been erroneously and wrongfully issued, wherever in his opinion the same ought to be cancelled for error in the issue thereof." If these words be read by themselves they might be held to authorize the cancellation of any patent whatever, but the context plainly shows that it must be limited to trust patents issued to Indian allottees. I am inclined to the opinion that it must be further limited and held to refer to those trust patents only which rest upon mistakes of the character mentioned in the first part of the act. If it had been intended to authorize the cancellation of any trust patent erroneously issued, then it was entirely unnecessary to specify any class of mistakes which might be corrected. It would have been sufficient to say: "The Secretary of the Interior is hereby authorized and directed to cancel any trust patent issued to an Indian allottee whenever in his opinion such patent has been erroneously and wrongfully issued."

To hold that this act is to be construed as if it read thus would be to say that the first half of the law as it reads in the books is without meaning. This would be to violate that elementary rule of construction, which requires that all parts of a statute must, if possible, be given effect. To follow that rule in this instance it is necessary to say that the Secretary was authorized to correct certain mistakes in allotments and to cancel any patent issued upon such erroneous allotment. Such construction gives effect to all parts of the act and does no violence to the language used.

This act enlarges the jurisdiction of the Secretary of the Interior and confers upon him powers theretofore exercised by the courts only, and is therefore to be construed strictly and held to authorized action in only those cases coming clearly within the meaning of the law.

In the case under consideration the party was entitled to an allotment and the land applied for was properly described in the patent. Upon the record, as then made up, the patent was properly issued. It is now alleged, however, that the proof upon which the allotment and the patent in question was issued was, as to the character of the land, false and fraudulent. If the construction of said act, as set forth above, be the correct one, this case does not present such a mistake as is contemplated by this law.

The question as to the character of this land was necessarily considered before the issuance of patent, and the conclusion was reached, and correctly so upon the record, as then made up, that it was of the character contemplated by the laws authorizing allotments. It is now asserted that this judgment was wrong and the

Department is asked to reopen the matter, make a further investigation and reverse its former judgment. I do not think the law in question demands such action.

The propositions laid down here are sound and the conclusion reached logically follows from said propositions. It will not do to assume that the Secretary of the Interior has authority to exercise the functions properly belonging to the courts simply because fraud has been committed in connection with some of these allotments. No doubt patents have been procured under other laws through fraud, but it would not be argued that the Secretary therefore has jurisdiction to investigate such cases and authority to cancel the patent if he shall determine it was wrongfully issued. The authority conferred by the act of 1895 may not be extended by implication, but must be limited to those cases clearly coming within the letter of the law. I find no good objection to the conclusion reached in my predecessor's opinion.

After a full consideration of this matter I conclude and so advise you that the Secretary has no authority to cancel the trust patent heretofore issued in this case.

Approved:

DAVID R. FRANCIS,

Secretary.

CONTEST—PREFERENCE RIGHT OF ENTRY.

HODGES ET AL. *v.* COLCORD.

The preferred right of a successful contestant is not defeated or impaired by adverse settlement claims acquired subsequent to the entry under attack.

The right of a successful contestant accorded by section 2, act of May 14, 1880, is not dependent upon the truth of the charge as laid, if the cancellation of the entry is the result of a contest prosecuted in good faith.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (R. W. H.)

I have considered the appeals of James L. Hodges and William C. Runyon from your office decision of October 3, 1896 (on review), dismissing their contests and allowing the entry of Colcord to remain intact.

This case involves lots 2, 3, 12, 13, 14, 15, and 18 of Sec. 30 T. 11 N., R. 3 W., Oklahoma district, O. T.

Most of the facts as they appear in the record have been heretofore stated in departmental decisions of December 1, 1894 and April 12, 1895, in the case of Simpson and Colcord *v.* John Gaymon, and are fully set forth in your decision of October 3, 1896, from which the present appeals are taken, so that only such portions as are material to the pending issues need be here repeated.

Upon a hearing as to the land in question between Colcord and Gaymon, upon the charge of disqualification by reason of Gaymon having entered the Territory during the prohibited period,—in which the

application of Hodges to intervene was denied—the local office decided in favor of Gaymon, and Colcord appealed.

On March 21, 1893, your office held that while Gaymon was in the Territory at the time of the opening—working for the A., T. & S. F. R. R. Co. on its right of way, he gained no advantage therefrom—and affirmed the decision below denying the application of Hodges and dismissing the contest of Colcord.

This decision came before the Department for consideration upon the appeal of Colcord, the motion for review of Hodges (which was not acted on by your office), and a third contest filed by Runyon on April 13, 1893, alleging prior settlement and the disqualification of Colcord. Hodges also filed a supplementary affidavit of contest making the same charges.

While the case was pending before the Secretary, to wit, on April 12, 1893, Gaymon filed his relinquishment of the tract, and Colcord made homestead entry No. 6850 of said land.

On December 1, 1894, the Department, having in view the rights of all parties, held that “upon the cancellation of Gaymon’s entry by his voluntary relinquishment, all contests pending against it necessarily abated. There remained nothing for the Department to do, and the case was closed,” thus denying Hodges’ motion for review “but without prejudice to any rights which Hodges may lawfully assert and maintain against the present entryman.” The papers in the case of Runyon were returned for appropriate action.

Upon this decision, your office, on January 5, 1895, directed a hearing on the charges of Hodges and Runyon against Colcord.

Before said hearing was had, however, a motion for review of the departmental decision of December 1, 1894, was filed by Colcord, insisting that the Department erred in not awarding him the preference right of entry by reason of the statement made in the relinquishment of Gaymon.

Although said motion for review was denied, the Department, in its decision thereon of April 12, 1895, said:

Gaymon’s relinquishment, written on the back of his duplicate receipt, is in these words and figures following: “I hereby relinquish all my right to and interest in, and to the government of the United States, and ask that my entry be canceled of record. This relinquishment is made for the reason that my entry is voidable, for the reason that I was in the Oklahoma country at noon of April 22, 1889, and so held by the decision of the supreme court of the United States in the case of Smith v. Townsend.

JOHN GAYMON.

Subscribed and acknowledged before me this 12th day of April, 1893.

D. D. LEACH, *Register*.

It is evident by this that the relinquishment of Gaymon was induced by the contest of Colcord, and the right of a successful contestant is superior to the right of any one who has not a right superior to that of the entryman whose entry was in contest. But as a hearing has been ordered upon the application of Hodges to contest Colcord’s entry, no judgment will be rendered in this case, in advance of such hearing.

The rights of the respective parties can then be determined.

At the hearing had in the case of Hodges and Runyon against Colcord, on September 20, 1895, Colcord moved to dismiss said contests, for the reason that neither of said plaintiffs alleged sufficient facts to show a superior right to that of Gaymon, the former entryman.

The evidence introduced by Hodges and Runyon showed that Hodges had resided on said land since July 22, 1889; Runyon since May 13, 1890, and Colcord since 1893, and that Colcord had paid Gaymon \$650 for his relinquishment, but no evidence was introduced to show the disqualification of Colcord.

Colcord introduced no evidence but elected to stand upon his said motion to dismiss, and upon "the record affecting this tract of land."

On October 25, 1895, the local office rendered a decision recommending the dismissal of said contests, basing its action upon the opinion expressed by the Department, relative to said relinquishment, and the right of a successful contestant, in its decision of April 12, 1895 (*supra*).

Upon the appeals of Hodges and Runyon your office, on April 29, reversed said local office decision and denied to Colcord the preference right to make entry of the land, holding that said departmental decision of April 12, was not *res judicata* upon this point, and that whether Colcord acquired any right to said land by virtue of his contest depended upon whether the charge of disqualification against Gaymon is true. In its decision upon Colcord's motion for review (October 3, 1896) your office used this language:

It is apparent that the decision of this office now sought to be reviewed, misinterpreted the decision of the Secretary, which clearly held that Gaymon's relinquishment was the result of Colcord's contest, and that his right was superior to the right of any one whose settlement was not made prior to the entry of Gaymon. But independently of said decision such should have been the ruling of this office. The record shows as well as the relinquishment of Gaymon, that he was in the Territory at the hour of the opening and therefore under the decision of the supreme court of the United States in the case of *Smith v. Townsend* he was clearly disqualified. It was unnecessary to introduce evidence upon this point. As Hodges and Runyon failed to show any settlement upon the tract in controversy prior to the entry of Gaymon, they could not, by a settlement made thereafter, and while the land was covered by said entry, and subject to Colcord's contest, gain any rights by their settlement. Hence the decision of the local office dismissing the contests of Runyon and Hodges was correct and should have been affirmed.

Your office, therefore, granted the motion for review, dismissed the contests, and allowed the entry of Colcord to remain intact.

The thirty-four specifications of error, in which the judgment here complained of is assailed by the attorney for Hodges, may be generalized so as to bring the material issues in the case within the scope of these two questions:

1. Did your office err in reviewing and setting aside its decision of the 29th of April, 1896?
2. Was there any circumstance connected with the relinquishment of Gaymon, which adversely affected Colcord's right to enter the land; either as the first applicant therefor after it became subject to entry, or, as a successful contestant in the exercise of his preference right?

It appears to me that the claims of Hodges and Runyon rest upon no other basis than that of settlements upon land, which, at the time, was covered by the entry of Gaymon. It had been segregated from the public domain by proper official action. No one could acquire any present right to it while in this condition. A settlement upon it, with a view to the initiation of an adverse claim—if not amounting to a trespass under the doctrine of *Atherton v. Fowler* (96 U. S., 513) is certainly without any legal status (*Maggie Laird*, 13 L. D., 502).

There is a line of cases to which attention is called in the argument of Hodges' attorney, in apparent conflict with this doctrine, which holds that a settler on land covered by the entry of another acquires a legal status as against the government the instant such entry is relinquished, and the right thus acquired is not defeated by the entry of a third party immediately following such relinquishment. (*McGowan v. McCann*, 15 L. D., 542; *Fosgate v. Bell*, 14 L. D., 459; *Poole v. Moloughney*, 11 L. D., 197).

In all of these cases—the settler being upon the land at the moment it became a part of the public domain and subject to entry—his right of priority was recognized as superior to that of a third party whose claim rested upon an entry subsequent to the settlement. The relinquishment had no other effect than to relieve the land from incumbrance and open up the other questions upon which the decisions turned. But in the case at bar the question is whether Gaymon's relinquishment was the result of Colcord's contest?

If this be the fact Colcord had a preference right of entry which nothing could defeat except his own disqualification, or a right superior to that of Gaymon, the original entryman.

It is unnecessary to pass upon the conflicting interpretations of the departmental decision of April 12, 1895, as given in your office decisions of April 29, 1896, and October 3, 1896, respectively, further than to hold that the judgment of the Department in said decision was suspended to await the issue of the hearing which had been ordered upon the application of Hodges to contest Colcord's entry. Said decision, however, did express a very decided opinion "that the relinquishment of Gaymon was induced by the contest of Colcord," and, also, that: "the right of a successful contestant is superior to the right of anyone who has not a right superior to that of the entryman whose entry was in contest."

This language—in view of the expressed purpose to render no final judgment in the case—must be regarded as *dicta* and having no other effect than a preliminary intimation to the contestants that, unless a right superior to Gaymon's was established at the hearing, the preference right of Colcord would not be affected.

As neither Hodges nor Runyon alleged *actual* settlement prior to Gaymon's entry, and as their contests were subsequent in date of filing to the contest of Colcord, there was no error in rejecting Hodges' application to intervene in the latter.

The only issue was as to Gaymon's disqualification, by reason of having entered the territory during the prohibited period.

Upon that issue—Simpson, who had filed the first contest, having abandoned it, Colcord, as next in order, had the right of way as against Hodges and Runyon. No rule is better settled than that contests are entitled to precedence in the order of their filing at the local office.

The record shows that Colcord was diligent in the prosecution of his contest, and that it was pending on appeal before the Hon. Secretary, at the time Gaymon's relinquishment was filed.

The question of Gaymon's disqualification by reason of his presence in the Territory during the prohibited period has not been passed upon by the Department, and it is unnecessary to pass upon it now for the reason that it ceased to be an issue when he relinquished his entry.

Section 2 of the act of May 14, 1880, declares that

in all cases where any person has contested, paid the land office fees and procured the cancellation of any pre-emption, homestead or timber-culture entry he shall be allowed thirty days to enter said lands.

There is nothing in the language here used which makes the preference right of the contestant dependent upon the truth of the charge of disqualification of the entryman. If the cancellation of the entry—whether by the relinquishment of the entryman, or the judgment of the Land Department—was the result of the contest, the preference right of entry inures to the contestant by operation of law.

The authorities agree that a relinquishment filed during the pendency of a contest is presumptively the result of the contest, (*Webb v. Loughrey et al.*, 9 L. D., 440, and cases therein cited) and I find nothing in the record to overcome this presumption in the case at bar.

It is contended that it was the \$650 paid by Colcord which moved Gaymon to make his relinquishment, and that Gaymon's statement (indorsed on his duplicate receipt) that:

This relinquishment is made for the reason that my entry is voidable, for the reason that I was in the Oklahoma country at noon of April 22, 1889, and so held by the decision of the supreme court of the United States, in the case of *Smith v. Townsend*, is untruthful. The facts and circumstances of the case lead me to a different conclusion.

Gaymon had resisted Colcord's contest at the hearing before the local office, and again, when it came before your office on Colcord's appeal, and still again, when it came on further appeal before the Department. In fact, Gaymon did not relax his hold upon his entry until the supreme court rendered its decision in the case of *Smith v. Townsend* (149 U. S., 490)—a decision from the court of last resort, upon a state of facts, similar in nearly every respect, to the facts in his own case.

This decision was upon the 3d of April, 1893, and Gaymon's relinquishment was ten days thereafter, to wit, on April 13th, 1893. It would be contrary to every sound principle of deduction to conclude

that Gaymon would have continued to rely upon the decisions of the local office holding him to be qualified—although affirmed by your office—in the face of a decision of the supreme court holding the contrary view.

I have, therefore, no doubt whatever that Gaymon's relinquishment was induced by the belief that the charge of disqualification as made in Colcord's contest would be sustained by the Department, on the authority of *Smith v. Townsend*. That he should desire under such circumstances to save the cost of his improvements and of the labor he had expended upon his entry, by its relinquishment, was natural, and, cannot with fairness, be assailed as fraudulent.

His offer to sell to Hodges—so far from being an indication of bad faith—is, to my mind, a proof that there was no collusion between Gaymon and Colcord.

The case of *Cullins v. Leonard* (17 L. D., 412), cannot be followed in the case at bar, for the reason that Leonard's contest was in bad faith and speculative—as he had held Pentz' relinquishment in his possession during the pendency of his contest against Pentz' entry, and frequently offered the same for sale.

The conclusions reached in your office decision (on review) of October 3, 1896, are affirmed. The contests of Hodges and Runyon will be dismissed and the entry of Colcord allowed to remain intact.

RAILROAD GRANT—FORFEITURE—ACT OF JUNE 22, 1874.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. *v.* THOMPSON.

The conditions on which the extension of time for the completion of the road was given by the act of June 22, 1874, operate as a revocation of the grant to the extent of the rights of actual settlers at the date thereof; and the protection thus given such settlers is effective, even though the lands were listed under the grant, and such list approved prior to the passage of said act.

Secretary Francis to the Commissioner of the General Land Office, February 27, 1897. (I. H. L.) (F. W. C.)

The record in the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Peter Thompson, involving the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 11, T. 148 N., R. 49 W., Crookston land district, Minnesota, was forwarded with your office letter of December 19, 1893, on appeal by the company from your office decision of July 20, 1883.

It appears that the appeal was duly filed in time but the same was mislaid and for that reason the record therein was not forwarded at an earlier day.

The tract involved is within the primary limits of the grant for said company upon the line known as the St. Vincent Extension of said road, as shown by the map of definite location filed and accepted

December 19, 1871. The grant made to aid in the construction of this part of the road was by the act of March 3, 1871.

The road was required to be completed by March 3, 1873, but the time was extended to December 3, 1873, by the act of March 3, 1873 (17 Stat., 631). The company failed to complete the road within the time allowed, and by the act of June 22, 1874 (18 Stat., 203), the time was again extended to March 3, 1876, upon the following conditions:

That all rights of actual settlers and their grantees who have heretofore in good faith entered upon and actually resided on any of said lands prior to the passage of this act, or who otherwise have legal rights in any of such lands, shall be saved and secured to such settlers or such other persons in all respects the same as if said lands had never been granted to aid in the construction of the said lines of railroad.

The company listed the land November 28, 1873, which list was approved by this Department April 30, 1874. Under the instructions contained in your office letter of September 3, 1874, which directed that "settlers upon the lands of the St. Vincent Extension, who were actual settlers at the date of the act of June 22, 1874, and applied to file within the legal period, are protected by the statute and their filings may be received," etc., Thompson was permitted to file pre-emption declaratory statement for this land, in which settlement was alleged May 28, 1874.

By letter of March 28, 1882, the local officers forwarded Thompson's appeal from their action rejecting his tender of proof and payment upon his filing covering this tract for the reason that the tract had been duly listed by the said company, as before stated. It was upon a tender of this proof and payment that the present controversy arose, the matter being considered in your office decision of July 20 1883, in which it was held that as Thompson's entry was made subsequent to the expiration of the grant of December 3, 1873, the same comes within the provisions of the third section of the act of April 21, 1876, and is therefore confirmed. Your office decision therefore directed that Thompson be permitted to make final entry of the land; from which action the company appealed to this Department.

As thus presented, the case is in all important particulars similar to that of *Tronnes v. St. Paul, Minneapolis and Manitoba Railway Company* (18 L. D., 101), wherein it was held (syllabus):

The act of June 22, 1874, extending the time for the completion of the road, in aid of which the previous grant had been made, and protecting the rights of actual settlers at the date of said act, required the company to file its acceptance of the terms imposed thereby, but the protective provisions therein, for the benefit of settlers, are not dependent upon the company's acceptance of the act.

The conditions on which the extension of time was given by Congress in said act operate as a revocation of the grant to the extent of the rights of actual settlers at the date thereof. It is in effect an extension of the protection intended to be given by the excepting clause in the original grant, and is applicable to all lands whether patented or otherwise.

The certification of lands prior to the passage of said act in no wise affects the right of an actual settler protected thereby, nor does it embarrass the Department in extending to such settler the protection of said act.

For the reasons given in said decision your office decision, recognizing the filing by Thompson as against the grant to said company, is affirmed, and the papers are herewith returned for your further action looking to the completion of said entry.

STATE SELECTION—CERTIFICATION—PATENT.

EDWIN F. FROST ET AL.*

The inadvertent certification of State selections at a time when the lands covered thereby are included within an existing entry, and involved in proceedings then pending before the Department, is inoperative, and constitutes no obstacle to the issuance of patent in accordance with the final judgment in said proceedings.

Secretary Francis to the Commissioner of the General Land Office, December 26, 1896. (J. L.)

This case involves lots 3 and 4 of section 35, and lots 3 and 7 of section 36, in T. 31 S., R. 39 E., Gainesville land district, Florida, containing 146.75 acres.

On June 28, 1895, list No. 14 of lands selected for the State of Florida under the provisions of the act of Congress of March 3, 1845 (5 Stat., 788), and sections 2275 and 2276 of the Revised Statutes, and embracing the four lots described, was approved by the Secretary. Whereupon, the State of Florida, by deeds dated July 10, 1895, for valuable considerations, conveyed lot 3 of section 35 and lot 3 of section 36, containing together 88 acres, to E. M. Lowe; and lot 4 of section 35 and lot 7 of section 36, containing together 58.75 acres, to G. M. Robbins, and to B. F. Hampton and H. E. Taylor as trustees for the benefit of James M. Graham, in equal shares; that is to say, one undivided half of said 58.75 acres to said Robbins, and one undivided half thereof to said trustees.

On July 31, 1895, your office informed the authorities of the State of Florida, that the lands in question had been inadvertently and through mistake certified to the State, and requested the governor to immediately execute and transmit to your office a proper deed reconveying the said land to the United States, and offered to permit the State to select an equal quantity of land elsewhere in lieu thereof. In reply your office was advised that the State had already disposed of said land, as above stated, and had thereby, divested itself of title, and was without legal authority to reconvey the land to the United States. Nevertheless, the governor, through the commissioner of agriculture, under date of May 28, 1896, transmitted to your office a quit-claim deed to the United States for the four lots of land aforesaid, bearing date August 17, 1895, and executed by the board of education of the State of Florida, under the provisions of sections 234 and 235 of the revised statutes of the State.

* Not reported in Vol. XXIII.

Your office was of opinion that said quit-claim was "without effect for the reason that the State had previously, to wit: on July 10, 1895, divested itself of title." And therefore your office by letter "G" of July 2, 1896, at the instance and request of Homer Kessler, submitted to the Secretary the following recommendation:

In order therefore that the United States may be reinvested with title, I respectfully recommend that the Honorable Attorney General be requested to cause the proper proceedings to be instituted to obtain a judicial decree declaring said list null and void so far as the same embraces lots 3 and 4 of section 35, and lots 3 and 7 of section 36, T. 31 S., R. 39 E., and that E. M. Lowe, G. M. Robbins, and B. F. Hampton and H. E. Taylor, trustees for James M. Graham, be joined as parties to such suit.

With said letter your office transmitted all the papers in the case, consisting of forty-four files. They are voluminous, and begin with May 7, 1877.

It appears that on August 25, 1883, Edwin Frost was permitted to make cash entry, No. 6090, of the four lots of land aforesaid, under the second section of the act of June 15, 1880 (21 Stat., 237). Said entry was contested and various proceedings were had in your office, during the progress of which, E. M. Lowe as owner of lot 3 of section 35 (containing 48 acres) and lot 3 of section 36 (containing 40 acres), and Homer Kessler as owner of lot 4 of section 35 (containing 18.75 acres), and lot 7 of section 36 (containing 40 acres)—both claiming under Frost's title—were made parties to the controversy.

On May 15, 1893, your office held Frost's entry for cancellation. Lowe and Kessler both appealed; and on December 8, 1894, this Department affirmed your office decision.

On April 13, 1895 (within the time prescribed by the Rules of Practice), Kessler filed a motion for a review of said departmental decision. And while said motion was pending and undecided, your office inadvertently and by mistake recommended the approval of list No. 14 of lands selected by the State of Florida, and thereupon the Secretary approved said list as aforesaid.

On July 6, 1895 (21 L. D., 38), this Department on consideration of Kessler's motion for review, revoked and annulled the departmental decision of December 8, 1894, and held Frost's entry intact.

After a careful examination of all the papers this Department is of opinion, that it is not necessary to begin judicial proceedings to set aside, as to lots 3 and 4 of section 35, and lots 3 and 7 of section 36, the approval and certification of list No. 14 described in your letter of recommendation; that the General Land Office and this Department were without authority to dispose of or to take any action in respect of the lots of land aforesaid while Kessler's motion for a review of departmental decision of December 8, 1894, was pending and undecided, as stated in your letter, and while the land was segregated by Frost's entry; and that therefore the approval and certification of said list No. 14, is null and void as to the lots of land aforesaid, and interposes no

obstacle to the issuing of patents for said lots in accordance with the departmental decision of July 6, 1895. (See case of *Weeks v. Bridgman*, 159 U. S., 541).

Your office is, therefore directed to issue to Homer Kessler a patent for lot 4 of section 35, and lot 7 of section 36, T. 31 S., R. 9 E.; and to E. M. Lowe (upon his making application therefor), a patent for lot 3 of section 35, and lot 3 of section 36, T. 31 S., R. 39 E.*

The State of Florida will be permitted to select elsewhere an equal quantity of public land in lieu of the four lots aforesaid.

PRACTICE—APPEAL—CERTIORARI.

EIMSTAD *v.* NORTHERN PACIFIC R. R. CO.

A writ of certiorari will not issue where it is apparent that the appeal, if before the Department, would be dismissed.

Secretary Bliss to the Commissioner of the General Land Office, March
(L. H. L.) 15, 1897. (J. L.)

This case involves the SE. $\frac{1}{4}$ of section 7, T. 144 N., R. 41 W., Crookston land district, Minnesota; a tract of land lying within the indemnity limits of the Northern Pacific Railroad Company, and selected by said company on June 17, 1885.

On January 8, 1895, the local officers rejected Michael Eimstad's application to make homestead entry of said tract; he alleging settlement in the year 1883, and valuable improvements on the land. On May 29, 1895, your office affirmed the action of the local officers and rejected Eimstad's application, because his declaration of intention to become a citizen of the United States was not made until March 7, 1887, and therefore he acquired no rights to the land applied for, prior to June, 1885, the date of the company's application to make selection thereof.

Service of notice of said decision was acknowledged by Eimstad's attorney on June 13, 1896. On July 28, 1896, he filed his appeal to this Department; but he failed to file any proof of service of notice of said appeal upon the Northern Pacific Railroad Company. He was notified of said defect on August 22, 1896, in accordance with Rule of Practice 82, and was requested to furnish proof of service of notice of his appeal, etc., etc., on the opposite party in accordance with the 93rd Rule of Practice. In reply he furnished proof that such service was not made until October 12, 1896—which was more than 120 days after he had received notice of the decision appealed from.

In the cases of *Rudolph Wurlitzer*, 6 L. D., 315, and *Hannon v. Northern Pacific Railroad Company*, 11 L. D., 48, this Department

* By departmental order of February 6, 1897, the directions for the issuance of patent are modified so as to accord with the decision of July 6, 1895.

held that the sufficiency of an appeal, if filed in time, is one for the appellate authority to pass upon. And that in all cases, whether appeals are defective under Rule 82 or incomplete under Rules 88 and 90, all the papers in the case, and especially the appeal itself, should be transmitted, and the letter of transmittal should specifically designate wherein the appeal is defective.

In this case, however, it is unnecessary to direct your office to certify the proceedings to the Secretary. It is manifest that notice of the appeal was not served upon the opposite party within the time prescribed by the Rules of Practice. If the appeal were before the Department it would be immediately dismissed.

Therefore the application for a certiorari is hereby denied.

SWAMP LANDS—INDEMNITY—ACTS OF 1849 AND 1850.

STATE OF LOUISIANA.

The swampy character of land forming the basis of a claim for indemnity should be shown in the same way, and by evidence of the same character, as required to entitle the State to lands under its grant.

Action on an indemnity list, in which the claim as to some of the tracts is allowed, amounts to a rejection of the claim as to the remainder.

By the act of March 2, 1849, all the swamp lands in the State of Louisiana were granted to said State, except lands bordering on streams, rivers, and bayous, which were treated by Congress as theretofore reclaimed from their swampy character, and falling within the provisions of the act of February 20, 1811, which gave to said State five per cent of the proceeds of their sale in order to provide a fund for their reclamation.

At the date of the passage of the general swamp land act of September 28, 1850, there were no lands in the State of Louisiana subject to the operation of said act, as all of the swamp land had, prior thereto, been granted to said State by the special act of 1849; and it therefore follows that the State is not included within the indemnity provisions made by the act of March 2, 1855, for said provisions were specifically limited to States included in the general act.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (W. M. W.)

On the 7th day of January, 1897, your office rejected the application of the State of Louisiana for indemnity under the acts of March 2, 1855 (10 Stat., 634), and March 3, 1857 (11 Stat., 251), for lands sold by the United States government after the date of the swamp land grants of March 2, 1849 (9 Stat., 352), and September 28, 1850 (9 Stat., 519), and prior to the said acts of March 2, 1855, and March 3, 1857. The lands in controversy are embraced in twelve lists, numbered from 14 to 25, of alleged swamp lands as a basis for the cash indemnity claimed.

These lists were filed in your office, by the agents for the State of Louisiana, on various dates from December 2, 1885, to January 16, 1891.

These lists were not submitted to the United States surveyor-general for the State of Louisiana for his action, as required by the regulations

issued under the granting act to said State. Said regulations required a personal examination to be made of alleged swamp lands under the direction of the surveyor-general by experienced and faithful deputies; the work to be done to his satisfaction; and

lists of the land falling to the State under the law will be made out by the agent for the State and certified to you by him, and, if satisfied of the correctness of the lists, you will so certify and transmit them to this office.

See instructions to the surveyor-general of Louisiana, dated April 18, 1850, Vol. 1, General Land Office Record, pp. 46 to 50, inclusive.

The lists under consideration were filed in your office, and the only evidence submitted by the State, in support of the allegation that the lands were of the character contemplated by the swamp land grant, is the certificate of the State agent, stating that on examination of the field notes of survey, the lands appear to have been swamp land. The certificate does not state that the tracts were swamp or overflowed lands at the date of the grant.

The number of tracts involved in your office decision appealed from is about eight hundred and sixty; the great bulk of them were surveyed long before the swamp grant to the State was made; some were surveyed as early as 1807, and many of them during the years 1824, 1828, and 1830. Said lists, except No. 24 and No. 25, were examined in your office, and between January 15, 1886, and May 9, 1888, the State was allowed—on the bases of the tracts found to have been swamp lands at the date of the grant—on lands embraced in said lists, cash indemnity to the amount of \$49,371.07, and land indemnity to the amount of 29,214.25 acres. (See Land Office report for 1891, p. 209.) No formal action appears to have been taken, at the time said indemnity was allowed, on the tracts found to have been non-swampy or doubtful in character.

Selections in the several townships embraced in these lists had been made and reported to your office by the surveyor-general some thirty years before the State agents filed the claim embraced in these lists.

The lands for which indemnity is asked were sold and patented, and at the dates patents issued there were no conflicting claims under the swamp-land grant of record.

Your office held that the issuance of patents, under the existing circumstances, raised a presumption against the swampy character of the land at the date of the grant; and that you

do not feel justified in allowing indemnity for said lands under the acts of 1855 and 1857, except upon the clearest proof that said lands were swamp and overflowed at the date of the grant.

The State appeals.

The appeal is based upon the claim that the showing made is sufficient to entitle the State to the indemnity claimed under the acts of March 2, 1855 (10 Stat., 634), and March 2, 1857 (11 Stat., 251). If it

be conceded that said acts apply to the State of Louisiana, the contention she makes is not tenable, in the light of the facts hereinbefore stated.

The swampy character of the lands forming the bases for indemnity should be shown in the same way and by evidence of the same character as was required to entitle the State to lands under its grant. The second section of the act of 1855 requires

due proof, by the authorized agent of the State or States, before the Commissioner of the General Land Office, that any of the lands purchased were swamp lands, within the true intent and meaning of the act aforesaid, etc.

There is absolutely no proof offered by the agent of the State in support of these claims. There is no attempt made to conform to the provisions of the act of 1849 or the regulations thereunder respecting the character of the lands claimed as swamp lands. These claims, except lists Nos. 24 and 25, have been acted on by the Department adversely to the claim of the State; and the lands included in lists Nos. 24 and 25 have been found by your office not to be swampy in character, and there is no sufficient evidence before the Department to warrant a reversal of your office decision as to lists Nos. 24 and 25. As to lands included in the other lists, they were passed upon adversely to the State when they were acted on and in part allowed. The failure to formally reject such as were not allowed can avail the State nothing now, for it necessarily followed that favorable action on a part of the lands in such list or lists included negative action on the remainder of the tracts included therein. And now, after the lapse of from five to ten years, the State can not in reason be permitted to say that said tracts have never been acted on. As to all these lists, except Nos. 24 and 25, the action heretofore had was final and the doctrine of *res judicata* applies to them.

In view of the great importance to the government, as well as the State, of the questions presented in this claim, it has been deemed proper to examine with care the several acts of Congress on the subject of granting swamp land indemnity.

This claim is based upon the act of March 2, 1855. The first question, therefore, to determine is, whether said act has any application to the State of Louisiana, *i. e.*, whether said State is now, or ever was, entitled to any indemnity in cash or in land under said act.

In order to determine this question, it is necessary to refer to the acts of Congress granting swamp lands to the State of Louisiana, the State of Arkansas, and the other States.

The act of March 2, 1849 (9 Stat., 352), was entitled: "An Act to aid the State of Louisiana in draining the swamp lands therein," and provided:

That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation, shall be, and the same are hereby, granted to that State.

SEC. 2. *And be it further enacted*, That as soon as the Secretary of the Treasury shall be advised, by the governor of Louisiana, that that State has made the necessary preparation to defray the expenses thereof, he shall cause a personal examination to be made, under the direction of the surveyor-general thereof, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation; and a list of the same to be made out, and certified by the deputies and surveyor-general, to the Secretary of the Treasury, who shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said State of Louisiana, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands shall be applied exclusively, as far as necessary, to the construction of the levees and drains aforesaid.

SEC. 3. *And be it further enacted*, That in making out a list of these swamp lands, subject to overflow and unfit for cultivation, all legal subdivisions, the greater part of which is of that character, shall be included in said list; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom: *Provided, however*, That the provisions of this act shall not apply to any lands fronting on rivers, creeks, bayous, water courses, etc., which have been surveyed into lots or tracts under the acts of third March, eighteen hundred and eleven, and twenty-fourth May, eighteen hundred and twenty-four: *And provided further*, That the United States shall in no manner be held liable for any expense incurred in selecting these lands and making out the lists thereof, or for making any surveys that may be required to carry out the provisions of this act.

The act of September 28, 1850 (9 Stat., 519), was entitled: "An Act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," and provided:

That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

SEC. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted*, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

SEC. 4. *And be it further enacted*, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as (and) designated as aforesaid, may be situated.

The act of March 2, 1855 (10 Stat., 634) was entitled: "An Act for the relief of purchasers and locators of swamp and overflowed lands," and provided:

That the President of the United States cause patents to be issued, as soon as practicable, to the purchaser or purchasers, locator or locators, who have made entries of the public lands, claimed as swamp lands, either with cash, or with land war-

rants, or with scrip, prior to the issue of patents to the State or States, as provided for by the second section of the act approved September twenty-eight, eighteen hundred and fifty, entitled, "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," any decision of the Secretary of the Interior, or other officer of the government of the United States, to the contrary notwithstanding: *Provided*, That in all cases where any State, through its constituted authorities, may have sold or disposed of any tract or tracts of said land to any individual or individuals prior to the entry, sale, or location of the same, under the pre-emption or other laws of the United States, no patent shall be issued by the President for such tract or tracts of land, until such State, through its constituted authorities, shall release its claim thereto, in such form as shall be prescribed by the Secretary of the Interior: *And provided further*, That if such State shall not, within ninety days from the passage of this act, through its constituted authorities, return to the General Land Office of the United States a list of all the lands sold as aforesaid, together with the dates of such sale, and the names of the purchasers, the patents shall be issued immediately thereafter, as directed in the foregoing section.

SEC. 2. *And be it further enacted*, That upon due proof, by the authorized agent of the State or States before the Commissioner of the General Land Office, that any of the lands purchased were swamp lands, within the true intent and meaning of the act aforesaid, the purchase money shall be paid over to the said State or States; and where the lands have been located by warrant or scrip, the said State or States shall be authorized to locate a quantity of like amount, upon any of the public lands subject to entry, at one dollar and a quarter per acre, or less, and patents shall issue therefor, upon the terms and conditions enumerated in the act aforesaid: *Provided, however*, That the said decisions of the Commissioner of the General Land Office shall be approved by the Secretary of the Interior.

The act of March 3, 1857 (11 Stat., 251), provided:

That the selection of swamp and overflowed lands granted to the several States by the act of Congress, approved September twenty-eight, eighteen hundred and fifty, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," and the act of the second of March, eighteen hundred and forty-nine, entitled "An act to aid the State of Louisiana in draining the swamp lands therein," heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law: *Provided, however*, That nothing in this act contained shall interfere with the provisions of the act of Congress entitled "An act for the relief of purchasers and locators of swamp and overflowed lands," approved March the second, eighteen hundred and fifty-five, which shall be and is hereby continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage.

To save space and repetition, these several acts will hereafter be referred to, respectively, as the Louisiana act, the Arkansas act, the indemnity act, and the confirmatory act.

In construing a statute a court may properly refer to the conditions of persons and things to be affected by such act, as well as the state of things as they appeared to the legislature at the time the enactment was considered. See *Aldridge v. Williams*, 3 How., 9; *United States v. Union Pacific R. R. Co.*, 91 U. S., 72; *District of Columbia v. Washington Market Company*, 108 U. S., 243; *Platt v. Union Pacific R. R. Co.*, 99 U. S., 48.

This has been applied by the Department. See *Townsite of Kingfisher v. Wood*, 11 L. D., 330; *Grandin Bros. et al*, 18 L. D., 459.

Applying this rule to the Louisiana act, at the time it was passed the southern portion of the State was largely, if not principally, low, flat, swampy, marshy in character; in some instances, especially towards the mouth of the Mississippi river, much the greater part of the land, a little back from the rivers, lakes and bayous, was in fact lower than the beds of such streams, or other bodies of water. From the northern boundary of the State to its center there was a strip of land from fifty to one hundred miles wide on the west side of the Mississippi river, which lands were likewise low, swampy and marshy in character. It was stated in the House of Representatives, by Mr. Bowlin, when the Louisiana act was under consideration: "that the precise amount of swamp lands in the State was 5,429,000 acres, as reported by the surveyors." See *Congressional Globe*, 30th Congress, 2d Session, p. 591. On the day the act passed the House, Mr. Harmanson, a representative from the State of Louisiana, stated during the debate, among other things:

That the State of Louisiana, and the citizens of that State, had constructed about fourteen hundred miles of *levees*, to keep out the waters of the river from the low lands. This work had been done at a cost of eight millions of dollars, as estimated by the committee on public lands; but which, in fact, had cost at least twenty millions. What had been accomplished by that work? Three millions five hundred thousand acres of land, which were before unfit for cultivation, had been reclaimed for the benefit of the general government. This vast amount of rich land, so reclaimed by Louisiana levees, had been sold, and the government had pocketed their proceeds.

The report of the Commissioner of the General Land Office stated that there were two millions two hundred thousand acres of swamp lands now in Louisiana, and he (Mr. H.) believed that one million of acres of these lands could be reclaimed. It would require five millions of dollars to accomplish this work, and the State of Louisiana was obliged to do this work, because it was required by the health of the country. . . . But the State of Louisiana was compelled by the force of circumstances to reclaim these lands; and the only question was, whether the general government would give them to the State, by way of compensation for the cost of reclaiming them. . . . Would the gentleman refuse to be just to Louisiana, for fear of receiving injustice at the hands of other States? . . .

He urged again the consideration of the claim of his State upon the general government, because she had already reclaimed three and a half millions of acres of the public lands; and he claimed the passage of the bill as a debt due from the general government.

Mr. Brodhead said he had but a word to say in explanation of the bill. In 1829 the officers of the government reported 5,429,260 acres as the whole amount of the great swamp lands in the State of Louisiana. On the 16th of April last, the Commissioner of the General Land Office reported that these swamp lands, at that time, had been reduced to 2,246,075 acres. It was apparent, therefore, that, since the year 1829, the State and people of Louisiana, by the levees which they had thrown up, had reclaimed and enabled the general government to throw into the market very large bodies of rich and valuable land. . . .

This large body of government land had been brought into market since the year 1829 at the expense of the people of Louisiana.

See *Cong. Globe* (No. 92), 30th Cong. 2d Sess. p. 592.

By an act of the legislature of Louisiana, of February 7, 1829 (see Session laws for that year, p. 76), it was provided by section 1:

That throughout all the portion of the State watered by the Mississippi and the bayous running to and from the same which are settled, where levees are necessary to confine the waters of that river, and to shelter the inhabitants against the inundations, the said levees shall be made by the riparian proprietors in the proportions and at the time hereinafter prescribed.

The second section prescribes the height and character of the levees. Other sections of the act specifically deal with the subject of levees, and define the duties of the owners of lands on the banks of the Mississippi and bayous running to and from it, respecting the making of levees, roads, etc. These provisions were carried forward and are to be found in the Revised Statutes of said State. See Revised Statutes Louisiana, 1856, p. 481 *et seq.*

With these aids, and the plain language of the act itself, there is no difficulty in arriving at the purpose and intention of Congress in passing it.

The act was clearly a grant *in presenti*, giving to the State "the whole of those swamp and overflowed lands," which were at the date of the act unfit for cultivation. The words used, "shall be, and the same are hereby, granted to that State," clearly import a present grant, and had the effect of a conveyance at the date of the act; thereafter the only thing that was required to be done was the identification of the land. The second section provided the manner that such identification should be accomplished, and when accomplished "the fee simple to said lands shall vest in said State of Louisiana;" no patent was required or necessary to complete the State's title to the lands granted. The first proviso in section 3 of the act carves out of the grant "any lands fronting on rivers, creeks, bayous, water courses," etc., for the very reason that Congress must have understood that all such lands had been reclaimed either by the riparian owners or the State under State laws; and, therefore, such lands were not in fact swamp or overflowed at the date of the act.

The Arkansas act granted to that State "the whole of those swamp and overflowed lands made unfit thereby for cultivation," which remained unsold at the date said act was passed. It was clearly a grant *in presenti*, taking effect as soon as the lands could be identified by listing and platting as specified in the act. It differed from the Louisiana act in that the Secretary of the Interior was required to cause to be issued a patent to the State for said lands; "and on that patent, the fee simple to said lands shall vest in the said State of Arkansas," and in other respects. But in this opinion it is not material to discuss the provisions of said act, except the 4th section, which extended the provisions of said act to, and conferred its benefits upon, "each of the other States of the Union in which such swamp and overflowed lands, known as (and) designated as aforesaid, may be situated." The right

of Louisiana to any swamp land indemnity depends entirely upon whether this section applies to said State, for the indemnity act of 1855, under which Louisiana makes the claim herein, specifically refers to the Arkansas act, and clearly and distinctly confines the indemnity it provides to such States only as were included in the Arkansas act. In this particular the language of the indemnity act is so plain and unequivocal that it can not be misunderstood.

The confirmatory act of 1857 referred to the Louisiana and Arkansas acts, and simply confirmed to the several States the swamp and overflowed lands theretofore selected and reported to the Commissioner of the General Land Office, so far as the lands remained vacant and unappropriated, and when such selections did not interfere with actual settlement claims under any existing law of the United States. The proviso to said act continued in force and extended the indemnity act to all entries and locations of lands claimed as swamp lands since its passage. The effect of this proviso was to simply keep in force the indemnity act of 1855 as to the subject matter as applied to the States included therein.

Adverting to the 4th section of the Arkansas act, for the purpose of determining whether or not it embraced the State of Louisiana, it seems proper to refer to the construction heretofore placed upon it by the Department.

On December 23, 1851, Secretary Stuart held that the Louisiana and Arkansas acts were not to be construed in *pari materia*, and that:

The act of March, 1849, has reference to Louisiana alone, and requires that the selections should be made under the direction of the surveyor-general, at the expense of the State of Louisiana entirely, and after the governor of that State should have informed the Secretary of the Treasury that the necessary preparations to defray those expenses had been made by the State. The provision in the act of September, 1850, is entirely different; for it makes it the duty of the Secretary of the Interior to make out lists and plats of the lands thereby granted, and to transmit the same to the governors of the States. See 1 Lester, 549, 550.

On January 14, 1856, Secretary McClelland held that:

The act of 1849 is not merged in the act of 1850, but each is to be executed according to its special tenor and provisions, the latter being merely cumulative, and embracing land which was excepted from the operation of the former. *Ib.* 554.

On February 12, 1886, your office refused to allow the State of Louisiana indemnity for swamp lands sold in said State between March 2, 1849, and September 28, 1850. On appeal to the Department doubts arose as to the proper construction of the swamp land grants of 1849 and 1850, and also the indemnity act of 1855 and the confirmatory act of 1857, and the matter was referred to the Attorney General for his opinion. On January 11, 1887, Attorney General Garland submitted his opinion, in which, after referring to the Louisiana and Arkansas acts, he said:

This last act was substantially a re-enactment of the act of the 2d of March, 1849, so far as Louisiana was concerned, with an extension of the grant in that act so as

to include the lands which had been excluded by the exception in the former enactment, as to which it was a new and substantive grant on the 28th of September, 1850. Both of these acts were grants *in presenti* by which, from their respective dates, the title to the lands therein described became vested in the several States. . . . These definitions of swamp lands in the acts of 1849 and 1850 are substantially the same. Therefore, all swamp lands granted by the act of 1849 would be within the intent and meaning of the words "swamp lands" in the act of 1850. The consideration for the grants in the acts of 1849 and 1850 was the same. The errors committed by the officers of the United States against both grantees were the same in effect. The wrongs done to both classes of purchasers were the same.

Mr. Garland also refers to an opinion rendered by Attorney General Speed (11 Opins., 472, and 3 L. D., p. 396) as supporting his views. See Attorney General Garland's opinion, 5 L. D., 464, *et seq.*

By reference to Attorney General Speed's opinion (11 Opins., 467 to 473, inclusive), it will be observed that said opinion related exclusively to the right of the State of Iowa to swamp land indemnity, and involved the construction of the acts of March 2, 1855, and March 3, 1857. There was no question but what Iowa was included in the Arkansas act of 1850. The only bearing General Speed's opinion could possibly have in determining this case is found in that portion wherein he discusses the proviso in the confirmatory act of 1857. In so far as he construed said proviso he seems to have held that it only amounted to a legislative declaration that the act of 1855 is "hereby re-enacted," having the same effect as if it had been in terms repeated and re-enacted on the third of March, 1857.

The State of Louisiana (3 L. D., 396), referred to by Attorney General Garland, was a formal affirmance by Secretary Teller of a judgment of Commissioner McFarland, in which the Commissioner held that the State of Louisiana was entitled to indemnity. The decision of the Secretary does not discuss the question as to the rights of the State. He simply stated that he saw no reason for excluding the State of Louisiana from the benefits of the acts of 1855 and 1857. The Commissioner's decision is set out at length, in which it is said, *inter alia*, that:

It is true that the act of 1849 is not specially mentioned in the act of September 28, 1850, or of March 2, 1855, but it is to be presumed from the language of these acts, in connection with that used in the act of March 3, 1857, which includes Louisiana, that it was the intention of Congress to confer the benefits contained in the acts of 1850 and 1855 to all the States over which the swamp land grant had been extended, if not, why was Louisiana included in the confirmatory act of March 3, 1857, which act places her on an equal footing with the other States.

It is claimed by the State that the act of February 20, 1811 (2 Stat., 641-643), has no bearing on the questions involved in the case. The 5th section of said act provided:

That five per centum of the net proceeds of the sales of lands of the United States, after the first day of January, shall be applied to laying out and constructing public roads and levees in the said State, as the legislature thereof may direct.

Section 1 of the act of September 4, 1841 (5 Stat., 453), provided that

the States of Ohio, Indiana, Illinois, Alabama, Missouri, Mississippi, Louisiana, Arkansas, and Michigan were to be paid ten per cent of the net proceeds of the sales of public lands therein, without in any manner diminishing the sum theretofore granted to any of said States. Section 2 of said act provided that, after deducting said amount and all expenses connected with the survey, sale, etc., of said lands, sold after the 21st day of December, 1841, the net proceeds were to be divided among the twenty-six States of the Union, the District of Columbia, and the Territories of Wisconsin, Iowa and Florida, according to their respective population, as shown by the census of 1840. By the 8th section of said act each of the States named in the first section was granted 500,000 acres of public lands, and the same amount for each new State thereafter admitted into the Union. Section 9 required the proceeds of the lands granted by section 8 to be faithfully applied to objects of internal improvements within the respective States, namely: "Roads, railways, bridges, canals, and improvement of water-courses, and draining of swamps."

While it may be true that these acts do not directly bear on the material questions involved, yet there can be no question but what they may properly be considered as aids in arriving at the purpose of Congress in passing the Louisiana act of 1849.

In the appeal great stress is laid upon the opinion of Assistant Attorney General McCammon, in *State of Ohio* (3 L. D., 571), and it is claimed by the State that it was upon the authority of said opinion that the first indemnity ever allowed the State of Louisiana was on December 28, 1885. Said opinion refers exclusively to the Arkansas act, the acts of 1855 and 1857; it makes no reference to the Louisiana act, and can not be accepted as an authority in determining the matter herein involved.

The Louisiana act was a special act in that it only applied to the State of Louisiana. It granted to said State all the swamp lands therein, except lands bordering on streams, rivers, and bayous, which it is clear, in view of the debates in Congress, and the Statutes of Louisiana, hereinbefore referred to, were not understood to be or regarded as swamp lands. The exception seems to have been made for the very purpose of protecting the United States from claims thereafter made by the State for the lands embraced in its terms. Said exception refers to lands surveyed under the act of 1811, which gave to the State five per cent of the proceeds of their sale for the very purpose of reclaiming them by draining and levees. This construction accords with sound reason, and under it every part of the act is harmonized. Said act was special and local, in that it only applied to the State of Louisiana. The United States having granted, in contemplation of law, all the swamp lands in Louisiana, there was no swamp land in that State when the Arkansas act was passed, and in the very nature of things the Arkansas act did not apply to any lands in the State of Louisiana. The Arkansas act

was a general act. In construing said acts, the maxim of *generalia specialibus non derogant* applies. Endlich on the Interpretation of Statutes, section 223, states it as follows:

It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute, to say that a general act is to be construed as not repealing a particular one, that is, one directed toward a *special object* or *special class of objects*. . . . It is usually presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special act. . . . Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language or there be something which shows that the attention of the Legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous one; or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one.

Applying this rule to the 4th section of the Arkansas act, it is perfectly clear that Congress did not intend that said section should apply to the State of Louisiana. The whole subject of swamp lands in that State had been disposed of in the prior special act, and therefore the Arkansas act should be read as silently excluding from its operation the State of Louisiana. This conclusion must necessarily result in denying the right of Louisiana to any indemnity, for, as before suggested, the indemnity act of 1855 specifically limits its provisions to such States as were included in the Arkansas act.

The confirmatory act of 1857 extended the act of 1855 and confirmed selections of swamp lands made by all the States, and in clear language included Louisiana in its confirmatory provisions, but it does not follow that in the matter of indemnity it had any reference to said State. Louisiana under the act of 1849, in common with Arkansas and other States under the Arkansas act, had made selections under the respective laws granting swamp land, and Congress by the act of 1857 confirmed said selections. Such confirmation had nothing to do with indemnity; it dealt exclusively with State selections. The fact that the State of Louisiana is referred to specifically in the matter of selections in the act of 1857, and not so referred to in the indemnity act, is an additional reason for believing that Congress did not intend to include Louisiana in the matter of indemnity.

Taking into consideration the conditions that existed in the State of Louisiana, as shown by the debates in Congress and the statutes of that State, at the time the Louisiana act was passed, and the nature and character of the act itself, there seems to be no escape from the conclusion that Congress intended by said act to convey to said State all the swamp lands in said State, and thereby finally and forever settle every question in respect to swamp lands, so far as that particular State was

concerned; that the lands excepted in said act were clearly understood not to be swamp land in character, but reclaimed, in so far as they had been swampy.

It is equally clear, in the light of reason and the authorities, that said State was not intended to be included in the Arkansas act, nor in the indemnity act of 1855; that the act of 1857 only operated in said State to confirm to her the selections theretofore made under her grant.

It follows that the State's application must be, and it is hereby, rejected and dismissed.

OKLAHOMA LANDS—SECTION 16, ACT OF MARCH 3, 1891.

BONNETT v. JONES (ON REVIEW).

The provision in section 16, act of March 3, 1891 (26 Stat., 989), that the lands specified therein shall be opened to settlement "under the provisions of the homestead and townsite laws," should be construed to mean that said lands are to be opened to settlement under the homestead and townsite laws governing the disposition of lands in Oklahoma, and not operating to repeal the provision contained in section 20, act of May 2, 1890, disqualifying as homesteaders all persons owning one hundred and sixty acres in any State or Territory, and applicable to all lands in Oklahoma.

Secretary Bliss to the Commissioner of the General Land Office, March 15, 1897.
(I. H. L.) (E. M. R.)

This case involves the SE. $\frac{1}{4}$ of Sec. 5, T. 16 N., R. 7 W., Kingfisher land district, Oklahoma Territory, and is before the Department upon motion for review, by James Jones, of departmental decision of December 23, 1896 (23 L. D., 547), in which was awarded the land in controversy to William J. Bonnett. That decision held that Jones was the owner of 160 acres of land at the time of the hearing in the case, and that under the law such ownership deprived him of the right of entry upon land situated in Oklahoma Territory.

By act of Congress of May 2, 1890 (26 Stat., 81, page 91 thereof, section 20), it is provided:

And no person who shall at the time be seized in fee simple of one hundred and sixty acres of land in any State or Territory, shall hereafter be entitled to enter land in said Territory of Oklahoma.

By act of Congress of March 3, 1891 (26 Stat., 989, page 1026 thereof, section 16), it is provided:

That whenever any of the lands acquired by either of the three foregoing agreements respecting lands in the Indian or Oklahoma Territory shall by operation of law or proclamation of the President of the United States be open to settlement they shall be disposed of to actual settlers only, under the provisions of the homestead and townsite laws (except section twenty-three hundred and one of the Revised Statutes of the United States which shall not apply).

By act of Congress of March 3, 1891 (26 Stat., 1095, page 1098 thereof, under the head of section 5), it is provided, in the amendment of sec-

tion 2289 of the Revised Statutes, after setting forth the qualifications of entry—

but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law.

In the decision sought to be reviewed it was held that the act last referred to could not under any construction of law known to the courts, be held to affect the class of lands mentioned in the act of May 2, 1890 (*supra*), because the one is general and the other special.

Counsel for the petitioner contends that the act of March 3, 1891 (26 Stat., 989), does serve to except these lands from the abridgment of the right of entry contained in the act of May 2, 1890, because it was under one of the three agreements mentioned in this act that the Cheyenne and Arapahoe lands were thrown open to settlement, and under section 16 (*supra*) said lands were thrown open to settlement under the provisions of the general homestead law.

Section 20 of the act of May 2, 1890, as has already been shown, contains an absolute and unqualified prohibition to any one who owned 160 acres of land in any State or Territory from thereafter acquiring title under the homestead law to any land in the Territory of Oklahoma. That was a general prohibition applicable to all lands within the Territory of Oklahoma. And as the Cheyenne and Arapahoe reservation is now a portion of that Territory, it is applicable to lands which were formerly in such reservation, as much as to any other lands within its territory.

Repeals by implication are not favored by the courts; and a subsequent act will not be held to repeal the provisions of a former act unless necessitated by the clear intent of Congress; in such instances as where there is a clear conflict between the meaning and scope of the acts. No such necessity is here presented. Both acts can stand.

The act of March 3, 1891, setting forth that these lands are opened to settlement "under the provisions of the homestead and townsite laws," can be and should be construed to mean that the land within the Cheyenne and Arapahoe reservation is open to settlement under the homestead and townsite laws pertaining to the Territory of Oklahoma. In this manner both acts are given force and effect without such construction being inharmonious with the true meaning of both.

The motion for review is therefore denied.

PRACTICE—CERTIORARI—APPEAL.

SEE *v.* SEE.

An application for a writ of certiorari will be denied where the applicant has not previously sought relief through appeal, as provided in the Rules of Practice.

Secretary Bliss to the Commissioner of the General Land Office, March 15, 1897. (I. H. L.) (J. L. McC.)

Clay See has filed an application for an order directing your office to transmit to the Department the record in the case of Frank V. See against said Clay See, in the matter of the simultaneous applications of the parties named to enter certain lands—the particular tract in conflict being the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 34, T. 5 N., R. 20 W., Missoula land district, Montana.

The applicant complains of the decision of your office, dated October 22, 1896, a copy of which is filed with his application.

The local officers had recommended that Clay See's homestead entry be canceled in so far as it embraced the forty acres in controversy, and that Frank V. See be permitted to file thereon.

Clay See filed an appeal to your office, alleging that it was error on the part of the local officers—

1. To recommend the homestead entry of Clay be canceled as to the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 34, T. 5 N., R. 20 W., and that Frank V. See be allowed to file upon the same;

2. Not to have recommended that said homestead entry remain intact, and that said contest of Frank V. See be dismissed.

A motion was made to dismiss said appeal, on the ground that it failed to set forth specific points of exception to the decision appealed from, as required by the Rules of Practice.

This motion was granted; and your office, proceeding to consider the case under Rule 48 of Practice, held the decision of the local officers final as to facts, concurred with them as to their conclusions of law, and directed the cancellation of Clay See's entry as to the forty acres in conflict—in case the plaintiff applied to perfect his application therefor into an entry.

It does not appear from anything in the application or the accompanying papers that Clay See has ever filed an appeal from said adverse decision of your office.

The right of proceeding by certiorari was instituted as a remedy for any injustice done by your office where the right of appeal therefrom does not exist (*Florida Navigation Co. v. Miller*, 3 L. D., 324-5; *George K. Bradford*, 4 L. D., 269; and many cases since); or where appeal has been filed but the right denied by your office (*Cedar Hill Mining Co.*, 1 L. D., 628, and many cases since). But the Department will not countenance, upon the grounds appearing by this record, a resort to the extraordinary remedy of certiorari where the applicant has not

previously sought relief through the ordinary method provided by the Rules of Practice,—to wit, by appeal (*Smith v. Noble*, 11 L. D., 558; *Spratt v. Edwards*, 15 L. D., 290; and many other cases).

The application is denied.

JUDGMENT—FINDING OF FACTS—CORRECTION OF ERROR.

FLORIDA RAILWAY AND NAVIGATION CO. *v.* HAWLEY.

On the application of a party in interest the Department may reform its finding of facts in a previous decision, so that it may be in accord with the record in the case, where such action seems requisite for the protection of the applicant, though the judgment as rendered may not be affected thereby.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (F. W. C.)

A motion has been filed on behalf of Chauncey I. Hawley to correct an alleged error in the finding of facts contained in departmental decision of March 21, 1894 (18 L. D., 236). In said decision it was held (syllabus):

A tract of land withdrawn for indemnity purposes under a railroad grant, and included in a descriptive list of lands announced for public sale under a subsequent proclamation of the President, that excepts therefrom all lands "reserved for railroad purposes" can not be regarded as "offered"; and a private cash entry of a tract occupying such status is void, and not subject to equitable confirmation.

Said decision was upon a motion filed for a review of departmental decision of May 20, 1889 (not reported), in which it was held that the private cash entry of Chauncey I. Hawley, made April 27, 1882, for certain tracts in the Gainesville land district, Florida, might be submitted to the board of equitable adjudication for confirmation.

The tracts covered by said entry are within the indemnity limits of the grant made to the State of Florida by the act of Congress approved May 17, 1856 (11 Stat., 15), to aid in the construction of a railroad from Amelia Island to Tampa Bay and Cedar Keys. The lands were in a state of reservation at the date of the allowance of Hawley's entry, and it was upon this ground that Hawley's entry was held to have been void and not capable of confirmation. The holding to this effect will be found in that portion of the opinion reported on pages 240 and 241 of the said land decisions, wherein it was held:

There being no authority to offer the tract in controversy, it must be considered as having never been offered, and, under the rulings of the court and of the Department in the cases above cited, the private cash entry of Hawley was without authority and void and can not be confirmed by the board of equitable adjudication.

This would seem to have effectually disposed of any rights under Hawley's entry; the opinion proceeds, however—

It further appears that the company applied to select this tract prior to the revocation of the withdrawal, and that the application was refused because of the entry

of Hawley. The company appealed from the action of the local officers, rejecting said list, but it was afterwards discovered that the local officers had neglected to place the selections of record, and your office was asked to correct that error, which was refused.

The finding complained of is that "the company appealed from the action of the local officers, rejecting said list."

While the decision was in no wise predicated upon this finding, and would not be affected by its elimination or change, yet as it is urged that said finding may prejudice any future rights desired to be asserted by Hawley in the courts, I have deemed it proper to inquire as to the correctness of the same, and find from the records of the land office, gathered from the report made by your office in response to a call from this Department, that, as a matter of fact, the company did not appeal from the action of the local officers in refusing to accept its list No. 2, covering this land, which list was tendered at the local office June 1, 1887. The finding made in said departmental decision, that the company appealed from the action of the local officers, rejecting its list covering the tract embraced in Hawley's purchase, is error and is set aside.

In answer to the motion it is urged on behalf of the Florida Central and Peninsular Railroad Company, the present claimant under said grant, that the finding should not be made that the company did not appeal, without a detailed statement of the several actions taken by your office and the local officers in relation to selections on account of this grant, which it is claimed will show that the selection in question was simply held in abeyance.

As before stated, the decision of the Department was not predicated upon, nor influenced by, the finding complained of, which, it is clearly shown, was an erroneous finding; and the same having been set aside, it seems to be unnecessary to further complicate the record in said case by any finding of facts not necessary to the conclusion reached in said opinion.

The motion and accompanying papers are herewith returned for the files of your office.

REPAYMENT—ASSIGNEE—MORTGAGEE.

CALIFORNIA MORTGAGE LOAN AND TRUST CO.

No right of repayment is acquired by an assignee whose interest in the land is not obtained until after the cancellation of the entry.

The right of assignees to repayment is limited to assignees of the land, and does not extend to one holding an assignment of the claim for the money paid on the entry. A mortgagee is not an assignee, within the intent and meaning of the act providing for repayment, if the mortgage is merely a lien on the land.

On application for repayment by an entryman he must show that the land is free from incumbrance.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (J. L. McC.)

The California Mortgage, Loan and Trust Company has appealed from the decision of your office, dated November 19, 1895, denying its

application for repayment of the purchase money paid by William B. Stewart for the land embraced in his pre-emption cash entry, No. 3640, for the NE. $\frac{1}{4}$ of Sec. 32, T. 4 S., R. 1 E., Los Angeles land district, California.

Said entry was canceled on March 31, 1890, because the land had been, by executive order of June 19, 1883, reserved from entry, for the benefit of the Mission Indians.

On November 27, 1893, the company above named, claiming as mortgagee, applied to have the entry reinstated. The application was denied by your office, on December 8, 1893; and on appeal the Department, on April 18, 1895, affirmed said decision. (See 307 L. and R., 150.)

Thereupon the company applied for repayment of the purchase money. With said application the company filed a certified copy of the receiver's receipt; the affidavit of the vice-president and general manager of the company, setting forth that said company, on July 28, 1889, loaned to said Stewart the sum of one thousand dollars, receiving as security for such loan a mortgage on the land; a grant deed, dated May 4, 1894, from Stewart to the company (duly recorded); a quit-claim deed from the company to the United States; an assignment by Stewart to the company of all right, title, and interest in the money paid by him to the United States for the land in controversy; and other documents.

Your office held that, inasmuch as the deed from Stewart to the company was subsequent to the cancellation of the entry, it gave the company no claim to repayment of the purchase money paid by Stewart.

It clearly appears that Stewart's entry was "erroneously allowed," within the meaning of Sec. 2 of the act of June 16, 1880 (21 Stat., 287); the only question for consideration is, whether the repayment should be made to the California Mortgage, Loan and Trust Company.

It is well settled that no right of repayment is acquired by an assignee whose interest in the land is not obtained until *after* the cancellation of the entry. (Adolph Emert, 14 L. D., 101; Albert G. Craven, id., 140; Alpha L. Sparks, 20 L. D., 75.) Also that the right of repayment is restricted to assignees of the land, and does not extend to persons holding an assignment of the claim for the money paid on the entry. (Instructions of November 2, 1895, 21 L. D., 366.)

The decision of your office correctly held that the showing made by the company relative to the existence of said mortgage was unsatisfactory. Such evidence may, however, be hereafter furnished by supplementary proof.

The question then remains for consideration, whether, in case such satisfactory evidence should be furnished, the company would be entitled to repayment?

The Department has repeatedly held that where a mortgage is merely a lien on the land, the mortgagee is not an assignee of the entryman

within the meaning and intent of the act providing for repayment. (Alonzo W. Graves, 11 L. D., 283; Emma J. Campbell, 15 L. D., 392.)

By the Civil Code of California (Sec. 2920), it is declared that a mortgage "is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." Sec. 2923:—"The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession." Sec. 2926:—"A mortgage is a lien upon everything that would pass by a grant of the property." And Sec. 2927 declares that a mortgage does not entitle a mortgagee to possession.

The California Mortgage, Loan and Trust Company not being, under departmental rulings, an assignee within the meaning of the act of June 16, 1880, repayment cannot be made to it; and your action in denying its application is therefore approved.

The title to the land was, at the date of the cancellation of the entry, in the entryman Stewart, subject only to the lien of the mortgage—if such mortgage in fact existed, as alleged; and in view thereof, repayment, if allowed at all, must be made to him. But before this can be done he will have to secure a release of the mortgage, by payment, relinquishment, or otherwise. Upon a proper application by the entryman, showing such release, I see no good reason why repayment may not be allowed.

OKLAHOMA LANDS—QUALIFICATIONS OF HOMESTEADER.

MASON v. CROMWELL.

The limitation in section 20, act of May 2, 1890, of the right to make homestead entry in Oklahoma, to persons who are not "seized in fee simple of one hundred and sixty acres of land," disqualifies one who owns a "quarter section," entered as such, though the area of the tract thus owned may fall short of one hundred and sixty acres by a small fraction, as shown by the field notes of survey.

A transfer of land owned by an intending homesteader will not operate to relieve him from the disqualification imposed by said section, if it appears to have not been made in good faith, but for the purpose of evading the statutory inhibition.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (C. J. G.)

The land involved in this controversy is the SW. $\frac{1}{4}$ of Sec. 20, T. 23 N., R. 6 W., Enid land district, Oklahoma.

Fullerton C. Cromwell made homestead entry of the above described tract on October 27, 1893.

A few days thereafter Calvin F. Mason filed an application to make homestead entry of said land, alleging settlement thereon October 13, 1893.

A hearing was duly had January 24, 1894, on the issue of prior settlement.

The register rendered decision in favor of Mason, finding that he was the prior settler and a qualified entryman. He therefore recommended that Cromwell's entry be held for cancellation.

The receiver found in favor of Cromwell, on the ground that Mason was disqualified to make entry by reason of his ownership of one hundred and sixty acres of land in the State of Kansas. He accordingly recommended that Cromwell's entry remain intact.

Both parties appealed, and your office, under date of May 22, 1895, sustained the decision of the receiver and dismissed the contest.

Mason has appealed to this Department, and in his said appeal three propositions are submitted: (1) That he was not the owner of one hundred and sixty acres of land at the time of his settlement or at the time Cromwell made settlement. (2) That before making settlement he had effectually transferred the quarter section of land that he owned in Kansas. (3) That he was not disqualified and that his entry should be allowed.

A point is raised in the plaintiff's appeal to this Department which was not discussed in the decisions below or in the briefs of the opposing counsel, namely, that as the area of the land owned by Mason in the State of Kansas (NE. $\frac{1}{4}$ of Sec. 28, T. 9 S., R. 34 W.) contains 159.35 acres, according to the field notes of your office, or less than one hundred and sixty acres, he is not therefore barred from making entry under section 20 of the act of May 2, 1890 (26 Stat., 81).

It will be necessary for the purposes of this decision to consider this proposition first, although it is the last one discussed by plaintiff in his appeal, for the reason if the point is found to be well taken it will render a consideration of the other features of the case unnecessary.

The language of the act of May 2, 1890, *supra*, having reference to this case, is as follows:

and no person who shall at the time be seized in fee simple of a hundred and sixty acres of land in any State or Territory shall hereafter be entitled to enter land in said Territory of Oklahoma.

As the plaintiff insists upon a strict and literal construction of the above statute, it will be necessary to ascertain as far as possible, in the light of previous legislation, just what meaning Congress intended to convey by the language employed. While the language of the statute is to the effect that no person who is the owner of a "hundred and sixty acres" of land shall be entitled to enter land in Oklahoma Territory, yet I am inclined to think that it would be a too strict interpretation of that language to say that simply because the plaintiff in this case happened to be the owner of a small fraction less than a hundred and sixty acres he is therefore not disqualified from making the entry applied for. The history of legislation on this subject would seem to indicate that Congress has used the terms "a hundred and sixty acres" and "quarter-section" interchangeably, and if this be true, the fact that the land owned by the plaintiff in the State of

Kansas contained a fraction less than one hundred and sixty acres or less than a quarter-section, makes no difference; he is barred equally with the owner of a full hundred and sixty acres or a technical quarter-section.

In the case of Benjamin C. Wilkins (2 L. D., 129), the Department reviewed at length the several statutes pertaining to the subject under consideration, and held that "a 'quarter-section' of public land is under the homestead laws one hundred and sixty acres." It was stated in that case as follows:

It seems clear to me from this review that Congress and the President used the terms "quarter-section" and "one hundred and sixty acres" interchangeably and as meaning the same quantity of land, and that this resulted from the fact that a quarter-section under the government system of public surveys embraces or is intended to embrace just one hundred and sixty acres, although from inaccuracies in adjusting meridians, and other exceptional reasons, it sometimes differs from that amount; and that the purpose was to give settlers under the law one hundred and sixty acres, and no more. When, therefore, by reason of the surveys, an entry for this precise amount is impracticable, it must, as nearly as possible, approximate it.

. . . . It thus appears that, substantially, the same words are used in limitation of land to be entered under both the pre-emption and homestead laws, and I cannot doubt that the terms "quarter-section" and "one hundred and sixty acres" are used synonymously in each to mean one hundred and sixty acres; and this is in harmony with the general policy of the government under other laws.

In the interpretation of Sec. 2289, Revised Statutes, which provides that every qualified person: "Shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands," the Department, in the case of William C. Elson (6 L. D., 797), said, *inter alia*

It is true that generally the quarter-section, if the survey be correct, will contain one hundred and sixty acres; but it was well known to Congress that many quarter sections were fractional in the survey, and that many, which were not fractional, did not contain exactly the one hundred and sixty acres of land. They, therefore, gave a settler the quarter-section as it should be found surveyed.

. . . . An actual area-measurement of the government survey shows, as is well known, that few subdivisions contain exactly the number of acres reported by the surveyor, generally containing more or less. The grants of the United States are not by quantity, but by description, and, it is a familiar rule, that a call of quantity in a grant must yield to description, and the act of Congress is to be regarded as a grant as to each tract, in a certain sense.

It will be observed that the question involved in the above cited cases was as to the entry of a quarter-section containing more than one hundred and sixty acres, and the entry was not rejected on account of the excess, the same being regarded as a quarter or one hundred and sixty acres "in conformity to the legal subdivisions of the public lands."

The issue has probably not heretofore been raised, under the act of May 2, 1890, as to an entry of a quarter-section containing less than one hundred and sixty acres, but, as is well known, a great many quarter sections have been entered as such when the area-measurement would not equal the one hundred and sixty acres; but as those entries

containing more have been allowed to stand, simply because the quarter-section was in conformity with legal subdivisions, it would seem that where the deficiency is shown to be small the rule should work both ways. Especially is this true since there is a provision of law to the effect that when a settler has entered less than one quarter section of land he may enter other and additional land lying contiguous to the original entry, which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres. But an application for additional land to make up the full one hundred and sixty acres in such a case as the Kansas land herein referred to, would probably not be considered, for the reason that such entry under the rules must be regarded as a quarter-section or one hundred and sixty acres, and the maxim of *de minimis non curat lex* would apply. It does not logically follow therefore, as contended by the plaintiff, that if he is barred by the ownership of 159.35 acres, he would be equally barred by the ownership of ten acres or any quantity less than one hundred and sixty acres, for the reason that when an entry is made for a much less quantity than one hundred and sixty acres, the entryman has the privilege of making an additional entry.

To all intents, therefore, the land owned by Mason in the State of Kansas was a full quarter-section according to the legal subdivisions made on the basis of one hundred and sixty acres to the quarter. Technically, the quarter section of land in Kansas did not contain one hundred and sixty acres as shown by the field notes in your office. But it was intended that it should, and the fact that the results reached by the survey show a fraction less than one hundred and sixty acres was due to the variations allowable in making the said survey. To hold otherwise would be to declare Mason a qualified entryman on a technicality, based on an interpretation of the statute by itself alone and according to the mere literal meaning of its words. The statute must be construed in connection with the whole system governing the disposition of the public lands and in the light of previous statutes upon the same subject. As heretofore shown, the terms quarter-section and one hundred and sixty acres, are used interchangeably, unless it is to be presumed that Congress, in the act of May 2, 1890, intended to reverse the former policy and introduce a fundamental change in the well established custom of the Department.

The evident intent, in all legislation relating to the public lands, has been to limit the entry of said lands to those who do not already own one hundred and sixty acres of land or a quarter-section. And the fact that the quarter-section may consist of a little more or a little less than one hundred and sixty acres, is shown by the well established practice of the Department to cut no figure either in the admission or rejection of applications to make entry. When an entry is made it is made by description, and there are numerous decisions going to show that when a quarter-section contains more than one hundred and sixty acres, the

entry therefor is not necessarily rejected on account of the excess. There seems to be no good reason for enforcing a stricter rule in cases where the actual number of acres falls in a small fractional degree short of one hundred and sixty acres. The records of your office show, with reference to the Kansas land in question, that one hundred and sixty acres in round numbers were originally entered. Presumably this represents the number of acres that passed by purchase into the possession of the plaintiff Mason.

The whole scheme for the disposition of the public domain has been to afford to landless people the opportunity of securing homes. This sentiment runs throughout the debates of Congress in passing various acts relative to such disposition of the lands. And one of the tests of a person's qualifications to secure the benefits of the law in this regard has been, whether at the time of entry he was the owner of a quarter-section of land in any State or Territory, or approximately one hundred and sixty acres. This was the evident intent of Congress as gathered from the history of legislation on that subject, regardless of the language employed in the acts. This view is certainly in harmony with sound policy and is in strict accord with justice and good faith, which constitute the essential features in a proper administration of the public land laws.

As was said in the case of *Ryan et al. v. Carter et al.* (93 U. S., 78)—

No known rule of law requires us to interpret it (act of Congress) according to its literal import, when its evident intent is different. It may be that the words, taken in their usual sense, would exclude the case of *Dodier*; but if it can be gathered, from a view of the whole law, and others *in pari materia*, that they were not used in that sense, and if they admit of another meaning in perfect harmony with the general scope of the statute, it will be adopted as the declaration of the will of Congress. Especially is this so when this construction withdraws the least number of cases from the operation of the statute.

I think it may fairly be assumed, in the light of past legislation, that it was the evident intent of Congress in the act of May 2, 1890, to convey the same meaning by the language employed therein as is indicated in its previous acts. There would seem to be no good reason for establishing a different rule from that already existing, especially as a different interpretation would have the effect of withdrawing a great number of cases from the operation of the prohibitory statute, and thereby qualify a great number of persons to make entry who have heretofore been deemed disqualified; and that too on mere technicality.

It thus being decided that the plaintiff was at one time owner of one hundred and sixty acres of land in the State of Kansas, and thereby disqualified to make entry, it becomes necessary to determine whether he was the owner thereof at 5 P. M. on October 13, 1893, the day and hour he alleges settlement on the tract in controversy. And in the consideration of this question it will be proper to attach much importance to Mason's good faith as gathered from the surrounding circumstances.

The facts relative to Mason's alleged transfer of his Kansas land are substantially as follows: Mason alleges settlement October 13, 1893. The evidence shows, however, that he was in the Territory and had examined the land several days prior to that date. He was negotiating with one Walter A. Carpenter, who had a settler's right to the land in question, for the purchase of said right. When the said purchase was consummated Mason alleges that at nine o'clock on the morning of October 13, 1893, he executed a deed transferring his land in the State of Kansas to his sister. Having acknowledged the said deed, he mailed it to his wife with instructions to send the same to the recorder's office. It appears that Mason did not know his wife's address, so he sent the deed to some one at Sabetha, Kansas, to be forwarded to his wife at St. Joseph or Marysville, Missouri. It seems also that the conveyance of the Kansas land was not in the nature of a sale, but was made as a gift, no money consideration passing between the parties to the contract. In explanation of the transaction Mason states, in affidavits accompanying a petition for rehearing, that prior to October 6, 1893, he received a letter from his sister saying that she was in need of financial aid, and that on that date he wrote her offering to give her the Kansas land and to make her a deed for the same. No evidence regarding these allegations was brought out at the hearing, and no further communication between Mason and his sister is shown. Mason claims that he has not seen the deed since he mailed it, and that he does not know whether his wife forwarded the same to the recorder's office. The affidavits referred to, however, state that the deed was finally recorded, but it was after considerable delay.

It will be unnecessary for this Department to consider at length the question as to whether or not the manner in which the said deed was delivered constituted a proper delivery in contemplation of law. In the light of the numerous authorities cited by counsel on both sides, and which it is not necessary to repeat here, I am of the opinion that Mason's act, under all the circumstances of the case, did not amount to proper delivery. There was apparently no previous agreement between the grantor and grantee as to how the delivery should be made, or that Mrs. Mason should act as the agent of both. The deed was not even sent to the grantee, nor were there any instructions that it should be delivered into the grantee's possession.

The authorities are perhaps uniform in holding that when the grantor parts with all control over the deed, that act is effectual and operates from the instant of delivery. The matter of control over the deed constitutes the essence of the case at bar. The question arises, whether from the fact that Mason mailed the deed to his wife, without any previous agreement to that effect between the parties to the deed, he thereby parted with all control over the instrument. The deed was never placed in the possession of the grantee. There were no instructions to Mason's wife that the deed should be delivered to the grantee;

in fact, the latter was at the time in Leavenworth, Kansas, a distance of three hundred miles away. So that if Mason did not really intend to transfer the Kansas land to his sister, he still had an opportunity to recall the deed, and in this view its delivery could hardly be regarded as valid.

When Mason mailed the deed he thereby constituted the government his agent to deliver the same to his wife, and then by instructions he made his wife his agent to see that it was recorded, but neither was the agent of the grantee according to any former agreement; in fact, the grantee, as subsequent events showed, knew nothing of Mason's intentions in this regard.

The principal question, however, as heretofore implied, is as to whether or not Mason has acted in entire good faith in his transactions connected with the land in controversy. One suspicious circumstance involved in the transaction is that Mason's sister, the grantee of the deed, apparently knew nothing of it. On the face of the record it looks as if she were employed as an unconscious beneficiary for the express purpose of qualifying Mason to make entry. No copy of the deed is put in evidence, nor of the letter containing the instructions to Mason's wife. The evidence concerning these things is made to depend solely upon the assertions of Mason, and he is the interested party. His testimony regarding what became of the deed after he had mailed it is entirely too vague and uncertain for a matter of so much importance. He does not know whether the said deed was acknowledged by his wife; does not recollect the description of the land he deeded away, nor is he quite sure that the said deed was ever forwarded to the recorder's office, as he has never seen it since.

Counsel for plaintiff in this case rely largely upon presumption to supply the deficiency caused by the absence of positive testimony. Given the frame-work, consisting of the bare statement of plaintiff that he properly executed and acknowledged the deed in question and placed the same in the mails, they depend upon presumption to complete the structure. They presume from Mason's statements that his intentions were honest and that the deed was properly delivered and regularly recorded. But beyond the acknowledgments of Mason himself the evidence is silent.

The Department is unable to conclude from Mason's uncorroborated statement, in view of the suspicious circumstances developed by the testimony, that being the owner of one hundred and sixty acres of land at nine o'clock in the morning of October 13, 1893, he could completely divest himself of all title thereto, without any positive agreement or negotiation with the grantee, and by the simple act of placing the deed in the mails transform himself into a properly qualified entryman by five o'clock in the afternoon of the same day. His purpose seems manifest. The history of legislation will show that the government has jealously limited the disposal of the public domain for the benefit of the

landless; so much so that where an applicant to make entry is shown to have been the owner at one time of one hundred and sixty acres of land, stronger evidence that he has become divested of title thereto will be required than is present in this case.

It is unnecessary to consider the evidence touching Mason's alleged settlement on and improvement of the land in question prior to Cromwell's entry, in view of the fact that he is found to be disqualified by reason of his ownership of one hundred and sixty acres of land in the State of Kansas at the date of said settlement.

Your office decision is hereby affirmed.

REPAYMENT—FEES AND COMMISSIONS.

LESLIE O. HUSTED.

Repayment of the fees and commissions paid on an entry will not be allowed where the entry is relinquished on account of the undesirable character of the land, and a second entry made.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (J. L. McC.)

Leslie O. Husted, on March 26, 1889, made homestead entry for the SE. $\frac{1}{4}$ of Sec. 15, T. 7 N., R. 49 W., Denver land district, Colorado.

Finding it was impossible to obtain water fit for use, he was, upon his own request, permitted to relinquish the land and make a second entry. Afterward he applied for repayment of the fees and commissions paid upon his former entry. This application your office refused, by letter of March 4, 1896. He now appeals to the Department. He quotes from the General Circular of October 30, 1895, which states that, where an entry is canceled as invalid for some reason other than abandonment, and not the wilful act of the party, he . . . may have the fee and commissions paid on the canceled entry refunded on proper application, under the act of June 16, 1880.

The paragraph quoted from the General Circular expressly refers to an entry "canceled as invalid;" the entry in the case at bar was not canceled because invalid. The act of June 16, 1880, provides for repayment where entries have "been erroneously allowed and can not be confirmed;" the entry here in question could have been confirmed, but the entryman did not wish that it should be; he preferred to relinquish it and select other land.

The decision of your office was correct, and is hereby affirmed.

REPAYMENT—PATENTEE—SURRENDER OF PATENT.

HENRY H. HARRISON.

On application for the return of purchase money by a patentee who was required to purchase under section 5, act of March 3, 1887, when in fact the land passed by the railroad grant under which he held, the applicant should surrender the patent, but should not be required to execute a deed of relinquishment.

Secretary Bliss to the Commissioner of the General Land Office, March 15, 1897. (I. H. L.) (J. L.)

This case involves the repayment of the sum of two hundred dollars, the purchase money paid to the United States by Henry H. Harrison for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 9, T. 47 N., R. 4 W., Ashland land district, Wisconsin, containing eighty acres of land.

Said tract was granted by the acts of June 3, 1856 (11 Statutes 20), and May 5, 1864 (13 Statutes 66), to the State of Wisconsin to aid in the construction of railroads. Decisions of the supreme court rendered on June 3, 1895, and reported in 159 U. S. reports—*Wisconsin Central Railroad Co. v. Forsythe*, p. 46, and *Spencer v. McDougal*, p. 62—finally adjudged that the Wisconsin Central Railroad Company acquired from the State of Wisconsin a good title to said tract of land under said grants. And it appears that Harrison by sundry intermediate conveyances had acquired and was owner of the title of the company.

Previous to the publication of said decisions, your office and this Department had held that the tract in contest (and other lands in *con-simili casu*), did not pass under the grants aforesaid, and was subject to entry under the general land laws. Your office thereupon advised Mr. Harrison, that it would be necessary for him to purchase said tract from the government under the fifth section of the act of March 3, 1887 (24 Statutes, 556). Consequently Harrison, on June 8, 1893, paid the government two hundred dollars for the tract, as appears by certificate No. 5728 of that date issued at Ashland, Wisconsin. And on August 31, 1894, a patent for the land was issued to him.

After the promulgation of said decisions, to wit: on July 3, 1895, Harrison filed his application for repayment of the two hundred dollars aforesaid in accordance with section 2362 of the Revised Statutes of the United States. On December 6, 1895, (by letter "F"), your office required Harrison (1) to surrender the patent issued to him, (2) to furnish a duly executed deed relinquishing to the United States all right and claim to the land under said patent, (3) to have said deed duly recorded, and (4) to furnish a supplemental abstract of title continued from June 27, 1895—the date of the abstract now on file—down to and including the date of recording said deed.

On January 15, 1896, Harrison filed a motion for a review of said decision. On July 2, 1896 (letter "F"), your office denied said motion, and declined to modify the former decision.

Whereupon Harrison appealed to this Department.

By section 2362 of the Revised Statutes it is enacted that:

The Secretary of the Interior is authorized, upon proof being made to his satisfaction that any tract of land has been erroneously sold by the United States so that from any cause the sale can not be confirmed, to repay to the purchaser or to his legal representatives or assigns, the sum of money which was paid therefor, out of any money in the Treasury not otherwise appropriated.

It is conceded, that before he applied to purchase under the act of March 3, 1887, Harrison had acquired the valid title already conveyed by the United States to the State of Wisconsin; that the patent issued to him conveyed no title, because the land therein described did not belong to the United States; and that his right to be repaid the purchase money is unquestionable. The only question involved is merely a matter of administration to be determined by reference to the regulations.

The General Land Office circular of February 6, 1892, on page 86, and the circular of October 30, 1895, on page 98, both prescribe as follows:

If however, the applicant has acquired the valid title already conveyed by the United States, it will not be necessary for him to reconvey the land, but he may make a full statement, with corroborative evidence of the facts, waiving all claim under the invalid entry, and thereupon receive repayment of the amount erroneously paid.

Harrison filed a full statement, which is corroborated by the records of your office. He is willing and offers to surrender his patent, and waive all claims under it, and the invalid entry on which it was issued. Your office erred in requiring him to execute a deed of relinquishment, and have the same recorded, and to furnish a supplemental abstract of title continued from the date of the abstract on file down to the date of such recordation.

The patent is null and void to all intents and purposes. It conveyed no right, title, interest or estate which Harrison can consistently undertake to relinquish. He should be repaid the money upon the return and surrender of the patent with his receipt for the money duly attested endorsed thereon, in full payment and satisfaction of all his claims thereunder, in such form as your office may prescribe.

Your office decision is hereby modified as above indicated.

ADJOINING FARM ENTRY—TOWNSITE—MINERAL LAND.

CALDWELL v. GOLD BAR MINING COMPANY.

An adjoining farm entry is invalid, and will not be allowed to stand, if the entryman was not in fact the owner of the alleged original farm at the time of entry.

An application to make townsite entry under section 2389 R. S., will not be allowed, where the number of bona fide occupants is not given, and it is not manifest that the occupants in fact desire in good faith to make such entry, and also where the application covers land apparently mineral in character, and in close proximity to another town.

In case of an attack on a mineral location of land that has once been adjudged mineral in character, the abandonment or forfeiture of the claim must be shown by clear and unmistakable evidence.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (P. J. C.)

The record shows that the Gold Bar Quartz Mining Company made application for patent for the Gold Bar mining claim, lot No. 206, Sacramento, California, land district, on November 24, 1893. Notice by publication was duly given of this application, which ran from November 26, 1893, to February 3, 1894.

John Caldwell, a superior judge of Nevada county, California, filed in the local office an application to enter, for townsite purposes, "in accordance with the provisions of sections 2388-9 inclusive (R. S.)," lot 3 in Sec. 33, lot 6 in Sec. 28, lot 12 in Sec. 27, and fractional NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ (also described as lot 20) in Sec. 34, T. 16 N., R. 8 E., M. D. M., in trust for the uses and purposes of the occupants and dwellers thereon. He represented that the land was then used and occupied for townsite purposes and had been since 1860. This application is not dated, but the local officers say it was presented January 23, 1894. It appears that they declined to accept the application because of conflict with the mineral application "and with the homestead entry of Richard Ryan." It is also stated by the local officers that on the same day Judge Caldwell filed a protest against the mineral entry. It seems that this protest was against the "mineral applicants the Gold Bar Quartz Mining Company, Richard Ryan, homestead claimant, and Central Pacific Railroad Company." It is dated January 15, 1894, and alleges that he desires to make entry of the land for the use and benefit of the inhabitants thereof; that the land is entirely enclosed and occupied by persons residing thereon; that there are more than fifteen dwellings and families thereon, the total number of inhabitants being one hundred and fifty; that the land has been used for townsite purposes for more than thirty years; "that the majority of the occupants of said premises have requested me to make application in trust for them under the United States Revised Statutes;" that he files "this adverse claim and protest against the said application by said Gold Bar Quartz Mining Company for said Gold Bar Quartz Mine," because

"the land embraced therein is agricultural land, and that no part of it is mineral and that no mineral or quartz of any kind has ever been discovered thereon;" that the land is settled upon and occupied as a townsite; and that "that portion in section 27 is excepted from the railroad grant by reason of the pre-emption claim of J. J. Collins."

This protest is not sworn to by the judge, but he states "that the facts upon which said adverse claim and protest are based being (are) fully set forth in the affidavits hereto annexed."

The affidavits referred to were made by Richard Ryan, one of the defendants in the protest, and John Thomas, in which they swear that there are nine dwellings etc. on the land; that there is no lode existing within the limits of the Gold Bar claim; that no gold nor quartz has been extracted from the premises; that the ground embraced is non-mineral in character, and that there are no indications of mineral upon the same; and that Collins settled upon lot 12 in Sec. 27 prior to 1862 and filed his declaratory statement therefor in 1868. This affidavit was sworn to on January 12, 1894.

On January 24, following, the local officers issued notice calling for a hearing on this protest.

On February 3, 1894, the mining company made application to purchase the land applied for, which was denied because of the pending contest. Subsequently, in the same month, the mining company applied for a re-hearing on its application to purchase and to reconsider the respective orders issued, and that the notice might be dismissed and quashed. The local officers thereupon modified their former decision to the extent of quashing the notice which had been issued; and thereupon transmitted the record to your office with the recommendation that a hearing be ordered. The mineral claimants appealed from their action.

Your office, by letter of January 20, 1894, considered this appeal, and in doing so recited the prior history of lot 3, included in the tract, as follows:

In deciding this question it becomes necessary to consider briefly the facts of record relative to said lot 3, of section 33.

This office by decision dated November 27, 1885, (letter F), in the case of S. J. Alderman v. C. P. R. R. Co., involving said lot 3, decided: "The residence of Irish antedating the railroad grant, and extending beyond the date of definite location, excepted the land from the operation of the grant, the same is therefore subject to disposal under the general laws of the United States."

Said office decision was affirmed by the departmental decision of September 28, 1887.

It appears from the record in quasi contest No. 601, W. H. Weldon claiming the Gold Bar Quartz mine v. C. P. R. R. Co. that Weldon on October 8, 1890, filed a petition alleging that the land in said lot 3, is mineral in character.

Upon said petition a hearing, which was ordered by this office, was held March 27, 1891.

Said hearing resulted in a final decision by this office, dated February 26, 1892, from which I quote: "You decided that the land was mineral in character and recommended that it be excluded from the grant to the said respondent.

"The parties in interest were duly notified of your decision and no appeal has been taken therefrom.

"Your decision is accordingly affirmed and the Central Pacific R. R. Co.'s selection as per list No. 12, is hereby canceled as to the extent of said lot No. 3 of Sec. 33, T. 16 N., R. 8 E., M. D. M.

"It further appears that while the case was pending in this office you allowed in violation of Rule 53 of Practice, homestead entry No. 5945 to be made by Richard Ryan"

"This entry covers the tract involved in the above contest and was wholly irregular but will be allowed to stand subject to any prior attached rights."

In view of the foregoing, the proper townsite authorities and Richard Ryan will be allowed thirty days in which to apply for notice of a hearing, to be by them served in accordance with the rules of practice, at which evidence must be submitted to show whether the land embraced in said mining claim is valuable mineral land, and whether that part thereof embraced in said lot 3 is more valuable for mineral than agricultural purposes.

Lot 12, of section 27, T. 16 N., R. 8 E., embraced in said declaratory statement is also within the grant to the Central Pacific Railroad Company. Before the townsite declaratory statement can be received and filed, it will be necessary to have said lot 12, regularly excepted from the grant.

In order to show that lot 12, ought to be excepted from the grant, said railroad company should be made a party defendant in this case by due service.

A motion for review of this decision was denied by your office letter of October 4, 1894.

A hearing was had before the local officers in pursuance of this order, at which the townsite claimants and Richard Ryan were represented by an attorney, and there was also present an attorney for the mining company. The railroad company appeared and filed a protest in reference to lot 12 in section 27. It may be said in this connection that this lot is not included in nor does it conflict with the Gold Bar Quartz mine in any way.

As a result of the hearing before the local officers they decided that the land involved is non-mineral in character and that lot 12 of section 27 was covered by a valid pre-emption claim at the date of the grant to the Central Pacific Railroad Company, and decided that the mineral application of the Gold Bar Mining Company should be canceled; that lot 12 was excepted from the terms of the grant; that Richard Ryan's homestead entry of an additional farm homestead should be allowed to stand intact; and that Judge Caldwell or his successor in office be allowed to enter the land applied for by him and not embraced in Richard Ryan's claim.

On appeal your office affirmed the decision below, except as to Ryan's additional farm homestead, which was held for cancellation. A motion for review of said decision was denied, and the case now comes before the Department on the separate appeals of the mineral claimants and Ryan. The specifications of error filed by the mining company are quite voluminous and will not be set forth, but such errors as are suggested that are pertinent to the issues involved will be considered. The error alleged by Ryan is in holding his additional farm homestead entry for cancellation.

As to the appeal of Ryan: The judgment of your office that his additional farm homestead entry should be canceled is concurred in. In the first place, it was erroneously allowed by the local officers, inasmuch as the land was then under contest and of course not subject to entry until that contest was disposed of. Again, this entry should not be allowed to stand under the circumstances. In his affidavit he stated

that I now own and reside upon an original farm containing about three acres and no more; that the same comprises a portion of mineral lot No. 198, in the NE. $\frac{1}{4}$ of Sec. 33, T. 16 N., R. 8 E., and is contiguous to the tract this day applied for.

The testimony in the case shows that Ryan was only a settler or "squatter" on the mineral land at the time he made his additional farm entry and that he had no title to the land until about two months prior to the hearing which was held December 17, 1894. If it be conceded, for the sake of argument, that he had the right to make additional farm entry simply by reason of purchase of this tract, yet it is clear that he had no such title to the three acres as would warrant the allowance of the entry at the time it was made (*Boord v. Girtman*, 14 L. D., 516; *Rush v. Bailey*, 16 L. D., 565).

Apparently a little more than one half of the ground included in the Gold Bar is in lot 3 of Sec. 33. It is triangularly shaped, the base of the triangle extending almost the entire length of the southerly side line of the mining claim and the apex being just outside the northerly side line.

This particular piece of land has been the subject of litigation in the Department and the local courts since 1885. This is probably owing to the fact that the land has been inhabited to some extent ever since 1860, by a few persons; its close proximity to the city of Grass Valley, and that it is surrounded by mines and mining claims, many of which have been patented by the government, and which are now, or have been in the past, extensively worked.

So far as disclosed there has never before been any attempt made to secure title to the land for townsite purposes, neither was the tract under municipal control or laid off in lots and blocks. It is shown by the testimony of one witness, however, that since this proceeding was commenced it has been included within the corporate limits of Grass Valley.

It will be observed that the application for townsite entry is not made under the act of March 3, 1877 (19 Stat., 392), as an additional entry for townsite purposes, but is for an original townsite entry under "sections 2388-9 inclusive."

It is gathered from the record that the application of the superior judge was brought about by a petition from the residents. There is in the record a petition signed by ten persons representing themselves to be "of the number represented by your honor, officially, in a certain petition and application for townsite patent," etc., requesting him to

withdraw the application made for entry. In compliance therewith, as stated by him, the superior judge filed a formal withdrawal of his said application, which was dated December 10, 1894. Subsequently, however, on the day the hearing began, the judge withdrew this abandonment. In his letter of withdrawal he states that he had supposed the request to abandon the application presented to him had been made by "all the townsite residents within the limits of said Gold Bar quartz claim," but he is "now informed that five of the townsite residents" did not join in the petition. So it appears that the superior judge is now representing the wishes of but five persons in prosecuting his application for patent. At the hearing the attorney who appeared for the townsite applicants also acted for Ryan, to the extent of offering the testimony taken in behalf of the townsite applicants as evidence for Ryan. It will be remembered that the protest of the superior judge was made both against Ryan and the mineral claimant, and his application to enter included the land Ryan had entered as an additional farm homestead. It is therefore clearly apparent, if these parties—the superior judge and Ryan—are acting in good faith, that their interests are necessarily antagonistic.

It is shown by the testimony on the part of the defendant, that at the time of the hearing there was residing on the mining claim the individuals who petitioned the superior judge to abandon the application for townsite. This petition was shown to one of the witnesses for the defense and he was asked if it included all the settlers within the Gold Bar mining claim. His reply was, that it did not; that those not signing were Richard Ryan, John Thomas, John Thompson, Mrs. Wallace and Peter Keelly. It is shown, however, that Ryan did not live on the land, but had a part of it included in his enclosure. It is also shown that Peter Keelly did not then reside on the tract, his house having been burned previously. The townsite claimants' testimony shows "ten or eleven dwellings" and gives the names of eleven persons living there with their families, including Weldon, who it appears is largely interested in the Gold Bar Company. It also shows that there have been people living on the land since 1860.

It also appears that all the settlers, except five, have entered into an agreement with the mining company by which they are to get title to the surface of the ground they occupy.

It further appears that there have been mines worked in this immediate vicinity since its first settlement; that in all directions immediately surrounding the Gold Bar are mining claims and on the two sides and one end have been patented as mineral land. It is shown that in 1888 Ryan and Keelly and two others located lot 3 as a placer claim. The ground included in the Gold Bar claim was originally located in 1877, under the name of the Silver Star, and relocated under its present name in 1888.

It seems to me, in view of all these circumstances, that there is not presented such a case here as will warrant the Department in permitting an entry of this land under the townsite law, at least under the

application that is now pending. The actual number of *bona fide* occupants of the tract is not given, neither is it shown that any emergency exists that would demand the granting of another and independent townsite entry such as this application contemplates, in such close proximity to another town. In the protest filed by the superior judge it is alleged that there are "more than 9 dwellings occupied by 8 families," but the testimony does not show "more than 9 dwellings."

It is contended that the former decision of your office in the case of *Weldon v. Central Pacific R. R. Co.*, affirming that of the local officers adjudging the land included in the Gold Bar to be mineral in character, is *res judicata* of that question. It appears to me that there is much force in this proposition. If its mineral character was such as to except it from the operation of the grant to the railroad company, it would seem to be ample for the purpose of at least throwing the burden of proof upon those attacking it on the ground that it is agricultural, which is one of the charges made in the affidavit of contest. This question as to the burden of proof in cases where there has been a former adjudication on this subject, is fully discussed in all its features in *Stinchfield v. Pierce*, 19 L. D., 12; *Dargin et al. v. Koch*, 20 L. D., 384, and *McCharles v. Roberts*, Id., 564, and it is not deemed necessary to go over the ground again. It is enough to say that in the last-named case it was decided that where parties attack a mineral location on land that has once been adjudged to be mineral in character it is necessary to allege and prove abandonment or forfeiture of the mining claim and that the testimony should be clear and unmistakable;

that after final judgment declaring land to be mineral in character the simple allegation that the land is as a present fact more valuable for agriculture is not sufficient upon which to order a hearing, and again compel the mineral claimant to adjudicate the question.

The clear preponderance of the testimony in the case at bar is with the mineral claimants. It is shown that there is some mineral in sight on the claim. It is true, as said in your office decision, that no ore has been produced by the claimants, but this may be accounted for by the fact that there has been continuous litigation over the land. But be this as it may, the fact is that there is not sufficient evidence in the case to warrant a reversal of the former judgment as to the character of the land.

Your office judgment that the land is not mineral in character is therefore reversed, and the application by the superior judge denied.

INDIAN LANDS—ALLOTMENT—CONTEST.

OPINION.

The Secretary of the Interior has authority to investigate the validity of an Indian allotment at any time prior to the issue of the first patent provided for under the allotment law, and on sufficient cause shown, to rescind the approval of an allotment and reject it.

*Assistant Attorney-General Lionberger to the Secretary of the Interior,
February 15, 1897. (W. C. P.)*

A letter from the Commissioner of the General Land Office in regard to hearings on charges against the legality of certain Indian allotments was referred to me by First Assistant Secretary Sims, with request for an opinion upon the questions involved.

Other papers relating to similar matters were transmitted by the Commissioner before and after said letter was received, and were referred to me for an opinion. Subsequently the Commissioner addressed a letter to you requesting that all these matters be considered together.

It seems in this particular instance allegations were made that the lands covered by certain Indian allotments were covered by a heavy growth of timber, which constituted their chief value, and that the allotments were made for the benefit of timber speculators, whereupon the Commissioner of the General Land Office ordered a hearing to determine the facts. This action was taken under departmental letter of December 6, 1895, to the Commissioner of the General Land Office, wherein it was said:

In accordance with your recommendations you are hereby authorized to suspend action on all Indian allotments in said States under section 4 of said act pending investigation of the charges preferred against the same.

In the letter which called forth these instructions the Commissioner of the General Land Office made the following statement and suggestion:

I have temporarily suspended action on a number of allotment applications in said States now in this office, and on a number of allotments which have been before the Department and approved for patent, pending instructions from the Department in the matter.

I respectfully suggest that this office be authorized and directed to suspend all action on Indian allotments under section 4 of the general allotment act of February 8, 1887, in the States of Minnesota and Wisconsin, pending investigation thereof by a special agent of this office as to the charges preferred against the same in the letters transmitted herewith.

The instructions given by the Department when read in connection with this letter from the Commissioner of the General Land Office which called them forth are broad enough to justify his conclusion that the order of suspension covered approved allotments as well as those where applications were under consideration.

I take it, however, that my opinion was desired upon the general question as to the authority of the Secretary to investigate the legality of an allotment after approval, rather than upon the question as to whether the action of the Commissioner of the General Land Office in ordering hearings on charges against approved allotments was within the scope of his instructions.

The Commissioner of Indian Affairs requested the Commissioner of the General Land Office to rescind his order for these hearings, contending that the approval of any Indian allotment is a final determination of the right of the Indian thereto, and that thereafter there is no authority to investigate the legality of the allotment. In support of this contention he cites the decision in the case of *Falconer v. Price* (19 L. D., 167), and a decision of December 3, 1888, in respect to selling timber by the allottee after approval. He also argues that the ruling of the supreme court that where a right to a patent has once been vested in a purchaser of public lands, it is equivalent to a patent issued, is by analogy applicable to an Indian allotment.

The decisions of the supreme court (*Stark v. Starrs*, 6 Wall., 402, and *Simmons v. Wagner*, 11 Otto, 260), cited by the Commissioner of Indian Affairs, do not touch upon the question of the authority of this Department to investigate the legality of an entry of public lands at any time prior to the issuance of patent, but announce the rule that a right once vested, that is, by legal entry or purchase, is equivalent to a patent against subsequent claimants of the land. These cases are not in point here. The authority of this Department to investigate entries of the public lands, and to cancel any entry shown to be illegal at any time prior to the issuance of patent, is too well established to require the citation of authorities in support of the proposition. By analogy this same rule may be well applied to Indian allotments.

The departmental letter of December 3, 1888, does not announce any rule that should be recognized as controlling the question now under consideration. That letter simply instructed the Commissioner of Indian Affairs that certain Chippewa Indians who had been given allotments under a treaty with that tribe might be allowed to sell the timber upon their allotments after approval by the President and prior to the issue of patent thereon. This action does not by any means go to the extent of saying that this Department would have no authority to investigate as to the legality of any allotment at any time prior to the issue of patent. It is true that the right under an approved allotment upon which patent subsequently issues relates back to the date of approval, but that has no influence upon the question now under consideration.

The decision in the case of *Falconer v. Price* (19 L. D., 167,) seems to sustain the contention of the Commissioner of Indian Affairs. It seems that Falconer applied to contest Price's allotment, and in the decision thereof, after reciting that the allotment was approved by the Commissioner of Indian Affairs, and by the Department, and was sent to the

General Land Office, with directions to issue patent thereon, but that no patent had been issued, it is said:

Your office held that the allotment having been approved by the Department, the question as to the right of Price was settled, and your office declined to order a hearing in the case. Your action is approved. The decision of your office is affirmed.

There is no discussion of the question, no citation of authority, nor anything to indicate the line of reasoning by which the conclusion was reached. I can not agree with that conclusion. The duty of making these allotments devolves upon the Secretary of the Interior, and while the interests of the Indians should be carefully guarded, there is also an obligation upon him to watch the interests of the government and to prevent the making of illegal allotments. A mistake may be corrected or a fraud prevented at any time before the Secretary of the Interior, as the officer having charge of the public lands and their disposal, completes his duties so far as to issue the patent provided for in said law. Having been given charge of this work he is necessarily thereby vested with authority to do whatever may be necessary to its proper performance.

As said before, this question may be determined by applying the rules which obtain as to the sale or other disposition of the public lands under other laws. A homestead or other entry is subject to cancellation at any time prior to the issuance of patent, for fraud or illegality. That the same rule should be applied in Indian allotments as in the case of final entries will not be seriously disputed.

After a careful consideration of this matter, I am of the opinion, and so advise you, that the Secretary of the Interior has authority to investigate the validity of an Indian allotment at any time prior to the issue of the first patent provided for in the allotment act, and upon sufficient cause shown, to rescind the approval of the allotment and reject it.

Approved:

DAVID R. FRANCIS,

Secretary.

MINING CLAIM—NOTICE—POSTING.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 11, 1897.

REGISTERS AND RECEIVERS,

United States Land Offices.

GENTLEMEN: Your attention is directed to the fact that by decision rendered by the Department on February 27, 1897, in the case of W. H. Gowdy *et al.*, v. The Kismet Gold Mining Company, the decision rendered in said case on May 23, 1896, and reported in 22 L. D., 624,

was modified, and paragraph 29 of the Mining Regulations amended so as to read as follows:

29. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim; the mining district and county; whether or not the location is of record, and, if so, where the record may be found, giving the book and page thereof; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well defined place on the claim; the names of all adjoining and conflicting claims, or, if none exist, the notice should so state.

According to the last decision of the Department, the amendment of said paragraph will take effect on the first day of June, 1897, and all publications thereafter made must contain the information therein prescribed. All publications made or started prior to that date are to be treated in accordance with the practice of the Department existing prior to the original decision in the case of *W. H. Gowdy, et al., v. The Kismet Gold Mining Company*.

Said decision of February 27, 1897, will be found published in Vol. 24 of Land Decisions, page 191.

Very respectfully,

E. F. BEST,
Acting Commissioner.

Approved:

WM. H. SIMS,
Acting Secretary.

MISSISSIPPI LANDS—ACT OF FEBRUARY 17, 1897.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 22, 1897.

The REGISTER and the RECEIVER,
United States Land Office, Jackson, Mississippi.

SIRS: The act of Congress, approved February 17, 1897, provides as follows:

AN ACT to enable certain persons in the State of Mississippi to procure title to public lands.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all persons who, prior to January nineteenth, eighteen hundred and ninety-five, purchased in good faith from the State of Mississippi any lands within the six miles or granted limits of the Mobile and Ohio Railroad, and which lands were included in approved swamp-land list numbered seven, Augusta series, their heirs or assigns, shall have the preference right for one year from the passage of this act to enter under the homestead laws of the United States not exceeding one hundred and sixty acres of the lands so purchased by them from the State of Mississippi and to purchase not exceeding one hundred and sixty acres additional of such lands at one dollar and twenty-five cents per acre, or, if they

elect not to avail themselves of the homestead law, to purchase three hundred and twenty acres of such land: *Provided, however,* That this act shall not affect the rights of homestead claimants who, between the sixteenth day of February, eighteen hundred and ninety-five, and the twenty-seventh day of May, eighteen hundred and ninety-six, made settlements and entries or filed with the local land officers applications to enter in good faith, under the homestead laws, any of the lands included in the provisions of this act not occupied or actually and substantially improved by such purchasers from the State.

SEC. 2. That all persons who have legally purchased any of the lands aforesaid at tax sales shall be considered assigns within the meaning of this act.

Approved, February 17, 1897.

The act provides that persons who, prior to January 19, 1895, purchased in good faith from the State of Mississippi any of the lands in question, their heirs or assigns, shall have one year from the passage of the act within which to enter, under the homestead laws, not to exceed one hundred and sixty acres of land so purchased by them, and to purchase from the United States, one hundred and sixty acres additional at \$1.25 per acre; or, if they do not desire to make entry under the homestead laws, to purchase three hundred and twenty acres of said land. It also provides that such act shall not affect the rights of homestead claimants who, between February 16, 1895, and May 27, 1896, made settlements and entries or filed applications to enter in good faith, under the homestead laws, any of the lands included in the provisions of the act not occupied or actually and substantially improved by such purchasers from the State.

Section two provides that persons who have legally purchased any of said lands at tax sales shall be considered assigns within the meaning of this act.

All persons applying to enter either under the homestead law or to purchase any of such lands by virtue of their rights as purchasers from the State, must present to you satisfactory evidence that they were purchasers from the State prior to January 19, 1895, or are heirs or assigns of such purchasers.

All persons who have made homestead entries of any of said lands between the dates mentioned in the proviso to the first section of the act, or had filed applications in the local office to make such entries, are entitled to perfect their entries even as against the purchasers from the State unless the land entered or embraced in their application was occupied or actually and substantially improved by such purchasers from the State, but they must submit satisfactory evidence that no portion of the land embraced in their entry or application to enter was so occupied or actually and substantially improved by any purchaser from the State at the date of their entry or application.

If the purchaser from the State of any of the lands embraced within the provisions of this act do not apply to make entry under the homestead law, or to purchase said lands within one year from the passage of this act, such lands will be subject to settlement and entry under the homestead law as other portions of the public domain, and nothing

in this act will be so construed as to impair or affect the rights of any homestead settler upon said lands, but such subsequent right will be subject to the preference right of purchasers from the State for the period of one year.

Respectfully,

E. F. BEST,
Acting Commissioner.

Approved:

C. N. BLISS,
Secretary.

ABANDONED MILITARY RESERVATION—FORT CAMERON.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 22, 1897.

REGISTER AND RECEIVER,
Salt Lake City, Utah.

GENTLEMEN: The appraisers have appraised the lands in the Fort Cameron, post and wood and timber, abandoned military reservation at from ten cents to two dollars and fifty cents per acre.

The Secretary of the Interior has approved the appraisal of the lands appraised at or above \$1.25 per acre, and for lands appraised at less than \$1.25 per acre he has, under the law, fixed the minimum price of such lands at \$1.25 per acre. Therefore, no tract of land in this reservation can be disposed of at less than \$1.25 per acre, although you will be governed by the appraisal in disposing of those lands appraised at more than \$1.25 per acre.

All of said lands, except the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 14, the NE. $\frac{1}{4}$ Sec. 23 and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 24, T. 29 S., R 7 W., which contain buildings purchased by Mr. John R. Murdock from the government, and all school sections, reserved by law from settlement and entry, are subject to settlement under the provisions of the act of August 23, 1894 (28 Stat., 491), which, among other things, provides:

That persons who enter under the homestead law shall pay for such lands at not less than the value heretofore or hereafter determined by appraisement, *nor less than the price of the land at the time of the entry*, and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior.

On April 9, 1895 (20 L. D., 303), the Secretary of the Interior directed this office to issue instructions under said act of August 23, 1894, as follows:

That the homesteader be given the option in making payment upon his entry of these lands, of making his payments in five equal payments to date from the time of the acceptance of his proof tendered on his entry, and that the rate of the interest upon deferred payments be charged at the rate of 4 per cent per annum.

In allowing entries for lands in this reservation, under said law, you will in each case endorse on the application "Fort Cameron Reservation, act August 23, 1894," and make the same notation on your abstract of homestead entries.

Under the provisions of the homestead law, an entryman has the right either to commute his entry after fourteen months from date of settlement, or offer final proof under Sec. 2291 R. S. In entries under said act of August 23, 1894, he may, at his option, commute after fourteen months with full payment in cash, or, after submitting ordinary five year final proof and after its acceptance, he may pay for the land the full amount of the appraised value thereof or at not less than \$1.25 per acre, without interest, or he may make payment in five equal installments, the first payment to be made one year after the acceptance of his final proof, and the subsequent payments to be made annually thereafter, interest to be charged at the rate of four per cent per annum from the date of the acceptance of final proof until all payments are made.

In case the full amount is paid after fourteen months from date of settlement you will, if the proof is satisfactory, issue cash certificate and receipt; and in the event that regular final proof is made, and the full amount then paid, you will issue final certificate and receipt; but when partial payments are made the receiver will issue a receipt only for the amount of the principal and interest paid, reporting the same in a special column of the abstract of homestead receipts, and at the time last payment is made, you will issue the final papers as in ordinary homestead entries.

In issuing final papers you will make the proper annotations thereon, as well as on the applications and abstracts, as before directed, to show that the entry covers lands in Fort Cameron reservation.

You are further advised that the same rule, as to the allowance of credit for residence prior to entry and for military service, applies to entries under said act of August 23, 1894, as to other homestead entries.

Where, upon submitting final proofs the entrymen elect to make payment for the lands entered in five annual installments, you are authorized to make the usual charges for reducing the testimony to writing, but as the final certificate and receipt cannot be issued until the last payment is made you cannot charge the final commissions until said final certificate and receipt are issued.

Where the entrymen submit final proofs and elect to pay for the lands in installments, you will not give said proofs current numbers and dates but will, if they are acceptable to you, make proper notes on your records showing that satisfactory proof has been made and the dates upon which the partial payments must be made, and then transmit said proofs to this office, in special letters, and not in your monthly returns, for filing with the original entries.

There are no guarantees to be taken in order to secure payment of

the installments, but if, when each installment is due, any entryman fails to pay the same you will report the matter to this office when proper action will be taken in the case.

The said act of August 23, 1894, did not repeal the act of July 5, 1884 (23 Stat., 103), hence, parties qualified to make entry under the second section of the latter act may do so without making other payment than the legal fee and commissions.

Sections 2, 16, 32 and 36 of this reservation are reserved for school purposes.

On May 4, and August 5, 1895, you transmitted the applications of John R. Murdock to be permitted to purchase, under the third section of the said act of July 5, 1884, the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 13, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 24, S. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 14 and the NE. $\frac{1}{4}$ Sec. 23, T. 29 S., R. 7 W., subdivisions containing buildings purchased by him from the government.

Subsequently Mr. Murdock relinquished all claims to the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 13, and the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 14, T. 29 S., R. 7 W. It therefore appears that the subdivisions containing buildings and which Mr. Murdock is entitled to purchase are the following, viz: SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 14, the NE. $\frac{1}{4}$ Sec. 23, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 24, T. 29 S., R. 7 W.

You will advise Mr. Murdock that he will be allowed sixty days from notice hereof, within which to make application to purchase the last mentioned subdivisions, upon which the buildings are situated, and to pay therefor the appraised value where that is fixed at or more than \$1.25 per acre, and at the rate of \$1.25 per acre for the subdivisions appraised at less than \$1.25 per acre, and inform him that if he fails to make said purchase within the time specified the lands will become subject to homestead entry by the first legal applicant.

In case the application is made and the purchase money tendered you will issue cash certificate and receipt, modified to suit the case, making the following notation on the margins thereof: "Purchased under Sec. 3, act of July 5, 1884."

Issue notice to Mr. Murdock and in due time make report in accordance with circular of October 28, 1886 (5 L. D., 204).

You will acknowledge receipt of this letter.

Very respectfully,

E. F. BEST,
Acting Commissioner.

Approved March 22, 1897:

C. N. BLISS,

Secretary.

SETTLEMENT RIGHT—STATE SELECTION.

BENSON v. STATE OF IDAHO.

No rights are secured by a settlement made for the purpose of securing the timber on the land and not for the establishment of a home.

A State selection made prior to the official filing of the township plat is premature and invalid.

Secretary Francis to the Commissioner of the General Land Office, January
(I. H. L.) 8, 1897. (R. W. H.)

On July 16, 1894, Elmer E. Benson made application to enter, under the homestead law, the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 8, and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ Sec. 9, Tp. 39 N., R. 2 E., Lewiston land district, Idaho. His application was rejected, on the ground that the State of Idaho had selected the land under its grant for the support and maintenance of an insane asylum, as provided by section 11 of the act of July 3, 1890, for the admission of the State of Idaho into the Union. (26 Stat., 215.)

On appeal to your office a hearing was ordered, which resulted in a recommendation by the local office that Benson's homestead application be allowed and the State selection canceled.

Upon the State's appeal from this decision of the local office, your office declined to allow said homestead application, for the reason that you were not satisfied from the testimony that—

Benson went upon the land honestly and in good faith for the purpose of actual settlement, and of honestly endeavoring to comply with all the requirements as to settlement, residence and cultivation necessary to acquire title under the homestead law, [being] of the opinion rather that his purpose from the first was speculative only, in that he intended to obtain the valuable timber upon the land by means of a homestead entry, without complying with the conditions of the homestead law.

This conclusion is supported by the facts as they appear in the record. Benson was an unmarried man. He first went upon the land, which was covered with valuable timber, about April 24, 1894, cleared about a quarter of an acre and laid eight small unhewn logs in square form as a foundation of a cabin. In the latter part of May, or early part of June following, he finished the cabin with logs of the same sort, and after that did nothing more upon the land up to the time of the hearing.

There is no disinterested testimony as to Benson's good faith, his only witnesses being his brother Orin L. Benson, and Mace E. Kent, both of whom had contests pending against the State's selection of neighboring tracts, and who depended, each upon the other, for evidence to support their claims.

Against this testimony the State produces two witnesses, Florence and Jordan, the former a public officer and the latter his assistant, who were employed by the State to make the selections under its grant

from Congress; and, inasmuch as the law (act of March 3, 1893,) provided that the preference right of selection for the period of sixty days, given therein to the States, "shall not accrue against bona fide homestead and pre-emption settlers on any of said lands at the date of filing of the plat of survey of any township in any local office of said States," it must be presumed, in the absence of evidence to the contrary, that the State's selecting agents used due diligence to discover evidences of settlement, and were careful to avoid the selection of occupied tracts.

Both Florence and Jordan, on behalf of the State, swear that they went over this land in May, 1894, and saw no indications of settlement or improvements alleged to have been made on the ground in April.

Upon weighing the testimony, I find that whatever settlement there was on the land was only a colorable one, and made to anticipate the filing of the map and the selection of the State, with a view to securing the valuable timber thereon, and not for a home.

In *Dobie v. Jameson* (19 L. D., 91), *Little v. Durant* (3 L. D., 74), *McWeeney v. Greene* (9 L. D., 38), and many other cases, it is held that "the acts of settlement upon unsurveyed land must be of such a character, and so open and notorious, that the public generally may have notice of the settlers' claims." The rule as laid down in *Wright v. Laïson* (7 L. D., 555), applies as well to this case as to entries under the act of June 3, 1878. It is that "a settlement for the purpose of securing the timber on the land, or for any other purpose than establishing a home, is not a *bona fide* settlement within the meaning of said act."

Your decision declining to allow Benson's homestead application is therefore affirmed.

Among the specifications of error in the claimant's appeal is the following:

The Hon. Commissioner erred in not holding and deciding that the selection by the State of Idaho, embracing the land in controversy, was prematurely made, and, as such, was and is absolutely void.

It appears from the record that the plat of township 39, range 2 E., B. M., was received at the local office at Lewiston, on May 4, 1894, and that George B. Florence, State selecting agent for Idaho, selected the land in controversy on June 30, 1894, for the insane asylum (List No. 3), under the grant contained in section 11 of the act of July 3, 1890 (26 U. S. Stat., 215), providing for the admission of Idaho as a State into the Union. The plat, however, was not officially filed in the local office until July 2, 1894. Prior to this date, under rules established by the Department, the land embraced in said approved plat was not subject to entry or selection (4 L. D., 202).

In *Campbell v. Jackson* (17 L. D., 417), it is held—

That an application to enter land, which is not subject to entry at the time the application is made, confers no rights upon the applicant. This was held in *Goodale*

v. Olney (13 L. D., 498), and in *Maggie Laird*, on page 502 of the same volume. . . . The same rule would prevail in the case of a selection by a State, and it must be made to appear, that at the time the State applied to select the land, it was subject to such selection. Otherwise, no rights would be secured by the application.

In *Lansdale v. Daniels* (100 U. S., 113), Mr. Justice Clifford said:

Beyond doubt the declaratory statement was a nullity, as it was filed at a time when the act of Congress gave it no effect. The fact that it remained in the local office will not remove the difficulty, as it was made and filed without authority of law.

The Department makes no distinction between entries by individuals and selections by States or corporations under Congressional grants, as to the time when their rights, respectively, attach, unless the language of the grant itself makes an exception to the general rule, as stated above, which is not claimed in the present case.

The State selection of the land in question, made June 30, 1894, prior to the official filing of the township plat on July 2, 1894, was therefore premature and invalid. (*William Herth*, 22 L. D., 385.)

No right, however, accrues to Benson, because his settlement was not bona fide and his application was speculative.

The land in question is still a part of "the surveyed, unreserved and unappropriated public lands of the United States within the limits of the State," and subject to selection by the State under the direction of the Secretary of the Interior, as provided in section 14 of the act of July 3, 1890, provided that, at the time of exercising its right, the land is not occupied by a bona fide homestead settler or reserved under any other law for the disposal of the public lands.

PRACTICE—ORDER FOR HEARING—RAILROAD GRANT.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RY. CO. *v.* MCCLAINE.

An order for a hearing issued by the General Land Office, on the appeal of an applicant from the rejection of his application to enter, operates as a disposition of said appeal, and its want of regularity is thereafter not material.

Land not protected by withdrawal and embraced within a bona fide settlement claim is not subject to indemnity selection.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 15, 1897. (W. M. W.)

The case of the St. Louis, Iron Mountain and Southern Railway Company *v.* John H. McClaine has been considered, on the appeal of the former from your office decision of November 9, 1895, holding for cancellation its list of selection as to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 17, T. 22 N., R. 3 E., Ironton, Missouri, land district.

The land in question is within the indemnity limits of the grant to the Cairo and Fulton Railroad Company, now the St. Louis, Iron Mountain and Southern Railway Company by the act of July 22, 1866 (14 Stat., 338), and was selected by the company July 12, 1894, per list No. 1.

The withdrawal made in favor of said road was revoked August 15, 1887. See circular, 6 L. D., 131, 133.

The records of your office show that, on June 6, 1869, one Gish made homestead entry for the NW. $\frac{1}{4}$ of Sec. 17, T. 22 N., R. 3 E., which was canceled October 7, 1876; that on October 14, 1878, Austin Fuller made homestead entry for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section, which was canceled on May 5, 1886; that on December 26, 1885, Andrew Inman made homestead entry for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, which was canceled May 26, 1893.

On August 3, 1894, John H. McClaine filed in the local office his application to make homestead entry of the tract in controversy, which application was rejected for conflict with the selection made by the railroad company.

McClaine appealed to your office.

On June 20, 1895, your office considered McClaine's appeal, and found that he based it on the ground that he made *bona fide* settlement upon this land May 28, 1894, with the intention of entering it under the homestead laws; that on the same date

he applied at the local office of the clerk of the court of Ripley county, for the purpose of making application to homestead this tract, but owing to his not being familiar with the description of the land, he made out his application papers in blank, and left them with the clerk until the proper description could be furnished, and feeling secure in his position as possessor in fact, he deferred perfecting his application until August 1, 1894; that his improvements consisted of a dwelling house, 19 by 25 feet, and about twenty acres cleared and in cultivation,

and that his improvements were made before the company's selection and were worth about \$1,050.

On this showing your office directed a hearing, after due notice to the parties in interest, to establish the exact condition of the land at the date of its selection by the railroad company.

On September 6, 1895, the hearing was had, after due notice to each of the parties. Both parties appeared by attorneys at the hearing.

The evidence submitted at the hearing on the part of McClaine shows, without conflict, that about October 1, 1893, McClaine and his wife moved on this land; that at that time there were improvements on the land, consisting of a log house and two stables; afterwards, McClaine built a one-room log house, a frame smoke house, dug two cisterns and made rails to fence a portion of the land; that on July 1, 1894, McClaine had some of the land in cultivation; that McClaine's residence on the tract has been continuous since October, 1893. The county clerk of Ripley county, Missouri, testified that on May 28, 1894, McClaine went to his office to make out his homestead application papers, for land embraced in Sec. 17, T. 22 N., R. 3 E., but was in doubt as to the correct description of the land on which he settled, so he (the clerk) filled out the blanks, except the description of the tract, and McClaine signed the papers and left them and the necessary fees

with the clerk; after that, and before August 1, 1894, McClaine ascertained the correct description of the tract he intended to enter, and went to the clerk's office to get his application papers, and thereupon, at the suggestion of the clerk, executed a new application to enter, dated August 1, and filed August 3, 1894.

The railroad company did not introduce any evidence.

The register and receiver made no decision, but transmitted the evidence and record to your office, and, in view of the somewhat irregular proceedings in the case, you exercised your supervisory authority and passed upon the whole record as it was presented.

On September 24, 1895, resident counsel for the railroad company filed a motion in your office to dismiss the appeal of McClaine from the action of the local officers of August 3, 1894, rejecting his application. Said motion was based upon the ground that the appeal was not served upon nor any notice thereof given to the railroad company.

Upon consideration of the case on the merits, your office set aside the action of the local officers in rejecting McClaine's application,

as being contrary to the facts and merits of the case, and, under this showing, I will hold that it is immaterial whether a notice of said appeal was served upon the railroad, or whether he had filed any appeal.

Your office further found that

McClaine had a *bona fide* settlement and residence upon the land prior to its selection by said railroad company, and also that he endeavored to make homestead entry for the tract May 28, 1894.

In its appeal, the company alleges error in your office decision on five grounds, all of which may practically be considered under two general heads: 1. Did your office err in its action on the company's motion to dismiss McClaine's appeal? 2. Was the finding of your office erroneous in holding that McClaine's settlement and improvement on the land were sufficient to defeat the railroad company's selection? Each of these must be answered in the negative.

Your office evidently treated McClaine's appeal as an application for a hearing, and as such found it was sufficient to justify an investigation. The matter of ordering a hearing was discretionary with you. *Reeves v. Emblen*, 8 L. D., 444; *Ulitalo v. Kline et al.*, 9 L. D., 377.

The action of your office in ordering the hearing has not been questioned by the company. It is clear that your office had authority to make the order for an investigation without notice to the railroad company. When that action was taken it disposed of the appeal; the case was not pending on said appeal at the time the motion to dismiss it was filed, nor when it was decided on the merits. When the hearing was ordered, in a legal sense, the whole case was sent back to the local officers for disposition *de novo* by them in the light of such evidence as might be adduced by the parties.

At the time your office decided the case on its merits, the case was pending on the report of the register and receiver and the evidence

taken at the trial. The irregular manner in which the case on its merits reached your office can not be held to revive the original appeal, in fact it had nothing to do with it.

The motion to dismiss clearly related to an immaterial matter.

From a careful examination of the evidence, the conclusions reached by your office are concurred in.

PRACTICE—NOTICE OF APPEAL—BURDEN OF PROOF.

MAJORS v. RINDA.

Rule 105 of Practice, providing for the service of notices upon attorneys, is one of convenience, and not of exclusive right; hence an appeal is not defective in the matter of notice, if the service is made upon the appellee, and not upon his attorney.

The local officers, after due notice given, may inspect the premises in dispute, and use the information thus obtained as an aid to the proper understanding and valuation of the evidence adduced at the hearing.

The burden of proof is properly upon one alleging the mineral character of a tract that has, prior thereto, been adjudged agricultural.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 24, 1897. (E. B., Jr.)

This is an appeal from the decision of your office dated September 25, 1896, in a proceeding wherein Alexander Majors appears as contestant against the homestead entry of Venzel C. Rinda, made January 21, 1895, for the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 13, T. 10 N., R. 4 W., Helena, Montana, land district, the grounds of Majors' contest, as set out in his corroborated affidavit thereof, filed February 27, 1895, being that the land is more valuable for the gold it contains than for agriculture, and that he claims the same under placer locations made December 3, 1894. The decision of your office was in affirmance of the decision of the local office dated May 26, 1896, after hearing duly had June 17 to 29, 1895, and held the land to be agricultural and not mineral in character and dismissed the contest.

Mr. George B. Foote, attorney for Rinda, has filed a motion to dismiss the appeal on the ground that the same was not served upon him (Foote) as required by the Rules of Practice, citing Rules 86, 104, and 105.

The rules are cited as follows:

RULE 86. Notice of an appeal from the Commissioner's decision must be filed in the General Land Office and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision.

RULE 104. In all cases, contested or ex parte, where the parties in interest are represented by attorneys, such attorneys will be recognized as fully controlling the cases of their respective clients.

RULE 105. All notices will be served upon the attorneys of record.

It appears from the record that notice of your office decision was mailed to Majors' attorney on October 2, 1896, and that on December 10, 1896, within the seventy days allowed in such case (Rule 87), Majors, by his attorney, filed an appeal, a copy of which was received by Rinda, himself, the same day, having been mailed to him the day preceding. It does not appear that any direct notice of appeal was given Rinda's attorney. None was necessary in view of the notice to Rinda (*New Orleans Canal and Banking Co. v. State of Louisiana*, 5 L. D., 479; and *Northern Pacific R. R. Co. v. Bass*, 14 L. D., 443). Rule 86 is specific and controlling as to the person to whom the notice may be given. Rules 104 and 105, under the subhead "Attorneys," were intended to give due recognition to attorneys practicing before the land department, in their representative capacity, but not to operate in any way to accord to them standing or authority there superior to that of their clients, nor divest the latter of the right to recognition and supreme control in litigation. Rule 105 is one of convenience and not of exclusive right. The motion is accordingly denied.

Of the numerous errors assigned in the appeal, only three require any consideration:

1. Error to hold that the burden of proof is upon the plaintiff.
2. Error not to find that the local officers ignored the weight of the evidence and rested their conclusion as to the character of the land upon alleged tests made in their presence upon the land and by partisans of the defendant procured by him for the purpose and upon unsworn testimony there received by the local office and error not to reverse their decision because thereof.
3. Error not to find that the land is shown to be mineral in character as a present fact and more valuable for mining purposes than for agricultural purposes.

The land above described has been the subject of litigation before the land department for several years. It is within the granted limits of the Northern Pacific Railroad Company, and adjoins the city of Helena, Montana, on the north. Application having been made on July 29, 1881, by Karl Kleinschmidt and others to make mineral entry for the land, the said company and Rinda filed protests against the same, alleging the land to be agricultural. Upon the testimony submitted at a hearing in June, 1888, at which the mineral applicants made default, the local office decided the land to be non-mineral. Your office affirmed the decision of the local office, and on May 24, 1889, canceled said mineral application. A second hearing involving the land was had in July, 1889, at which Rinda, said company and Majors were parties, the company claiming under its grant and Rinda and Majors as applicants to make homestead entry therefor. The history of this second case is given in *Rinda v. Northern Pacific R. R. Co. et al.* (19 L. D., 184). The right of entry was awarded by the Department to Rinda, as against Majors, by virtue of his successful contest against the mineral application of Kleinschmidt *et al.* and of his prior homestead application, it being held that, despite his prior settlement, Majors, who had previously made and relinquished a homestead entry

for another tract, could not make a second entry under the act of March 2, 1889 (25 Stat., 854), in the presence of Rinda's adverse claim. Rinda's entry above mentioned, now under attack by Majors, was made pursuant to this decision.

The decisions of the local office and your office in the first contest involving this land and the entry of Rinda pursuant to the decision of the Department, were beyond question abundantly effective to bestow upon this land a strongly agricultural status, and to place upon anyone thereafter asserting its character to be mineral, the burden of proof. The onus was therefore rightly placed upon Majors.

I am unable to discover from a very careful examination of the record before me any evidence of irregularity, or of undue or improper influence by or in behalf of the defendant, in or in connection with the visit of the local officers, July 17, 1895, to the land, and their personal examination thereof. Their visit and examination were in pursuance of motion and notice duly made and given, and it does not appear that the information thus gathered by them was used by them otherwise than as an aid to the proper understanding and valuation of the evidence adduced at the hearing, nor that they substituted in any extent their personal knowledge of the character of the land for such evidence. The second assignment of error is not therefore well founded.

The testimony taken at the hearing is very voluminous, and, as to the character of the land, very conflicting. At both previous hearings hereinbefore mentioned Majors testified very positively that the land was non-mineral in character. He had resided upon the land since about April, 1882, he stated, and had had experience as a miner and had prospected it and was satisfied that it was not worth anything for mining purposes. He testified at the hearing in the case at bar that when he learned that the Department had awarded the land to Rinda he went ahead and prospected it, and in the latter part of November, 1894, discovered gold, and on December 3, following, located one-half of the land as a placer claim for himself and the other half for his wife. Certified copies of these locations covering the entire forty acres are on file—the location for the north twenty acres made in the name of said Majors and for the south twenty in the name of his wife.

It is not necessary to discuss the testimony as to the character of this land at any length. It has been very carefully read and considered. The land has been quite thoroughly prospected. According to the testimony for Majors, gold, ranging from minute particles to nuggets as large as a pea, is quite evenly distributed throughout the entire soil (which is gravelly, with some boulders), from the grass roots down to an unknown depth; and will pay from about two to six dollars per day per man, with the use of water which can be readily obtained at reasonable cost; and the land is of but very little value for agriculture. Rinda's witnesses testify that from extensive and careful

examinations of ground taken from the same shafts, holes, and points on the surface, from which Majors and his witnesses obtained the ground they tested, they (the former) could only get, at the best, a few scant colors of gold and very often nothing at all; that the mineral product of the land would not, at the utmost, amount to more than a few cents per day per man with plenty of water and improved processes; and that by the reasonable use of water and fertilizers the land is far more valuable for agriculture than for mining. Nearly all of the witnesses for the respective parties testified that they were experienced miners. The local officers who saw and heard the witnesses evidently gave more credence to those of the entryman, Rinda, and, I am constrained to believe, properly so, from my reading of the testimony.

The burden of proof has not been successfully carried by Majors, and his contest must therefore fail. I find no warrant to disturb the decision of your office, and the same is accordingly affirmed.

PRACTICE—RECONSIDERATION OF CASE—TIMBER CULTURE
APPLICATION.

NORTHERN PACIFIC R. R. CO. *v.* COFFMAN ET AL.

Prior to the issuance of patent, the land department may re-open a case, to correct an error in the decision thereof, and readjudicate the same, after due notice to the parties.

The right secured by a timber culture application, erroneously rejected and pending on appeal, may be exercised by the heir of the applicant.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (A. B. P.)

This case involves the SE. $\frac{1}{4}$ of Sec. 19, T. 15 N., R. 42 E., Walla Walla, Washington.

The land was within the limits of the executive withdrawal on amended map of general route filed by the Northern Pacific Railroad Company February 2, 1872, and fell within the indemnity limits of said company's grant on map of definite location of its road filed November 17, 1880.

It appears that Thomas H. Coffman made timber culture application for the tract in June, 1883, but the same was rejected by the local officers because of conflict with the said withdrawal of 1872. Coffman appealed.

On March 20, 1884, the company selected the land for indemnity purposes under its grant.

The appeal of Coffman was considered by your office on October 2, 1888, and the decision below was reversed. Upon the company's appeal to this Department, your office decision was, on August 8, 1894, affirmed. Coffman was thereupon allowed thirty days after notice within which to make timber culture entry for the land, in which event

it was directed that the company's selection should be canceled, but otherwise, his application would be finally rejected and the company's selection allowed to stand.

On June 10, 1895, the local officers reported that notice had been given as directed, by letter addressed to Coffman at Colfax, Washington, but the letter had been returned uncalled for. Upon this report your office, on June 26, 1895, finally rejected Coffman's application and closed the case.

It further appears that on July 8, 1895, Maud A. Coffman filed in the local office her affidavit, dated May 13, 1895, at Bexar county, Texas, setting forth that she is the only child of Thomas Coffman, deceased; that said Thomas Coffman never exercised his right to make timber culture entry; and that at the date of his timber culture application for the land in question, he was qualified to make such an entry. She at the same time tendered the necessary fees, and formally applied to be allowed to complete the timber culture filing of her father.

The affidavit and application were at once forwarded by the local officers, and upon examination thereof your office, on August 3, 1895, re-opened the case for further consideration, and returned the application papers to the local officers for appropriate action, with directions that Miss Coffman be advised thereof, and allowed thirty days within which to make entry for the land in accordance with the provisions of the timber culture law (20 Stat., 113), if found qualified and entitled to do so, in which event it was further directed that the company's selection of the land be canceled.

From this action by your office the railroad company has appealed.

By the errors assigned in this appeal it is, in effect, asserted:

1. That having finally rejected the application of Thomas H. Coffman, on June 20, 1895, your office was without authority thereafter to reopen the case in the absence of any motion for rehearing by either party;

2. That Thomas H. Coffman having failed to make entry during his life, it was error to allow his daughter to complete his timber culture application by entry after his death, under the timber culture act; and

3. That in the absence of notice to the company, your office was without authority to consider, in any manner, the application of Maud A. Coffman.

The point raised by the first assignment is, in my judgment, wholly untenable. While it is true that the case was formally closed, as stated, and the company so notified by your office, it does not follow that the Land Department thereby lost jurisdiction of the land involved, prior to patent to the company, so as to absolutely preclude a reopening of the case of its own motion, or upon application of any party interested, in the event it should subsequently appear that the action in closing the case was probably premature, or otherwise erroneous in any respect. Of course it would be improper to re-open, and

proceed with the re-adjudication of a case without notice, but such does not seem to have been done or attempted in this case. The records of your office show that the attorneys of the appellant company were advised by letter the very day the action complained of was taken, not that the application of Miss Coffman had been allowed, but that the case had been that day "re-opened, with a view to the allowance of" said application, the letter closing with the statement: "You will take due notice hereof." This notice gave the company abundant opportunity to reappear and do whatever was necessary to protect its interests in the premises.

Nor is there, in my judgment, any merit in the third assignment of error. The simple act of re-opening the case was in no sense a re-adjudication of any question involved in it, and from the very nature of the proceeding, could not be. Notice of that act was duly given, and the company was thereby afforded every opportunity of defending the newly presented application that it could have had, if it had been notified before the case was reopened. There has been, as yet, no final action in the case in favor of Miss Coffman. She appears to have been allowed by the local officers to make timber culture entry for the land, on September 11, 1895, and the entry papers were forwarded to your office, and are filed in this record (though not properly a part thereof), but there has been no action thereon by your office. The company has still the right, and will be allowed to appear and protect its interests in the premises, by interposing such defense as it may wish. While, therefore, it would have been the better practice, upon the receipt of the application of Miss Coffman, to have notified the company to show cause, if any it could, why the case should not be re-opened for the consideration of that application, yet I do not think the failure to do so, was, under the circumstances of this case, reversible error. As the company still has opportunity to make any defense not now properly presented by its said appeal, I do not see that any good could be accomplished by sustaining its appeal in this particular even were it otherwise proper to do so.

The second assignment of error goes to the merits of the controversy as far as they can be determined at this stage of the proceeding. It involves a denial of the right of Maud A. Coffman, as the legal heir of Thomas H. Coffman (if indeed she is such) to complete the latter's application or filing by entry under the timber culture law. The facts on this point are that Thomas H. Coffman while in life, did everything he could do toward perfecting his entry. He filed his application to enter as early as June, 1883, and tendered the necessary fees, as shown, but the same was rejected for the reasons stated, which action was afterwards held to be erroneous by this Department. But for this erroneous action his entry would have been allowed and in all probability, before this time, passed to patent. Thus by the erroneous action of the local office he was prevented from making any further

compliance with the timber culture law, and was compelled to await the final adjudication of his rights upon his appeal, which he did, and although his appeal was filed in 1883, it was not acted upon until 1888, a seemingly unreasonable delay, due to no fault of his. By his affidavit filed in this case October 27, 1887, it appears that at that date he had erected two miles of fence on the land (presumably enclosing it) at a cost of \$320. He also, at the same time, filed a renewal of his application to enter the land, but no action appears to have been taken thereon.

Can his heir now complete his entry, and by further compliance with the law thereunder save the land and the improvements thereon?

In the case of *Southern Pacific Railroad Company v. Sturm* (2 L. D., 546), which arose under the timber culture law, and was in some respects similar to this case, Secretary Teller held:

Although Sturm did not actually make an entry of the tract, he nevertheless applied in good faith so to do and tendered the requisite fees. . . . And just as there is no difference in principle between a case where the filing was recorded and one where the filing was offered and rejected, neither is there any difference in such a case as this, so far as the applicant's rights are concerned, for they inure to the benefit of the heirs. That the tract was subject to his entry cannot, in the light of the aforesaid state of facts, be questioned. His right to enter the tract was not prejudiced by the register and receiver's denial of his application. See *Duffy v. Northern Pacific Railroad Company* (2 Copp, 51), and *Shepley et al. v. Cowan et al.* (91 U. S., 330).

But inasmuch as he was prevented by death from perfecting his application, entry will be allowed in proper form in the name of his heirs, provided the same is made within ninety days from receipt of notice hereof.

The principle announced in that case has been followed by the Department in a number of cases. In *Tobias Beckner* (6 L. D., 134-7) it was said:

The broad underlying principle that controls the question is—that when a person initiates any right in compliance with, and by authority of the public land laws, and dies before completing or perfecting that right, it will not escheat and revert to the government, but inure to those on whom the law and natural justice cast a man's property, and the fruits of his labor after his death.

See also the case of *Rosenburg v. Hale's Heirs* (9 L. D., 161); *O'Connor v. Hall et al.* (13 L. D., 34); *Thompson v. Ogden* (14 L. D., 65); *Bellamy v. Cox* (24 L. D., 181).

In the present case the right of entry was lawfully initiated by Thomas H. Coffman by the filing of his application and the tender by him of the requisite fees; and he appears to have done all he could to perfect his entry while in life. The land was undoubtedly subject to entry when his application was presented; and, therefore, the right initiated by him could not be prejudiced by the action of the local officers in rejecting his claim.

Under the authorities cited, I am of the opinion that upon his death the right thus initiated, though uncompleted, inured to his heirs, and that they should be allowed to perfect the right by entry under the

timber culture law. The application of Maud A. Coffman, as such heir, however, is not before me for action on this appeal, and no question relative to that application as allowed by the local officers is intended to be decided. All that is now decided is that the lawful heir or heirs, if any, of Thomas H. Coffman should be allowed to perfect the entry initiated by him. Whether Maud A. Coffman has properly shown herself to be such heir is not a question now before me. Upon that question the company will be allowed ample opportunity of proper defense.

In view of the foregoing, I find no error in the decision appealed from, and the same is therefore affirmed.

LAND RESERVED FROM ENTRY—APPLICATION.

LOWELL D. TETER.

Lands embraced within a departmental order directing their reservation until further instructions are not subject to entry during the pendency of said order.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (C. J. G.)

I have considered the appeal of Lowell D. Teter from your office decision of March 29, 1895, wherein is affirmed the action of the local office in rejecting his homestead application for the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 13, T. 17 N., R. 2 E., Guthrie land district, Oklahoma.

The said application was rejected

for the reason that the schedule of lands opened to settlement by the President's proclamation dated September 18, 1891, on September 22, 1891, does not show tract described to be open to entry.

The record shows that the land in question was embraced in allotment No. 104, made to Sydney, an Iowa Indian. The said allotment was approved by the Department and patent regularly issued therefor. Subsequently, under the provisions of the act of October 19, 1888 (25 Stat., 612), the said Indian relinquished said land to the United States, and the patent therefor was canceled. At the same time your office was "directed to reserve the lands thus relinquished until further instructions concerning the disposition of them."

If there were any question as to the proper disposition of the land embraced in this allotment after its relinquishment by the allottee and the cancellation of the patent, or from whatever cause, the Secretary of the Interior undoubtedly possessed the power and authority to hold said land in reservation subject to future instructions. In the case of *Wolsey v. Chapman* (101 U. S., 755) the supreme court held that the act or order of the head of a Department, within the scope of his power or authority, is in contemplation of law, the act or order of the President.

So long, therefore, as the instructions referred to remain unrevoked,

the land in question is not subject to entry. Accordingly the action of your office in rejecting the appellant's application to enter said land was entirely proper.

Your said office decision is hereby affirmed.

INDIAN LANDS—PATENT—ACT OF JANUARY 26, 1895.

HARDY v. McCLELLAN ET AL.

The patents issued on Indian allotments in the Cherokee Outlet were not conditional, but conveyed a fee simple title, and the Department is consequently without jurisdiction over the lands covered by said patents.

The act of January 26, 1895, authorizing the Secretary of the Interior to cancel patents issued on Indian allotments, for the correction of mistakes therein, is limited in its operation to a specified class of trust patents, and is not applicable to a patent that conveys a title in fee simple.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (E. M. R.)

This case involves the SE. $\frac{1}{4}$ of Sec. 23, T. 27 N., R. 1 W., Perry, Oklahoma.

The record shows that this tract of land is covered by Cherokee Indian allotments Nos. 56 and 57, made on behalf of John F. McClellan and Mary E. McClellan, and were approved by the Department on September 8, 1893, and patents issued thereunder on November 18, 1893.

June 17, 1895, Noah Hardy made homestead application for the above described land, which was rejected by the local officers on account of the allotments made to the McClellans.

An appeal having been taken, your office decision of August 27, 1895, was rendered, affirming the action of the local office, from which decision Hardy appeals to the Department, alleging—

that the said appellees obtained this land fraudulently by allotment wherein the agreement between the United States and the Cherokee Indians providing for allotments were not complied with by these appellees. That this land so allotted is not now nor never was used for farm purposes and that they have not now and never had any valuable farm improvements, that these appellees had not lived in that part of the territory and at the time provided by the proclamation and the law governing these allotments. That they did not conform to the wishes and requirements of the association of settlers on the Cherokee strip and that these appellees were not entitled under the law to these allotments. That patents were erroneously issued by the United States to these appellees for this land—

wherefore the appellant asks that the patents be canceled.

There is contained in the record the affidavits of James W. Hamilton and A. J. Blackwell—that of the former being as follows:

Personally appeared before a notary public came James W. Hamilton who upon his oath says that he is acquainted with, and has been since about 1872, the tract now known as John F. McClellan and Mary E. McClellan allotments, viz. The south-east quarter, section 23, town. 27 range one west of the I. M. and knows that there

never was any sign of any permanent and valuable farm improvements of any kind or description ever made upon said land by any Indian or any other person prior to 1891, and that there was never any improvements of farm nature, made upon any lands adjoining or in the vicinity of said land by Charles M. McClellan or the allottees of said land. That he has for several years known that the home of the allottees and Charles M. McClellan and family was in the Indian Territory east of the 96° but that said Charles M. McClellan had at one time a cattle ranch upon the eastern portion of the strip or triangle part of the Cherokee outlet.

In the affidavit of Blackwell the only material portion sets forth that the McClellan allotments had originally been located about six miles east of where they are now located, but that one Owens, whom he alleges had a contract with Charles McClellan, succeeded in having them located adjacent to the townsite of Blackwell.

By the act of Congress of March 3, 1893, 27 Stat., 612, page 641, in speaking of the Cherokee outlet, after reciting that a commission had been appointed to enter into an agreement with these Indians, it is stated that—

said agreement is fully set forth in the message of the President of the United States, communicating the same to congress, known as executive document numbered fifty-six, of the first session of the Fifty-second Congress, the lands referred to being commonly known and called the "Cherokee Outlet;" and said agreement is hereby ratified by the Congress of the United States.

Article five of that agreement, as found on page 18 of said document, is as follows:

Fifth. That any citizen of the Cherokee nation who, prior to the first day of November, 1891, was a bona fide resident upon and further had, as a farmer and for farming purposes, made permanent and valuable improvements upon any part of the land herein ceded and who has not disposed of the same, but desires to occupy the particular lands so improved as a homestead and for farming purposes, shall have the right to select one-eighth of a section of land, to conform, however, to the United States surveys; such selection to embrace, as far as the above limitation will admit, such improvements. The wife and children of any such citizen shall have the same right to selection that is above given to the citizen, and they shall have the preference in making selections to take any lands improved by the husband and father that he can not take until all of his improved land shall be taken.

That any citizen of the Cherokee nation not a resident within the land herein ceded, who, prior to the first day of November, 1891, had for farming purposes made valuable and permanent improvements upon any of the land herein ceded, shall have the right to select one-eighth of a section of land to conform to the United States surveys; such selection to embrace, as far as the above limitation will admit, such improvements.

In the agreement made for the cession of the Cherokee outlet it is provided that—

It is further agreed and understood that the number of such allotments shall not exceed seventy (70) in number and the land allotted shall not exceed five thousand and six hundred (5,600) acres; that such allotments shall be made and confirmed under such rules and regulations as shall be prescribed by the Secretary of the Interior, and when so made and confirmed shall be conveyed to the allottees, respectively, by the United States in fee simple.

In other words, that the patent given should convey absolutely the

title of the government. And in fact the patents issued under this agreement were unconditional and conveyed a fee simple title.

The act of January 26, 1895 (28 Stat., 641), is as follows:

That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian and for which a conditional patent may have been issued, to rectify and correct such mistake and cancel any patent which may have been erroneously and wrongfully issued, whenever in his opinion the same ought to be canceled for error in the issue thereof, or for the best interests of the Indian, and, if possession of the original patent can not be obtained, such cancellation shall be effective if made upon the records of the General Land Office; and no proclamation shall be necessary to open the lands so allotted to settlement.

The question presented for determination is: Do the facts set forth present such a case as comes within the purview of that act?

In the first portion of the act it is said: "That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made," that the Secretary of the Interior would have the authority to cancel such patent.

But there has been no double allotment in this case; and whilst the rest of the language in the statute is broader, it will be construed as a whole, and the same general language following thereafter will, if possible, be construed as carrying out the object first set forth.

It is further noted that the act apparently contemplates the canceling of patents only where the patent itself is a "conditional patent." For, after speaking of errors that might be corrected by the Secretary, it is said—

Said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian and for which a conditional patent may have been issued, to rectify and correct such mistake and cancel any patent.

I am therefore of opinion that the case presented is one which does not fall within the purview of the act, and the patent issued to the tracts in controversy not being a conditional one, the Department is ousted of jurisdiction.

The decision appealed from is therefore affirmed.

TIMBER CULTURE ENTRY—EQUITABLE ACTION.

CARTER v. DAVIDSON.

Where the notice of the expiration of the statutory life of a timber culture entry is not given in accordance with the address furnished in the entry papers, and the entry is thereafter canceled for failure to submit final proof within the statutory period, such entry should be reinstated; and equitable action thereon will not be defeated by the intervening entry of another, if good faith is manifest, and the final proof shows due compliance with the law in all respects except in the matter of submitting proof within the statutory period.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (R. W. H.)

It appears from the record in this case that Arthur M. Davidson made timber culture entry No. 2736 for the SW. $\frac{1}{4}$, Sec. 9, T. 6 N., R. 42 W., McCook land district, Nebraska June 27, 1879; that October 10, 1894, the local office reported the entry for cancellation on account of the expiration of the statutory period without proof; and said entry was canceled by your office October 25, 1894, for this cause; that, March 31, 1895, John D. Carter made homestead entry No. 10961 for the tract; that, May 1, 1895, Davidson made final proof showing the cultivation and planting of ten acres, there being at that date five hundred trees to the acre, and one hundred acres in cultivation.

Supplemental testimony was submitted by Davidson and his witnesses to the effect that his entry was made in good faith; that it had always been his impression that he was entitled to sixteen years within which to make proof, having learned the contrary only two weeks since; that he never received notice of the expiration of the statutory period, which he would have done had the same been addressed to the post office nearest the land, viz: Earl, six miles distant, whereas they were sent to Elwood, sixteen miles away, in a different county, and to Homer-ville, which was discontinued as a post office long before the notice was sent.

Davidson further alleges that he had made arrangements for making proof August 1, 1894, but on July 15, 1894, having been thrown from a wagon, received such serious injuries that he was confined to the house until November, 1894, and thus prevented during the winter from going to the land office, and will be a cripple for life. He states that about March 30, 1895, he was approached by a man, since learned to be John D. Carter, who made inquiries regarding his timber culture claim, and has since made entry therefor. Further that he has been obliged by reason of crop failures and other misfortunes to mortgage his homestead claim, and if his timber culture proof is rejected, he will be deprived of long years of toil. He therefore prayed for the reinstatement of his entry, acceptance of his proof, and cancellation of the entry of Carter.

A physician's certificate dated May 5, 1895, sets forth the fact of Davidson's accident and its consequences, from which, it states, he will never entirely recover.

In transmitting these papers the local officers report that, not being informed of the address of Davidson, the offices to which notices were addressed were taken from an old map on which the county lines were not well defined; and the fact that the land was in Frontier county was not observed until their attention was called thereto at the time of proof. The local office found the proof satisfactory, and also that the failure to submit the same within the statutory period, was due, to his ignorance of the law and that he is equitably entitled to the land.

The time within which Davidson should have made proof expired June 27, 1892. Your office held that the notices addressed to Davidson at Elwood (which were returned unclaimed) not having been sent to "Frontier county," the place of his residence as stated in the entry papers, nor any known address of the claimant, cannot be considered the notice required by law.

In view whereof the cancellation of Davidson's entry was found irregular and void. It was ordered that Carter, the adverse claimant, be notified, and that thirty days be granted him to show cause why his homestead entry No. 10961 should not be canceled, and the timber culture entry of Davidson be reinstated.

July 19, 1895, the affidavit of Carter, uncorroborated, made July 1, 1895, was forwarded to your office, in which he stated his grounds of complaint and asked for a hearing to sustain them, unless deemed sufficient as presented. Your office held that Carter's application did not present sufficient grounds for a hearing, and it was denied.

He then moved for a review of your decision, which resulted in its modification in several non-essential respects, but you adhered to your "former ruling that Davidson, having given 'Frontier county' as his residence, without further specifying his address, he was entitled to notice mailed to 'Frontier county,' or to the post office in Frontier county nearest the claim."

In connection with your decision on this point you state that,

It seems from the statements made by the register and receiver that notice would have been sent to some post office in Frontier county, but for the mistaken idea that Davidson's claim was in Gosper county, into which county the notices were sent.

Carter's motion for review was accordingly denied, and he appeals from both of your said decisions, alleging that it was:

(1) Error to accept the *ex parte* statements of Davidson as a basis for the restoration of a canceled entry, an adverse right having attached, without first calling a hearing in which all parties could be heard.

(2) It was error on the part of the Commissioner to refuse him a hearing when applied for under oath, and under the showing made.

(3) It was the fault of the entryman that he did not furnish the local office with his address at the time of making entry.

(4) No valid or even plausible excuse is given by Davidson as to his failure to make proof within the statutory time.

(5) It is error on the part of the Commissioner to hold that notice should have been sent to "Frontier county," when no address is given, as it would never leave the McCook post office, but would be returned to the writer from the office where mailed or sent to the Dead Letter Office &c.

Without observing the exact order in which these specifications are presented I find the reinstatement of Davidson's entry on the ground that it had been canceled without notice to the entryman as required by law, was proper; and it appearing that the fact that such notice had not been served was officially known to and certified by the local officers, it was not necessary to order a hearing, notwithstanding another entry of the tract had been inadvertently allowed.

The only question in the case is whether there was such notice to Davidson as the law requires. It is admitted that he did not receive actual notice. He had given no other address at the local office than "Frontier county"—a circumstance which may be explained, perhaps, by the necessity of frequent changes in post office addresses to meet the needs of new settlements.

It is also in evidence that the local officers, in sending out the notices to Davidson, were misled by an old map in which the county lines were not well defined, and instead of sending them to some office in "Frontier county" sent them to offices in Gosper county. They state, that but for this mistake, the notices would have been sent to an office in Frontier county. Davidson was an old settler, well-known at the county-seat and throughout the eastern part of the county where his entry was made, and it is reasonable to conclude that if a notice had been sent to the county-seat or to any office near the land in "Frontier county" it would have reached him.

I agree in the conclusion of your office that Davidson

was entitled to notice in accordance with the address as mentioned in his entry papers, viz: Frontier county, or the office in that county nearest the land.

The only difficulty in the case arises from the fact that Davidson failed to make his final proof within the period prescribed by law. His entry was on June 27, 1879; its life expired June 27, 1892; and his final proof was not made until May 1, 1895.

The excuses he offers for his default—that he was ignorant as to the time when his proof ought to have been made, and, also, that he was disabled by an accident, which occurred after the statutory period of his entry, are of no avail against the plain requirement of the law.

The fact, however, that Davidson's good faith is not questioned, and that he has fully complied with the timber culture law in every respect, except as to the time of making proof—it appearing that for the period of ten years last preceding that ten acres of timber had been planted, cultivated and protected and were kept in a healthy growing condition,

that the trees were of an average diameter of three inches and an average height of from eight to fourteen feet, consisting of ash, box elder, elm, mulberry, with a few cottonwood trees,—5,168 by actual count, being more than five hundred to the acre—entitle his claim to equitable consideration.

The cancellation of Davidson's entry without notice being void for want of jurisdiction—said entry must be regarded as legally subsisting at the date of Carter's homestead. The latter is not, therefore, such an adverse claim as will defeat equitable confirmation of Davidson's entry. Carter's homestead entry will therefore be canceled, and Davidson's timber-culture entry after reinstatement upon the record will be submitted to the board of equitable adjudication for its consideration and action.

SOLDIER'S ADDITIONAL HOMESTEAD-ACT OF AUGUST 18, 1894.

ROBORDS *v.* LAKEY ET AL.

Under the act of August 18, 1894, an entry made on a certificate of a soldier's additional homestead right is valid, and must be approved, where the land is held by a bona fide purchaser, though the issuance of the certificate may have been secured through fraud; and the patent in such case should issue in the name of the assignee.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (E. B., Jr.)

This is a contest for title to the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 31, T. 21 N., R. 3 E., Helena, Montana, land district. On November 1, 1882, Simon Lakey, who had previously made original homestead entry at Springfield, Missouri, for eighty acres of land (final certificate No. 4315, issued December 19, 1881, patented August 5, 1882), executed an application for a certificate of right to enter, under section 2306 of the Revised Statutes, an additional eighty acres of land. This application and evidence in support thereof tending to show service by Lakey in Co. "I", 46th Mo. Vol. Inf., were filed in your office in December, following, by W. C. Hill, then a resident attorney.

On March 19, 1893, your office rejected said application upon the ground that the evidence showed that said Lakey was not the person who performed the military service above indicated. Subsequently, under a power of attorney from Lakey to L. D. Stone, dated February 7, 1889, to make application for, select, locate, receive duplicate receipt of entry for, and demand, receive, and receipt for patent, for any land to which he might be entitled under said section 2306, Lakey's application was by some means, which do not appear, revived and allowed, and such certificate was issued by your office February 26, 1889. Acting under an appointment as attorney in fact of Lakey, made by Stone under a power of substitution in said power of attorney, one Ashburn

K. Barbour, on May 4, 1889, entered in the name of Lakey at Helena, Montana (final certificate No. 1381), the land above described, as an additional homestead. This entry has been the subject of repeated attacks, on the ground of fraud, by different parties, commencing with that made by one Amy Gregg November 19, 1890. The history and disposition of certain of these attacks is set out in decisions of the Department in case of Gregg *v.* Lakey, dated May 11, 1892 (unreported), and January 10, 1893 (16 L. D., 39), and in Gregg *et al. v.* Lakey, dated July 7, 1893 (17 L. D., 60), and need not be recited here.

The present contest by Ezra M. Robords, referred to in said decisions, was initiated October 20, 1891, and charged that said additional entry was fraudulent in this, that Simon Lakey, who made said original homestead entry, final certificate No. 4315, at Springfield, Missouri, had not rendered service as alleged, nor rendered at any time the service necessary to entitle him to make said additional entry; that said original entry was not made under section 2304 but under section 2289 of the Revised Statutes; and that said Lakey had knowingly, wilfully and fraudulently, in the matter of said additional entry, personated his uncle Simon Lakey, then of Douglas county, Missouri, who had served from October, 1864, to May, 1865, in the company and regiment hereinbefore mentioned. On June 2, 1892, your office ordered a hearing upon these charges of Robords.

In its decision of July 7, 1893 (*supra*), the Department said, among other things:

In promulgating the departmental decision of May 11, 1892, you directed a hearing on the contest of Robords. Such hearing was suspended by the filing of motion for review. After that motion was denied, you ordered said hearing to proceed, but it is now again suspended by the motion for rereview. . . .

On the 29th of March, 1893, Lucius B. Kendall, who described himself as a party in interest, filed a motion, asking that the pending motion for re-review, filed by Amy Gregg, be dismissed, and that departmental decisions of May 11, 1892, and January 10, 1893, be sustained, in so far as they dismiss the claims of said Gregg, and reversed and set aside, in so far as they recognize the rights of Ezra M. Robords to contest said soldier's additional homestead entry; that the homestead application of Burlingame for the land be rejected, and his pending appeal be dismissed; and that the entry of Lakey be confirmed, and he (Kendall) be allowed to purchase under the act of March 3, 1893.

His motion is supported by his affidavit, in which he makes oath that said entry was made upon a certificate of the Commissioner of the General Land Office, of the right to make the same; that said land was conveyed to him by warranty deed on the 4th of May, 1889, for a valuable consideration, to wit, \$3,000; that he purchased the land in good faith, without any knowledge of the fact that the certificate to said Lakey had been fraudulently procured; that there are no adverse claimants to the land, which fact the official record will prove, and that he is still the owner thereof. He further states that the invalidity of the certification to the said Lakey has been clearly established by affidavits now in the record; that by the confirmation of this certificate he will not acquire more than one hundred and sixty acres of public land, and he asks that he be permitted to perfect his title by paying the government price for said land, as provided in the act of March 3, 1893 (27 Stat., 593).

To his affidavit is attached an abstract of title to the land, certified to by the

clerk and recorder of the county, which shows the title to be in Kendall, his deed therefor having been recorded on the 6th of May, 1889.

Among numerous other things, the act of March 3, 1893, provides:

"That where soldier's additional homestead entries have been made or initiated upon certificates of the Commissioner of the General Land Office, of the right to make such entry, and there is no adverse claimant, and such certificate is found to be erroneous, or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for the land; but no person shall be permitted to acquire more than one hundred and sixty acres of public land through the location of any such certificate."

If all the matters stated in the affidavit of Kendall, filed in support of his motion, are true, he is brought within the provision of law quoted above. I can not accept, however, without further proof, his statement that the entry was made upon a certificate issued by you on the 26th of February, 1889. Neither does he make it satisfactorily appear that such certificate is found to be erroneous or invalid. These facts must be clearly established, in order to entitle him to the benefits of the act of March 3, 1893. . . .

You will direct the local officers to proceed with the hearing ordered by you on the 2d of June, 1892, on the charges of Robords, against the entry of Lakey, that the truth as to the charge made that Simon Lakey was not a soldier may be ascertained, and whether this fact was known to Kendall before his purchase.

Upon the showing made by Kendall, on his motion now before me, he will be allowed to intervene at such hearing, and submit any proof which he may desire, to establish his interest in, and title to the land in question.

The decision of July 7, 1893, eliminated Amy Gregg as a party from the case and denied the application of one J. M. Burlingame Jr. to be allowed to intervene therein. By departmental decision of October 13, 1893, George W. Bird, claiming to be a transferee of the entryman Simon Lakey, was allowed to intervene in the case. A hearing was had December 13, 1893. The day following, the local office rendered a decision dismissing Robords' contest. Robords appealed, and on July 14, 1894, your office remanded the case for hearing *de novo*. By reason of various causes of delay, recited in the decision of the local office dated March 5, 1895, but not necessary to be narrated here, the date of the hearing was not fixed until March 11, 1895, when, as reported by the local office, "all parties of interest were cited to appear at this (local) office May 13, 1895, for the trial of the cause." The hearing was not finally concluded until December 16, 1895. All parties were represented at the hearing except Lakey, who, the local office reports, made default. Robords offered no testimony at the hearing, but was represented there by counsel.

The local office held that the fraudulency and invalidity of the certificate issued to Simon Lakey, upon which entry was allowed, was "fully established by the testimony adduced by Kendall," but that said "certificate and its assignment before entry are in all respects confirmed and validated by act of August 18, 1894 (John M. Rankin, on re review, 21 L. D., 404)," and that patent should issue to Simon Lakey, and recommended the dismissal of Robords' contest, and the rejection of the applications of Kendall and Bird to purchase under the act of March 3, 1893 (*supra*). Upon appeal by Robords your office affirmed

the decision of the local office as to Robords and Bird, holding that Robords "was a party to the fraud in procuring the issuance of said certificate," and that Bird's alleged interest was acquired subsequently to and with full knowledge of the sale and conveyance to Kendall, but held that the act of August 18, 1894 (28 Stat., 397), gave Kendall no right not already given him by the act of March 3, 1893, and that his application to purchase under the latter act would be allowed. Appeals by Bird and Robords now bring the case before the Department.

It clearly appears from the evidence that said certificate was procured by fraud and that Robords was the chief instrument in perpetrating the fraud. He induced Simon Lakey, the nephew, to make application for the certificate, leading him to believe that a short service, which said Lakey informed him he (Lakey) had had in the Missouri militia in 1865, entitled him (Lakey) to such certificate and additional homestead, and himself (Robords) making or procuring to be made the false representations of service by Simon Lakey as hereinbefore charged by him (Robords). Due to the agency or instrumentality of Robords, apparently, the second and successful effort for the issuance of said certificate was prosecuted, the said power of attorney to Stone was procured, and a sale by Lakey of his supposed right to make additional entry was effected, Stone paying Lake \$200 therefor. The allegations of Kendall as to the purchase by him in good faith and conveyance to him of said land by Simon Lakey, the entryman, are shown to be true. A warranty deed from said Lakey and wife, duly executed May 4, 1889, by Ashburn K. Barbour, as their attorney in fact, under a power of attorney previously given, conveyed said land to said Lucius B. Kendall. In addition, said Lakey and wife executed a confirmatory deed to the land, to said Kendall, April 15, 1893, ratifying and confirming their previous deed by Barbour, attorney in fact, and reciting that their certain deed dated May 2, 1890, to George W. Bird, was procured by misrepresentation and deceit, the same having been executed by them (Lakey and wife) in blank, with the understanding that the name of said Kendall was to be inserted therein, and that the same was intended to confirm title to said land to said Kendall.

The provision in the act of August 18, 1894 (*supra*), relative to soldier's additional homestead certificates, is as follows:

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of *bona fide* purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

As construed in the case of John M. Rankin (*supra*), this legislation was intended to afford larger relief than the said act of March 3, 1893, and "should not be limited to validating the transfer of certificates," but was intended "to validate all certificates heretofore (theretofore) issued, in the hands of *bona fide* holders," notwithstanding any invalidity attending the issuance thereof.

It would seem unnecessary, therefore, to discuss at length the contention of Robords that his contest gives him any right or valid claim under the act of May 14, 1880 (21 Stat., 140), as against the claim of Kendall. It would be sufficient answer to any claim of Robords, even had the fraud charged by him been proven by the testimony adduced by him—which was not the case—that he was shown to be the prime mover in the fraud. He would not be permitted, as such, to have judgment in his favor, and thus reap advantage through his own wrong. But were he blameless in the entire transaction proof that said certificate was fraudulently obtained would avail him nothing against the right of Kendall under the acts of March 3, 1893, and August 18, 1894. The proposition can not be entertained that in the former act Congress intended in one breath to enable the purchaser under a fraudulent certificate to perfect his title, and in the next, to enact that a contestant might defeat that provision by proving the fraud alone. These acts being *in pari materia* are to be construed together and so construed they were clearly intended to protect any purchaser mentioned in either against the consequences of invalidity, whether by reason of fraud, or otherwise, of the certificate to which he traced his title.

The only color of title in Bird to the land in question is under said quit claim deed. But as Kendall's deed was duly recorded, thus giving Bird constructive notice thereof, and as Lakey had no title when the deed to Bird was made, the latter could certainly take nothing by his deed, and his application was properly denied. This disposes of the entire case so far as the issues between these parties are concerned.

It will be noticed that the act of 1894 directs that

all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

Under this provision, following the construction of the act in case of Rankin (*supra*), said entry will stand, and patent will issue to said Kendall. The only difference in point between the positions of Rankin and Kendall is that the former purchased prior to entry, and Kendall after entry. In both cases the entry was made in the name of the party named in the certificate. The difference is immaterial.

Your office decision as herein modified is affirmed.

ISOLATED TRACT—ACT OF FEBRUARY 26, 1895.

JOHN P. SHANK.

Section 2455 R. S., as amended by the act of February 26, 1895, contemplates that no tract shall be regarded as isolated, within the meaning of the law, unless at the time of the application to have it sold under said section the land surrounding said tract is included within entries, filings or sales, made at least three years prior thereto.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 25, T. 15 N., R. 18 E., Lewistown land district, Montana, and is before the Department upon appeal, by John P. Shank, from your office decision of February 8, 1896.

The record shows that on January 16, 1896, the appellant made application, as a prospective purchaser, to have the above described tract sold under section 2455 of the Revised Statutes of the United States, as amended by the act of February 26, 1895 (28 Stat., 687).

Your office decision states that the records show that the land involved is vacant, but does not come within the statute for the reason that the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 25, same township and range, is embraced in coal entry No. 1, made by Frank Bland on October 2, 1894, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 26, same township and range, is embraced in coal entry No. 2, made March 4, 1895, by Millie L. Conway.

Section 2455 as amended by the act of February 26, 1895, is as follows:

Sec. 2455. It shall be lawful for the Commissioner of the General Land Office to order into market and sell for not less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of the public domain less than one quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided*, That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the government: *Provided*, That not more than one hundred and sixty acres shall be sold to any one person.

The appellant contends that whilst the entries mentioned in your office decision (those of Bland and Conway) have not been made long enough to bring the land within the time required by the act, to wit, three years, that in fact the land surrounding the tract in controversy has been filed upon for a much longer period than the time required by the act, and he therefore asks for the reversal of your decision.

It will be noted that the section is not mandatory in its requirements. It says, "It shall be lawful for the Commissioner of the General Land Office," and again, "which in his judgment it would be proper to expose to sale;" and I am of opinion that the interpretation placed upon this act by your office is the correct one, conceding the assertion of the

appellant to be correct, that other entries had been allowed and filings made from time to time covering a period greater than that required by the statute, that nevertheless the true meaning of the section contemplated that no tract became isolated within the meaning of the law unless at the time of the application to have it sold, such tract was surrounded by entries or filings, or land already sold, which entries or filings or sale had been made at least three years prior thereto.

The decision appealed from is therefore affirmed.

SETTLEMENT RIGHT—ADVERSE CLAIM—ESTOPPEL.

PHILLIPS *v.* MATTHEWS.

The right of a settler to make homestead entry will not be defeated by the prior application of an adverse claimant, if, by the conduct of said claimant, he is estopped from asserting his claim as against such settler, and it appears that said claim is wanting in good faith.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (E. M. R.)

This case involves that tract of land in the Gainesville land district in the State of Florida known as the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 5, T. 15 S., R. 22 E.

The record shows that on December 15, 1890, Duncan D. Matthews made homestead application for the tract in controversy, together with an affidavit of contest against the claim of the Florida Transit and Peninsular Railroad Company, and subsequently, on November 28, 1892, he was allowed to make homestead entry.

On the second day of December, 1892, Clifton J. Phillips made application to enter under the homestead law the same land, which was rejected, and on January 3, 1893, he filed his affidavit of contest against the entry of Matthews on the ground of prior settlement and superior equities and that the entry of the defendant-respondent was not made in good faith.

On the day following, the local officers issued notices of hearing to be had on February 15, 1893, before the clerk of the circuit court at Ocala; at which time and place the parties appeared and submitted testimony.

November 23, 1893, the local officers issued a new notice setting January 9, 1894, as the date of the new hearing and the local office as the place. May 7, 1894, the local officers rendered their decision in favor of the plaintiff and recommended the cancellation of the entry of the defendant. Upon appeal, your office decision of December 6, 1894, was rendered, wherein was reversed the action of the local officers and the homestead entry of Matthews held intact. Further appeal brings the cause before the Department for final adjudication.

From an examination of the evidence it appears that in November, 1887, Phillips, the contestant, secured the quitclaim of E. W. Agnew, his brother-in-law, or more accurately, one C. E. L. Schmidt, who had entered into a contract for the purchase of this land from the Florida Transit and Peninsular Railway Company, and who, in consideration of an indebtedness due Agnew, left with said Agnew this contract as collateral security, it being in the nature of an equitable mortgage, and having thereafter left the country, the said Agnew, at the time above mentioned, told the plaintiff that he might go into possession of this land.

In November, 1887, the plaintiff commenced his improvements upon the land by building a fence around forty acres; a well was also dug and a house twelve by fourteen feet was built. He cleared ten acres and planted in orange trees, and set out about 15,000 nursery stock trees. In November, 1892, he added three rooms to his house. His intention from the start was to acquire title from the railroad company. In June, 1892, he discovered that the company could not give title, and soon thereafter made settlement under the homestead law. His improvements are worth \$2,500.

On June 4, 1892, your office, in reply to a letter from the plaintiff, stated that the tract in controversy was within the limits of the grant to the Florida Railway and Navigation Company and had been selected by said company on September 3, 1887; that on June 18, 1883, your office had passed upon the case of said company *v. Schmidt*, and rejected the claim of the company, from which action the company had appealed, and on April 22, 1884, the Department had affirmed your action; that thereafter the entry of Schmidt had been canceled; that the tract was at the time of the communication involved in the case of the said company *v. Matthews*; and that on June 9, 1891, your office had considered the above entitled cause and had decided against the company, and appeal had been taken to the Department.

Subsequently, and to wit, on June 14th, your office, in reply to another communication, informed the plaintiff that the claim of Matthews was based upon an application to enter under the homestead law. The plaintiff, after the receipt of the first letter, saw the defendant and asked him if he laid any claim to the land, and he denied that he laid any claim to any land in that neighborhood. He denied that he had ever had any contest with the railroad company over any land.

After the receipt of the second letter from the then acting Commissioner, the plaintiff went on a visit to his former home in Kentucky, and upon his return ascertained that the defendant was absent, but succeeded in locating him in North Carolina, and wrote to him with a view to securing his relinquishment of all claim in and to the land. He received a letter from the defendant offering to sign any papers that the plaintiff might desire, if he were paid \$15.00; whereupon this appellant forwarded to him a check for that amount, which check was used by the defendant-respondent.

It further appears that in July, 1892, the defendant was employed by the plaintiff to work on the land in controversy, upon his orange trees, and was duly paid for such services. Early in December, 1892, Phillips took his wife on the land to live. Prior to this time, and extending back for some time, the plaintiff had kept up a desultory residence upon the land, going out from Ocala, where he was employed in the warehouse of Agnew, to spend a day or night, at which times he occasionally prepared his own meals. About the first of December, 1892, Matthews put up notices on the land, which the plaintiff tore down. Matthews, in answer to the fact that he worked for Phillips upon the land, states that he did not know it was the land in controversy. This land is just on the outskirts of Ocala. He admits that in reply to a letter from the plaintiff he promised to sell his interest for fifteen dollars. He says that at that time he expected to remain in North Carolina at least one year; that he had used the check sent by the plaintiff through mistake; that he had several other checks in his possession and had inadvertently cashed the check. On the day he presented the check he returned to Ocala and shortly thereafter deposited in his name, at the First National Bank of that place, an amount equal to the check. He had the land surveyed on the 3rd of December, 1892, and built a house on the land in January, 1893, and has two or three acres under enclosure and raised some few things.

The decision of your office was based upon the fact that the application to enter by Matthews, whilst subsequent to some of the improvements of Phillips, was prior to his settlement, and as Matthews' entry was followed within a reasonable time by residence, the settlement and extensive improvements of Phillips could not inure to his advantage because of the pending application of the defendant. When viewed by itself this position is impregnable, but an examination of the entire record shows that the plaintiff is entitled to judgment.

An estoppel is the preclusion of a person from asserting a fact by previous conduct, inconsistent therewith on his own part, or the part of those under whom he claims, or by an adjudication upon his rights which he can not be allowed to call in question (7 American and English Encyclopedia of Law, page 1).

The defendant told the plaintiff that he did not claim any land in that neighborhood and had never had a contest with the railroad company over any land. This it seems, under the authorities, amounted to an *estoppel in pais*. There was a false representation of a material fact (*Pittsburg v. Danforth*, 56 N. H., 272), which was knowingly made, and the plaintiff was ignorant of the fact; at least the denial came from the very highest authority—the applicant himself. And in this connection, as intent is a material part of all proceedings before this Department having as an ultimate end the acquisition of title to the public domain, the fact that the applicant disavowed any claim to any land in that neighborhood, would render the claim of record ineffectual as against Phillips. The false representations were apparently made

to mislead this plaintiff in order that he might act thereon, which he did.

It further appears that the defendant contracted to sell his relinquishment to this plaintiff. It is clearly shown by the record that the defendant, in answer to a communication received from the plaintiff, wrote him a letter in which it was stated that for the consideration of \$15.00 he would sign any paper the plaintiff considered necessary to clear the record; that the said sum was accordingly sent, and thereafter used by this defendant. It is true that the defendant claims that the presenting of the check was an inadvertence, but an examination of the record shows that this is not true. Equitable considerations are sufficient to demand that this defendant be prevented from denying the sale.

It is shown that at the time of the application of the defendant to enter, the plaintiff had valuable improvements upon the land, which facts suggest that the application of the defendant was not made in good faith, but with the intent to appropriate the valuable improvements of another. This Department has in various decisions indicated that one would not be allowed to appropriate the improvements of another in the manner here attempted. Thus in the case of *Caldwell v. Carden* (4 L. D., 306) it was held that the improvements and settlement of one, made with due notice of the *bona fide* claim of another, was not sufficient to defeat such prior claim. See also *Turner v. Bungardner* (5 L. D., 377) and the recent case of *Tustin v. Adams* (22 L. D., 266), wherein it was held, *inter alia* (syllabus):

The right of entry will not be accorded to a homestead applicant who, with full notice of the prior equities of an adverse claimant, fraudulently seeks to secure title through legal technicalities.

And again in *Roberts v. Gordon* (14 L. D., 475) it was held, *inter alia* (syllabus):

One who fails to assert any claim to a tract of public land which is in the adverse possession of another, and remains silent, though knowing that the adverse occupant continues to claim, occupy and improve the land, is estopped thereby from subsequently denying the good faith of said occupant and asserting a right of priority in himself.

I am therefore of opinion that a rightful regard to the equities of this cause demands a reversal of your office decision. The entry of Matthews will accordingly be canceled.

PRACTICE—REVIEW—OKLAHOMA LANDS—SETTLEMENT.

BRADEN v. SHAW.

The sufficiency of the charge, on which a hearing has been held, can not be called in question on review, if no objection thereto was made at the hearing.

The prohibitory provisions of section 14, act of March 2, 1889, with respect to settlement in Oklahoma, are general in character as to lands opened to settlement in said territory, and extend to Sac and Fox lands, becoming effective from the date of the act announcing the acquisition of the Indian title to said lands.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (P. J. C.)

Counsel for Knowles Shaw have filed two petitions for re-review of departmental decision of May 20, 1896 (333 L. and R., 129), on the merits of the contest initiated by George W. Braden; also of the decision on the motion for review of October 3, 1896 (342 L. and R., 45), and on a motion for rehearing on November 12, 1896 (344 L. and R., 366).

The petitions were entertained. Service of the same, together with the affidavits, was made on Braden, and the matter now comes up regularly for consideration.

It appears that Shaw, through his agent, filed soldier's declaratory statement for the NE. $\frac{1}{4}$, Sec. 10, Tp. 16 N., R. 4 E., Guthrie, Oklahoma, September 23, 1891; on September 30, following, Braden made homestead entry of the tract. On March 18, 1892, Shaw presented to the local officers his application to make entry under his said soldier's declaratory statement. This application was "suspended awaiting the determination of rights of" Braden for the said tract "who will be cited to appear at this office to show cause why his entry should not be canceled."

The record does not show whether Braden was actually cited, but on April 16, 1892, he filed an affidavit alleging:

That the said Knowles Shaw did not make settlement on said land prior to this affiant, that on Sept. 22, 1891, in the afternoon of said day, this affiant was in actual possession of said land; that at that time defendant was not on said land; that on said afternoon this affiant made settlement thereon as follows: set stakes on said land, and on Sept. 23, 1891, in the forenoon he laid foundation for dwelling and built a shed thereon; slept on land on night of 22 Sept. '91; have built a dwelling thereon, planted fruit trees, broken one acre; that his settlement was prior to said Shaw, and his claim superior to his, and he asks that his H. E. may remain intact on said land, and that he may be allowed opportunity to prove said allegation of prior settlement.

A hearing was ordered for August 26, 1892, before the local officers, when the parties appeared with their counsel. On September 30, the date to which the hearing was adjourned, counsel for Shaw filed a motion asking the local officers to set aside the suspension of his application to make homestead entry. This motion was granted.

As a result of the hearing the local officers found

from the evidence in this case that George W. Braden, the plaintiff, made settlement upon the claim in dispute as a homesteader, in the afternoon of September 22, 1891, and that he has in good faith complied with the requirements of the homestead law since said date.

They recommended the cancellation of Shaw's entry, and that Braden's remain intact. In discussing the facts as disclosed by the testimony the local officers say:

We are of the opinion that the question of soonerism and disqualification of the plaintiff as a homesteader can not be questioned in this proceeding, because there is no evidence showing that plaintiff entered upon said lands embraced in the act of February 13, 1891, subsequent to said date and prior to noon September 22, 1891.

On appeal, your office affirmed the action of the local officers upon the facts in relation to settlement on the land, but the question as to Braden's disqualification was not discussed, though raised by the specifications of error. The Department, May 20, 1896, formally affirmed the concurring conclusions below.

Motion for review of the latter decision was filed in the local office August 12, 1896. On October 3, following, this motion was denied. The errors assigned by this motion were, (1) that the decision was not responsive to the evidence, but repugnant to it; (2) that the affidavit of contest failed to allege sufficient grounds of contest, and that the decisions of your office and the Secretary did not consider or pass upon this question of practice; and (3) that Braden's alleged disqualifications to take land in Oklahoma was not passed upon. The Department decided these questions: (1) that this assignment was in substance an allegation that the judgment is against the testimony, and was insufficient to warrant consideration; (2) "Upon the question of priority, which was fairly raised by the affidavit of contest, your office rendered the judgment which was formally affirmed by the Department," and (3) that Braden was not disqualified by reason of entering the Territory after the passage of the act opening the same to settlement, and before the President's proclamation was issued. It was said:

If it be conceded that he did so enter, he would not be disqualified, for the reason that Congress did not fix any such penalty. The testimony that he did so enter, however, is not at all clear or convincing. Braden expressly denies that he was there or that he did any of the acts he is charged with.

On August 21, 1896, nine days after the motion for review was filed, Shaw filed a motion for rehearing. Through some oversight in the local office this motion was not forwarded to your office till October 10, following. The sole ground of this motion was Braden's alleged disqualification, and inasmuch as it had been decided that he was not disqualified, the Department, on November 12, 1896, denied the motion.

Two petitions for re-review of the former departmental action are now presented; one by counsel in Oklahoma, and the other by local attorneys. In the first, it is alleged (1) that the decision on review is not

responsive to the motion; and (2) that it "violates all the precedents of the Department heretofore rendered on the question of soonerism, and is in violation of the laws of Congress upon said question." In the second it is charged (1) "that the decision of May 20, 1896, absolutely ignores the facts shown by the record," and presented by counsel in argument in respect of Braden's "unlawful entry" on the land; (2) that it was error to find that Braden was not disqualified in the motion for review and in the decision on the motion for rehearing; and (3) that in view of the testimony of the contestant and the affidavits filed, it was error not to order a hearing to determine contestant's qualifications.

On the "question of practice," that is, as to whether the affidavit of contest raises the issue of prior settlement, there is but little to be said. The position of counsel is, that inasmuch as Shaw did not claim by reason of prior settlement, but because of filing his soldier's declaratory statement, the charges in the affidavit of contest are not sufficiently full or explicit to raise this issue. This contention is without potency in this case. It was said in the decision on the motion for review, that the question of priority was fairly raised. The reasons for this naked announcement were not given, because it seemed so apparent that this was the only issue upon which Braden could recover; that is, his settlement must antedate Shaw's filing, assuming the latter to be sufficient. This is the question that was tried and upon it the several concurring decisions have been rendered. Besides, the allegation, though not expressed in apt language perhaps, is sufficient in my judgment to raise this issue. It is certainly so when the circumstances are considered: the filing of the soldier's declaratory statement; the subsequent homestead entry of Braden, and the order citing him to appear and show cause why it should not be canceled for conflict with Shaw's.

But aside from this, the question as to the sufficiency of the charge can not now be raised. There was no objection made to it at the hearing, and both parties proceeded upon this theory of the case. Counsel will not, therefore, be permitted now to raise the objection. (*Paxton v. Owen*, 18 L. D., 540.)

It is urged by all the counsel who now appear that Braden was disqualified from making entry because, as charged by them, he entered the territory after the passage of the act—February 13, 1891,—and before the issuance of the President's proclamation declaring said land open to settlement, and it is insisted that Braden's own testimony is sufficient in itself to establish this fact.

The record does not sustain this charge. In the first place, the local officers distinctly ruled on the question as to whether the testimony was sufficient to warrant this finding, and held that it was not. This judgment has been affirmed, and it was expressly held by the Department, in the decision on the motion for review, that the evidence was not sufficient to justify this allegation. This finding of fact will not therefore be reviewed.

The ruling of the Department, however, in all its decisions in the case that Braden was not disqualified, even though he may have been in the territory after the passage of the act and before the issuance of the President's proclamation was erroneous. This question has been previously decided in *Rittwage v. McClintock* (21 L. D., 267), and the conclusion was (syllabus):

The prohibitory provisions of section 14, act of March 2, 1889, with respect to settlement rights in the Territory of Oklahoma, were intended to be general in character as to lands opened to settlement in said Territory, and it therefore follows that said prohibition extends to lands formerly embraced in the Cheyenne and Arapahoe reservation, and became effective from March 3, 1891, the date of the act announcing the acquisition of the Indian title to said lands.

This ruling was followed in *Griffard et al. v. Gardner*, Id., 274.

These decisions refer to the Cheyenne and Arapahoe reservations, which were opened to settlement by the President's proclamation of April 12, 1892 (27 Stat., 1018-1021), but the exact language used therein is found in the proclamation of September 18, 1891 (27 Stat., 989-992), opening the lands in the Sac and Fox, etc., reservations, wherein the tract in controversy is situated. The ruling in those cases would, therefore, apply to the one at bar. In the unpublished case of *Johnson v. Henderson*, decided October 3, 1896, the Department applied the ruling in those cases to land within the Sac and Fox reservation.

It is clear that the ruling in this case on the point as to whether Braden would not be disqualified if within the territory during the prohibited period, as construed by the prior decisions of the Department, was erroneous, and that part of it, so holding, must be revoked.

In view of this determination, it remains to consider the motion for a rehearing, the decision on this having been based on an erroneous construction of the law.

The motion for rehearing is based on the allegation of newly discovered evidence, and relates entirely to Braden's presence in the territory after the passage of the act, February 13, 1891, and the issuance of the President's proclamation. At the trial of this case this matter was gone into to some extent in the cross-examination of Braden, and, as before said, the testimony was not sufficient to warrant a judgment that he was in the territory during the prohibited period. He swore positively that he was not, and there was no testimony offered by the other side to contradict this. It is alleged by Shaw that the first he knew that Braden was disqualified was by reason of this testimony.

This motion is supported by several affidavits. Vandruff swears that Braden admitted to him in 1893 that he had been in the territory in "March, before said country was opened to settlement." The other affidavits are made by Burger, Todd and Stockton, and are all to the effect that they and some other persons named, together with Braden, made a trip into the country early in 1891. The date of this trip is not fixed with any degree of accuracy. The first witness says that it was in the latter part of the winter of 1891, and states that "probably the

last snow of the winter fell while they were out." Another says it was "after the cold weather was over, in the spring of 1891, but does not remember the month." The last witness fixes the time "on or about the last of February or the first of March in the year 1891."

In his own affidavit Shaw recites what other witnesses named will testify to. It is not deemed necessary to set forth the matters he thus states, for the reason that under the rulings their own affidavits must be presented, and for the further reason two persons named by him have made affidavits denying the statements attributed to them.

Braden, in his affidavit, admits having been in the territory in January, 1891, and unqualifiedly denies being there after that date until September 22, 1891. He also denies having made the declaration sworn to by Vandruff.

The showing made here by Shaw is not sufficient, in my judgment to warrant a rehearing. The statements made by his witnesses are too, indefinite to overcome the positive and direct denials made by Braden.

The petition for re-review is therefore denied.

HOMESTEAD ENTRY—NON-CONTIGUITY—MORTGAGEE.

JOHN R. CORRY ET AL.

When an entry is found to embrace non-contiguous tracts the entryman should be called upon to elect which tract or tracts he will relinquish in order to bring the entry within the rule as to contiguity; and if the entryman fails to take such action, the entry may then be canceled as to such tracts as may be deemed proper, having due regard to interests shown by incumbrancers.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) 30, 1897. (J. L. McC.)

John R. Corry, on August 19, 1894, made homestead entry for lots 10 and 11 of Sec. 4, lots 13 and 14 of Sec. 5, lot 1 of Sec. 8, and lot 4 of Sec. 9, T. 11 N., R. 4 W., Oklahoma land district, O. T.

The several lots named contain in the aggregate an area of 49.95 acres.

On March 18, 1895, Corry commuted said entry to cash, under Sec. 21 of the act of May 2, 1890 (26 Stat., 81); and cash certificate issued thereon.

When the entry papers were forwarded to your office, it was found that lots 10 and 11 of Sec. 4, and lot 13 of Sec. 5, were not contiguous to one another, nor to the other subdivisions embraced in the entry. Thereupon your office, by letter of June 2, 1895, allowed Corry thirty days within which to show cause why his entry should not be canceled.

A motion for review of the above decision was filed by J. H. Everest, attorney for J. R. Corry, J. M. Cox, William Maxwell and R. C. Hager.

On September 4, 1895, said motion for review was denied, and the homestead entry held for cancellation.

Thereupon, J. M. Cox, claiming to be transferee of said Corry, filed application to relinquish all the land embraced in said entry, except lot 10 of Sec. 4, and to have the entry as to that lot remain intact—transmitting his relinquishment for the other lots mentioned. Thereupon your office, by letter of December 17, 1895, directed the local officers to advise the parties that inasmuch as there was no evidence of the land having been transferred—only that it had been mortgaged—they should “advise the parties in interest that it will be necessary for them to furnish evidence of the transfer of said claim.”

From this action Cox has appealed, contending that your office erred in not holding that, by reason of his mortgage, he was the real party in interest as transferee of said John R. Corry.

In the view taken of this case, it is not deemed necessary to consider and decide the matters involved in that contention.

I am of the opinion that instead of calling upon the entryman to show cause why his entry should not be canceled, the better course would have been to have called upon him to elect which portions of his entry he would relinquish in order to make it contiguous.

The case is therefore returned to your office that you may pursue this course; and, in the event that the entryman does not elect and relinquish within the time named in the rule so issued, you will proceed to make such cancellation as in your opinion may seem proper, having due regard to the wishes of the mortgagee or incumbrancer.

The decision of your office is modified as above indicated.

DESERT LAND ENTRY—ANNUAL PROOF—COMPACTNESS.

ABRAM M. REID.

Orders of the General Land Office made on the submission of annual desert land proof are interlocutory in character, and no appeal will lie therefrom.

In determining whether a desert land entry is within the rule as to compactness no inflexible rule can be laid down, but each case must be considered in the light of the facts presented.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) 30, 1897. (W. C. P.)

Abram M. Reid has appealed from your decision of September 14, 1896 requiring him to relinquish a portion of the desert land entry, held by him as assignee of D. M. Limbaugh, for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 20, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 21, T. 4 N., R. 2 E., Tucson, Arizona land district to make it comply with the requirements as to compactness.

This entry was made by Limbaugh on April 11, 1893, the land being then unsurveyed and assigned to Abram M. Reid by an instrument executed May 19, 1893. The deed of assignment, together with the first year's proof, was filed in the local office April 18, 1894. On March 1,

1895, Reid as assignee, filed in the local office proof for the second year. The local officers recommended that his proof be not accepted because the claimant's affidavit was executed "without the Territory contrary to the requirements of the act of May 26, 1890 (26 Stat., 121)," and the claimant filed exceptions to their action. When the matter was considered in your office it was said as to this proof:

The testimony of the assignee having been made before a United States Circuit Court Commissioner in Minnesota, the proof is not acceptable to this office. It, however, is disposed of under the Clayberg case. See 20 L. D., 111.

In the same decision, however, it was held that the entry is not compact, and the claimant was required within sixty days from notice "to adjust his entry so as to make it a consolidated body, by the relinquishment of a portion thereof." The claimant asked a review of that decision, setting forth that by reason of a range of mountains to the north and east of said land substantially all the irrigable lands in said sections 20 and 21 were included in said entry, and that of Julia A. Reid; that at the time these entries were made the plats upon which the entryman relied as correct showed that section 29 had been entered, although it was afterwards discovered that it was section 28 instead of 29 that was thus appropriated, and praying that in view of these facts, and the further fact that the entry was accepted by the local office without criticism or objection and had been allowed to stand for more than two years, it be allowed to remain as made. By decision of September 14, 1896, your office adhered to the former ruling and the claimant appealed.

A large part of the argument in support of said appeal is directed to the proposition that the proof for the second year of said entry was properly made. No order was made by your office as to that proof and under the decision in the case of Andrew Clayberg (20 L. D., 111) any order that might have been made would have been interlocutory in character, from which no appeal would lie. It follows, therefore, that no question touching the yearly proof is now before this Department.

This entry embraces five tracts of forty acres lying alongside of each other, making a tract one and one-quarter miles in length, and of the uniform width of one-quarter of a mile. It is asserted by the claimant that the lands to the north of this entry are not irrigable, and this assertion is borne out by the statement in the decision appealed from, that it is shown by the field notes "that a chain of mountains run north-west and south-east near and east and north-east of this entry." There is no stream in the immediate vicinity of this land, and nothing to indicate that the entryman selected the land for the purpose of securing any advantage by reason of the form in which it was taken. Indeed, it would seem from the statements in the decision complained of as to the character of the land in section 29, that the entry would have been more desirable both as to form and quality of land, if it had been made to embrace lands in that section instead of the two tracts in

section 21. This tends to support the claim that the entry was made in its present form, because it was then understood that the land in section 29 had been appropriated. As has been frequently said by this Department, no inflexible rule can be laid down as to what does constitute compactness, but each case must be considered in the light of the facts presented. In this case, as said above, the entryman has apparently secured no benefit by taking the land in its present form, and the government has suffered no disadvantage thereby. In fact, it would seem that adjoining irrigable tracts left unappropriated are in a much more desirable shape for future purchasers than they would have been had this entry extended into section 29 instead of section 21. In that case the two tracts of irrigable land in the latter section would have remained unconnected with any other tracts of unappropriated irrigable land, and therefore undesirable for any purpose.

In view of all the circumstances surrounding this entry, and the fact that it was allowed to stand, as made, for more than two years, whereby the claimant was induced to expend his money thereon, I am not inclined at this time to require a relinquishment of any portion of the land embraced in said entry, even though that might be done under a strict application of the requirements as to compactness.

The decision appealed from is reversed, and the entry will be allowed to stand as made.

DESERT LAND ENTRY-REPAYMENT.

WILLIAM F. SLOCUM.

A desert land initial entry made under the act of March 3, 1877, by one not a citizen of the State in which the land is situated, but a qualified citizen of the United States, may be perfected under the amendatory act of March 3, 1891.

Repayment of the purchase price of the land can not be allowed a desert entryman who fails to furnish supplemental proof of reclamation properly called for by the local office, and abandons his claim to the land.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) 30, 1897. (W. M. B.)

William F. Slocum appeals from your office decision of July 2, 1894, wherein was denied his application for repayment of the purchase money paid on his desert land claim initiated by the filing, on October 28, 1889, of his declaration No. 697, and the payment of the first instalment of purchase money, for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$; the NW. $\frac{1}{4}$; the SW. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 18, T. 24 S., R. 29 E., Las Cruces land district, Territory of New Mexico.

The material facts in the case, as they appear of record, are:—that final proof was made, November 3, 1892, before A. A. Mermod, U. S. Commissioner of the fifth judicial district of New Mexico, and that said proof, and certificate of deposit for \$440.00, payable to Frank Lesnet, receiver, as purchase money for the land, were forwarded to the

local office at the same time; that said certificate of deposit was converted into cash, and the proceeds placed in bank to the credit of said receiver; that the final proof which was submitted on November 6, 1892, was found defective, but was retained in the local office, with the endorsement "Held for supplemental proof of reclamation"; Slocum being notified to furnish such proof.

It further appears that the required supplemental proof was never submitted, and that Lesnet never accounted to the government for the purchase money received by him.

There is embodied in the appeal, and made a part thereof, the copy of an affidavit made by Slocum himself—said affidavit being forwarded and submitted with the final proof—which clearly shows that there was no flow of water upon the land involved at the time final proof was made and submitted, which fact of itself was sufficient to warrant a rejection of the said final proof.

Appellant's proof being held to be incomplete by the local office, he abandoned his claim, as appears, and instead of making further effort to reclaim the land, elected to make application for repayment—under section 2 of the act of June 16, 1880 (21 Stat., 287)—of the purchase money on the ground that being a resident of the State of Colorado—and not the Territory of New Mexico, in which the land in question is situated—he was estopped by provision of section 8 of the amendatory act of March 3, 1891 (26 Stat., 1095), from making entry of the said land. There is no merit in such contention. The word "entry" as employed in said section of said act has reference not to the final entry but to the original or initial entry. Vide case of *ex parte* Fred W. Kimble (20 L. D., 67).

Slocum, though a citizen of the State of Colorado, having initiated his claim under the act of 1877, which allowed any qualified citizen of the United States to make desert land entries, could have completed his proof and made *final* entry under provisions of sections 6 and 7 of the amendatory act of March 3, 1891, which, among other things, protected all valid rights which had accrued under the former or original act.

There is no relief for appellant under provision of section 2 of the act of June 16, 1880, for said section only authorizes repayment where an entry of public land is "canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed." As shown, Slocum never made final entry of the land involved, and his initial entry was not, and could not be, canceled for conflict for the reason that there was no adverse claim to the land in question, nor can it be said that the same was erroneously allowed, for it was properly permitted to be made, and could have been prosecuted to final entry and confirmation by compliance on the part of Slocum with the requirements of law and existing regulations.

For the foregoing reasons your referred to office decision rejecting appellant's application for repayment is hereby affirmed.

HOMESTEAD ENTRY—TIMBER LAND—CONTEST.

LUCAS v. DUDLEY.

A contest against a homestead entry on the ground alone that the land embraced therein is unfit for cultivation, and of no value except for the timber thereon, will not be entertained.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) 30, 1897. (J. L. McC.)

Robert Dudley made homestead entry, on January 24, 1895, of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and lot 4, of Sec. 30, and lot 1, of Sec. 31, T. 149, R. 31, St. Cloud land district, Minnesota.

Later in the same day John W. Lucas offered for filing his sworn statement to enter the same land under the provisions of the timber and stone act of June 3, 1878 (20 Stat., 89); but his application was rejected because of Dudley's prior homestead entry.

On the next day Lucas filed contest affidavit against Dudley's entry, alleging:

That said land is unfit for cultivation, and has no value except for the timber thereon; that the same is valuable for the timber thereon; that the same is unfit for agricultural or farming purposes, and crops cannot be raised thereon; that about January 12, 1894, affiant selected said land under the timber and stone act as soon as the same should be subject to entry, and at said time he erected thereon a comfortable house for use in utilizing the timber thereon, and much other improvements.

Due notice issued for a hearing on the day fixed (March 20, 1895); the defendant moved to dismiss the contest, contending, in substance, that it set forth no sufficient cause of action; that it did not charge the homestead entryman with want of good faith; and that an allegation that land entered as a homestead is unfit for cultivation is not sufficient basis for a contest.

The local officers granted the motion and dismissed the contest.

The contestant appealed to your office, which, on December 21, 1895, sustained the action of the local officers. The contestant has appealed to the Department.

The law which provides that land unfit for cultivation, and chiefly valuable for its timber, shall be (in certain states named), subject to entry as timber land, does not prohibit the entry of such land under the settlement laws. It is true that settlements on land chiefly valuable for timber should be closely scrutinized, and that the character of the land may, in connection with other facts in the case, affect the question of the settler's good faith (*Porter v. Throop*, 6 L. D., 691). But in the case at bar the applicant to contest relies *solely* upon the character of the land, not connecting it with any "other facts" tending to show bad faith on the part of the homestead entryman. The burden of proof showing bad faith is on the contestant; and the character of the land is not, alone, sufficient proof of such bad faith. (*Hoxie v. Peckinpah*, 16 L. D., 108.)

The decision of your office is affirmed.

INDIAN LANDS--ALLOTMENT--CITIZENSHIP.

ULIN *v.* COLBY ET AL.

Children born of a white man, a citizen of the United States, and an Indian woman, his wife, follow the status of the father in the matter of citizenship, and are therefore not entitled to allotments under section 4, act of February 8, 1887, as amended by the act of February 28, 1891.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) 30, 1897. (C. W. P.)

William W. Ulin has appealed from your office decision of July 15, 1896, in the case of the said Ulin against Elizabeth and Harry Colby.

The land in controversy is the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 15, T. 32 N., R. 13 W., Seattle land district, Washington.

The record shows that on April 14, 1893, Eliza Obalthsa (Mrs. Colby) made allotment application No. 5, under the general allotment act of February 8, 1887 (24 Stat., 388), as amended by the act of February 28, 1891 (26 Stat., 794), for unsurveyed land, supposed to be the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lot 3 of township 32 N., range 13 W. Lot 3 is the fractional S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$. The section is not given, but it elsewhere appears to be section 10.

At the same time she made application No. 3 for her minor child, Elizabeth Colby, for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 10, the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 15, Tp. 32 N., R. 13 W., also application No. 4, for her minor child Harry Colby, for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 10, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 15, Tp. 32 N., R. 13 W. The official plat of survey was filed August 2, 1893.

On October 30, 1893, the local officers allowed William W. Ulin to make homestead entry (No. 15,696) of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 15, Tp. 32 N., R. 13 W. On December 23, 1893, your office held Ulin's entry for cancellation. On April 18, 1895, the Department reversed this action and ordered a hearing.

The local officers found in favor of the allottees, on the ground that the testimony showed that Ulin was aware when he first went to the land in 1892 that it was claimed by said Indians, and that, furthermore, he failed to make settlement on the land and to establish residence before the year 1895.

Ulin appealed. Your office affirmed the judgment of the local officers and held for cancellation Ulin's homestead entry as to the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 15, T. 32 N., R. 13 W.

The testimony shows that the father of Mrs. Colby, the mother of these children, belonged to the Hoko tribe of Indians and her mother to the Makah tribe; and it is admitted that she was married to a white man, a citizen of the United States, who is the father of Elizabeth and Harry Colby. It also appears that Mrs. Colby was not residing on any

Indian reservation at the time she made selection of the lands for herself and her children.

These being admitted facts, the question arises, are these children entitled to allotments under the fourth section of the act of February 8, 1887, as amended by the act of February 28, 1891.

The circular of September 17, 1887, relating to allotments under the act of 1887, directs that Indian women married to white men, or to other persons not entitled to the benefits of this act, will be regarded as heads of families. The husbands of such Indian women are not entitled to allotments, *but their children are*. But in the case of *Black Tomahawk v. Waldron*, reported in 13 L. D., 683, it was held by the Department, adopting the opinion of the Assistant Attorney-General, that:

The common law rule that offspring of free persons follows the condition of the father prevails in determining the status of children born of a white man, a citizen of the United States, and an Indian woman his wife. Children of such parents are, therefore, by birth not Indians, but citizens of the United States, and consequently not entitled to allotments under the act of March 2, 1889.

In the same case, reported in 19 L. D., 311, it is said:

Upon further considering the matters involved in this controversy, I see no good reason for changing the conclusions heretofore reached by the Assistant Attorney-General, on the record then before him, and which conclusions were approved by me.

There can be no doubt of the correctness of the general rule as laid down, that, among free people, the child of married parents follows the condition of the father. But it has been suggested that the laws and usages of the Sioux Indians may have made Mrs. Waldron a member of the tribe on March 2, 1889, the date of the agreement between the tribe and the United States, either by furnishing a different rule as to the effect of her birth, or by causing her adoption as a consequence of the facts connected with her life. While the general rule is as has been before held, yet it must yield to the laws and usage of the tribe when laws and usage upon the subject are satisfactorily proven.

Upon the authority of these cases, it must be held that Elizabeth and Harry Colby are not entitled to allotments under the acts of February 8, 1887, and February 28, 1891.

Consequently your office decision is reversed.

ALASKAN LANDS—SURVEY—INDIAN OCCUPANCY.

BENJAMIN ARNOLD.

A survey of Alaskan lands under sections 12 and 13, act of March 3, 1891, should not be allowed to include a ditch or water way, used by native Alaskan villagers for the purpose of securing the necessary fresh water supply for domestic use and consumption.

Secretary Bliss to the Commissioner of the General Land Office, March
(W. V. D.) 30, 1897. (W. M. B.)

This is an appeal by Benjamin Arnold from your office decision of May 8, 1895, wherein was suspended, in its present form, survey No. 22,

executed by Albert Lascy, U. S. deputy surveyor, under provisions of sections 12 and 13 of the act of March 3, 1891 (26 Stat., 1095), of a tract of land claimed by appellant, containing 7.19 acres, situated on Kayanak Bay, Kadiak Island, district of Alaska, and used as a trading post.

The field notes and plat of this survey show that the tract of land claimed, as laid off, is about four times as long as its average width, that the same is very irregular in form, and it appears that your office suspended the said survey in its existing form for the reason that it does not embrace a tract of land in square form as near as practicable, and for the further reason that the whole of the tract does not appear to be used by the claimant for carrying on the business engaged in.

The right of the claimant to the tract in its existing form appears to be affected by a feature or condition other than those already mentioned, with respect to which your said office decision contains the following statement:

Upon the tract of land embraced within this survey and running across from one side to the other is shown a ditch almost a half mile long which the deputy says "leads the water from the lake on the west boundary line to another below the native village of 1'0 inhabitants on the southeast, and supplies the same with water". It is not stated whether this ditch is a natural water course, or built by and for the natives for supplying the necessary fresh water for their consumption. Upon this fact hinges the right of the claimant to lands including any portion of the ditch.

An emendation of the survey is suggested in your office decision in manner therein particularly described, but it appears from a careful examination of the plat of the survey that if said survey was so amended the entire portion of the referred to ditch which is included in the survey in its original or present form would still be embraced within the lines of a survey amended and made in the form indicated in your said office decision, and it matters not whether said ditch be an artificial or natural water course the right of the native villagers to the free and uninterrupted use and enjoyment of the said stream of water would appear to be protected by that particular portion of section 14 of the said act of March 3, 1891, in words following:

That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands . . . to which the natives of Alaska have prior rights by virtue of actual occupation.

If it be ascertained that said ditch is an artificial water course constructed by or for the natives for the purpose stated, no portion of the land upon which it is located should be included in a purchase and entry made by claimant, and if on the other hand it is found to be a natural water way the actual and prior appropriation of the same by the native Alaskan villagers for the purpose of securing the necessary fresh water supply for domestic use and consumption entitle the said villagers to the exclusive use, control, and possession of said water way, and the particular portion of the land which is occupied by said

water way, and sought to be purchased and entered by claimant, may be considered, as land in or under the "actual occupation" of the said villagers, by virtue of which they have a prior right thereto, within the meaning of said section 14 of the act herein cited.

For the foregoing reasons if there be an emendation of the survey, the same should not be amended as suggested in your office decision, but on the other hand the lines of survey should be run in such manner as not to include any portion of the above described ditch.

The decision of your office, with the modification herein indicated, is hereby affirmed.

ALASKAN LANDS—ACTUAL USE AND OCCUPANCY.

SOUTH OLGA FISHING STATION.*

On application to purchase Alaskan land under the act of March 3, 1891, the extent of the actual use and occupancy of the land should not be determined on the report of the deputy-surveyor alone, and prior to the submission of final proof.

Secretary Francis to the Commissioner of the General Land Office, December 23, 1896. (W. C. P.)

The South Olga Fishing Station (a corporation) has appealed from your office decision of June 27, 1895, in the matter of survey No. 47, of a tract of land claimed by said company, situate on the south shore of Olga Bay, Kadiak Island, Alaska, containing 39.30 acres, and used as a fishing station.

It seems that said survey was approved on May 29, 1893, but afterwards by the decision appealed from herein, that action was revoked, and the survey "suspended pending emendation, for the reason that more land is claimed than is actually occupied by the claimants for their business." It is stated in the appeal from this decision that final proof has been submitted in support of the application to purchase, but this proof presumably had not reached your office when said decision was rendered. There seems to be no objection to the manner in which the survey was made nor to the form of the tract.

Claimants are entitled to purchase only so much land as is occupied, that is, actually used for trade and manufacture, in no case to exceed one hundred and sixty acres. Instructions (20 L. D., 434); McCollom Fishing and Trading Co., (23 L. D., 7).

The character of the use made of the land and the extent of the occupancy thereof can not as a rule be satisfactorily determined until final proof shall have been submitted, as required by the regulations provided under said act. Among other things required to be shown by the final proof are the actual use and occupancy of the land as a trading post or for manufacturing purposes, the date when the land

* Not reported in Vol. 23.

was so occupied, the character and value of the improvements, and the annual value of the trade and business conducted upon the land. (12 L. D., 533, 590).

The conclusion reached by your office that the tract as surveyed contains more land than is actually occupied is based upon the report of the deputy surveyor alone. While the surveyor is instructed to report the facts as to occupancy as shown upon the ground, yet it was not contemplated or intended that such report should be accepted as conclusively determining the extent of such occupancy. If such had been the intention no further proof would have been required. It would be unwise and unfair to all interested parties to rest the determination of so important a question upon the statements of the surveyor.

It cannot be satisfactorily determined from the information furnished by the record now here whether the occupancy of this tract is of the character contemplated by the act of March 3, 1891, nor can the quantity of land thus occupied be determined.

The decision complained of having been rendered before the questions involved had been properly presented, and therefore upon an incomplete record, is for that reason set aside, and the case will be now returned to your office for consideration in connection with the final proof therein, and such action as may be proper.

SETTLEMENT RIGHTS—ADVERSE CLAIMS.

HENLEY ET AL. v. SHARPNACK.

An alleged act of settlement, set up to establish priority of right as against an adverse settlement claim, can not be accepted as sufficient, if said act is not of a character to give notice of a settlement claim.

Secretary Bliss to the Commissioner of the General Land Office, March
(I. H. L.) 25, 1897. (E. B., Jr.)

The land involved in this case is the NE. $\frac{1}{4}$ of section 20, T. 21 N., R. 7 E., Perry, Oklahoma, land district, for which George Sharpnack made homestead entry No. 203 September 19, 1893. It lies within what was formerly known as the Cherokee Outlet and was opened to homestead settlement at twelve o'clock, noon, of September 16, 1893.

On October 12, 1893, John Newell, and on December 14, 1893, Edward S. Henley, respectively, initiated contests against said entry, each alleging settlement on the land prior to any other person, and prior to the date of the entry. The contests were consolidated and hearing were duly had, ending March 12, 1895. The local office found in favor of Henley, recommending the dismissal of Newell's contest and the cancellation of Sharpnack's entry, on the ground that although Newell was first upon the land his only prior act of settlement, which consisted in nailing a small board, on which his name was written, in a "black

jack thicket," was insufficient notice to Henley; that Henley made due settlement prior to said entry, upon which alone Sharpnack relied; and that Henley had duly complied since with the homestead law. The local office also found from the testimony that charges of "soonerism", made at the hearing by Newell and Henley against each other, were not sustained by the evidence. Your office decision of September 23, 1895, on appeal by Sharpnack and Newell, affirmed the decision of the local office, held said entry subject to the prior settlement right of Henley, and dismissed Newell's contest. Motions for review and rehearing by Newell were denied March 2, 1896. Appeals by Sharpnack and Newell, presenting questions relative to priority of settlement and "soonerism" in the case, now bring the same before the Department.

Sharpnack offered no testimony at the hearing, resting his claim of priority of right to the land upon his entry alone. The testimony in the case is voluminous and very conflicting. It is familiar doctrine that the Department accords great respect to the decisions of the local officers upon questions of fact, where, as in this case, they heard the witnesses and had opportunity to observe their demeanor in giving testimony; and it is well settled that the concurring decisions of your office and the local office upon such questions, where the evidence is conflicting, will generally be accepted here as conclusive (*Tyler v. Emde*, and cases cited therein, 12 L. D., 94).

The evidence in this case has been carefully read and considered, and therefrom no warrant is found for disturbing the conclusions of your office upon the questions of fact. I find, substantially as found by your office, that while Newell reached the land early in the afternoon of September 16, 1893, the day of the opening, he did no act of settlement thereon that day, save only to nail a small piece of board, about ten inches long and less than two inches wide, to a tree in the midst of a piece of black jack timber near the west side of the land, where it was not conspicuous; that he remained on the land that day only a few minutes; that he did not return thereto until September 25, following; that he left again the next day and did not return and actually take up his residence upon the land until October 5, following; that Henley went upon the land early in the forenoon of September 17, 1893; that he laid, that day, two foundations of poles thereon, blazed trees and put up a stake eight or ten feet high with flag attached; that he remained there claiming the land and warning persons off and doing other acts of settlement for one week, when he spent about two days going to Pawnee, about fifteen miles from his claim, to make application to enter the land; that from his return, September 26, 1893, until early in November, following, save a few days absence on a trip to Perry, early in October, for the purpose of filing a homestead application, he was on and about the land, chiefly engaged in building a house, which was completed October 28, and also in plowing, and doing what he could

with his scanty means to improve his claim; and that, with the exception of about one month ending in December, 1893, during which he was absent at Okmulgee, Indian Territory, earning money to maintain and improve his claim, he has continued to reside upon the land and make permanent improvements thereon. He denies any knowledge whatever, and it is not shown that he had any, direct or indirect, of the claim of Newell to the land until after the latter's return thereto in October, 1893.

I concur in the conclusion of your office and the local office that the evidence fails to show that Henley was in any part of the Cherokee Outlet at any time between August 19, and noon of September 16, 1893, the period of inhibition against entrance therein as fixed by the President's proclamation opening the same for settlement (28 Stat., 1222). And see, as to the period of inhibition, *Bowles v. Frazier* (22 L. D., 310).

Under the facts in this case, and the law applicable thereto, Henley's settlement right to the land is clearly superior to the right of Sharpnack to the same under his entry. I think it is likewise superior to the claim of Newell thereto. This conclusion does not in any way contravene, but, on the other hand, I think, harmonizes with, the views of the Department in *Hurt v. Giffin* (17 L. D., 162); *Bowles v. Frazier* (*supra*); and *Penwell v. Christian* (23 L. D., 10), which are leading cases upon the question:—What are valid acts of settlement upon Oklahoma lands as between adverse claimants who made the race for a homestead therein?

In the first of these it was held (syllabus):

As between two claimants for Oklahoma lands, each of whom alleges settlement in the afternoon of the day on which the lands were opened to settlement, priority of right may be properly accorded to the one who first reaches the tract and puts up a "stake" with the announcement of his claim thereon, where such initial act of settlement is duly followed by the establishment of residence in good faith.

In the second it was said that—

The initial acts of settlement are addressed to the purpose of giving notice that the land is taken and claimed;

And it was held that (syllabus):

Initial acts of settlement are sufficient if of such character as to give notice that the land is claimed under the settlement laws.

In the third it was held that (syllabus):

The conditions attendant upon the opening of Oklahoma to settlement require the recognition of extremely slight initial acts of settlement in determining priorities between adverse claimants, if such primary acts are followed by residence within such time as clearly shows good faith;

and it was further said that—

In cases of this nature, where the good faith of both parties is established and neither party is guilty of laches, I am of the opinion that the only sound rule that can be adopted is to award the land to the person who was first upon the land and performed any act that evinces an intention to assert title.

In each of these cases the successful contestant was not only actually first upon the land but gave immediate notice of his claim to all comers by setting up his stake thereon, apparently where it could be readily seen, and by his personal presence thereon during much of the day of the race and on the day following. Each of those parties gave, therefore, much better notice of his settlement, than did Newell, of his alleged settlement; and neither of the cases cited affords any sound basis for an argument in his (Newell's) favor. The several acts of settlements therein, on the day of the race, were sufficient notice for that day, and were, perhaps, all that could well have been given under the conditions of fatigue, anxiety, hurry and confusion of that day. But Newell's single proven act, done and hidden away in a piece of woods—a small piece of board containing his name in pencil, nailed to a small tree surrounded by many others in full foliage; inconspicuous, and practically invisible at any considerable distance, as he substantially admitted at the hearing,—was not sufficient notice to protect his claim against adverse settlement even on the day of the race, and much less was it notice for more than a week thereafter, against one who, during that period, made a sufficient settlement thereon in ignorance of such act or claim, and duly complied with the homestead law thereafter.

This disposes of the case upon the merits. It is unnecessary to discuss appellant Newell's assignments of error relative to the denials of the motions for review and rehearing. The affidavits of Hook and others, relative to Newell's alleged settlement, are merely cumulative upon that point and afford no ground for a rehearing.

The decision of your office is affirmed in accordance with the foregoing.

RAILROAD GRANT—SECTION 2, ACT OF APRIL 21, 1876.

INMAN *v.* NORTHERN PACIFIC R. R. CO.

An entry allowed, under the rulings and decisions of the Land Department, of land to which a homestead claim had attached prior to notice of withdrawal on general route, that remained of record till after definite location, and was then abandoned, is within the confirmatory provisions of section 2, act of April 21, 1876, though made after the passage of said act.

Secretary Francis to the Commissioner of the General Land Office, February 23, 1897. (I. H. L.) (F. W. C.)

James Inman has appealed from the decision of your office, dated October 26, 1895, holding for cancellation his homestead entry covering the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 35, T. 13 N., R. 2 W., Vancouver land district, Washington, for conflict with the grant to the Northern Pacific Railroad Company.

Said tract is within the primary limits of the grant to said company

upon the portion of its road between Portland, Oregon, and Tacoma, Washington, to aid in the construction of which a grant was made by the joint resolution of May 31, 1870 (16 Stat., 378). It is within the limits of the withdrawal upon the map of general route filed August 13, 1870, and within the primary limits adjusted to the map of definite location filed September 13, 1873.

The withdrawal upon the map of general route was not received at the local office until October 19, 1870. Prior to this time, to wit, on August 23, 1870, Anna M. Lane was permitted to make homestead entry No. 1131 for the SE. $\frac{1}{4}$ of said Sec. 35, which entry remained of record until November 26, 1877.

In the case of Northern Pacific Railroad Company *v.* Burns (6 L. D., 21), it was held that a homestead claim, existing prior to the receipt of notice of withdrawal on general route of the Northern Pacific, excepts the land covered thereby from the operation of the grant, it being held that said entry was confirmed by the first section of the act of April 21, 1876 (19 Stat., 35), without regard to the question as to whether said entry was ever completed.

This decision was overruled by departmental decision of March 12, 1895 (20 L. D., 192), in which it was held that the confirmation of entries under section 1 of the act of April 21, 1876, is solely for the benefit of the individual claimant, conditioned upon his compliance with law, and was not intended to confirm the entry absolutely, as against the right of the company, so as to except the land from the grant in favor of any other settler.

Following the decision in the Burns case, before the same was overruled, James Inman, the present claimant, was, on November 27, 1888, permitted by the local officers to file pre-emption declaratory statement for the land here in controversy, which filing he afterwards, on October 31, 1889, transmuted to a homestead entry.

By the second section of the act of April 21, 1876, it is provided:

That when at the time of such withdrawal as aforesaid valid pre-emption or homestead claims existed upon any lands within the limits of any such grants which afterward were abandoned, and, under the decisions and rulings of the Land Department, were re-entered by pre-emption or homestead claimants who have complied with the laws governing pre-emption or homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto.

The facts heretofore recited bring the entry by Inman clearly within the provisions of the second section of said act. (See decision in case of Northern Pacific Railroad Company *v.* Symons, 22 L. D., 686.)

Your office decision holding Inman's entry for cancellation is therefore reversed, and upon showing compliance with law his entry will be deemed valid and patent issue thereon under the second section of the act of April 21, 1876.

RAILROAD GRANT—CONFLICTING GRANTS—ADJUSTMENT.

NORTHERN PACIFIC R. R. Co.*

In the adjustment of the Northern Pacific grant between Thomson and Duluth said grant should be charged with all lands received by the Lake Superior and Mississippi company between said points under the prior grant thereto, whether within the primary or indemnity limits of said grant.

Secretary Francis to the Commissioner of the General Land Office, November 17, 1896.
(I. H. L.) (F. W. C.)

With your office letter of October 7, 1896, was forwarded, with favorable recommendation, clear list of selections, made on behalf of the Northern Pacific Railroad Company, covering 1,250.20 acres, within the St. Cloud land district, Minnesota. These lands are within the second indemnity belt, and were selected on account of losses set forth in the list submitted, which upon inquiry at your office I learn are lands lost to the grant by reason of patents issued to the Lake Superior and Mississippi River Railroad Company under the grant of May 5, 1864 (13 Stat., 64). These lands are opposite the portion of the last mentioned road between Thomson and Duluth, which road was used by the Northern Pacific Railroad under an agreement entered into with the Lake Superior and Mississippi River Railroad Company, which agreement has been held by this office to have been in effect a confederation, consolidation or association of the latter company as contemplated by the provisions of Sec. 3 of the act of July 2, 1864 (13 Stat., 365), by which the grant to the Northern Pacific Railroad was made.

In considering the question as to the proper establishment of the terminal of the Northern Pacific grant at Duluth, it was held in departmental decision of October 29, 1896 (23 L. D., 428), that the Northern Pacific Railroad Company will not be entitled to indemnity for any lands received by the Lake Superior and Mississippi River Railroad Company opposite the portion of the road between Thomson and Duluth. In referring to that part of the act of July 2, 1864, *supra*, wherein it is provided

that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have heretofore been granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act,

it was held that the intention of Congress evidently was to provide against making a double grant where two land grant railroads were found to be upon the same general line, and this can only be arrived at by charging to the Northern Pacific all lands received by the company to which the first grant was made, opposite the portion of the lines which are similar, whether within the primary or indemnity limits of that grant.

* Not reported in Vol. 23.

It is clear therefore that the basis as assigned in the list submitted for the approval of this Department is not a satisfactory basis, and the list is herewith returned without my approval.

RAILROAD SELECTIONS MINERAL LANDS.

INSTRUCTIONS.

Secretary Bliss to the Commissioner of the General Land Office, April 9, 1897.

I am in receipt of your letter "N" of the 2nd instant, requesting an amendment of the last paragraph of the circular of July 9, 1894 (19 L. D., 21), providing for the examination of selections by railroad companies of lands in mineral belts so as to read as follows:

That all lists that have been heretofore prepared in accordance with any rules, regulations or instructions of the Secretary of the Interior, where such rules have been complied with (such as furnishing affidavits showing the non-mineral character of the lands in accordance with the instructions of the Interior Department) and such mineral affidavits furnished *for each and every legal subdivision* shall be excepted from the terms of the foregoing regulations.

Said paragraph, as now in force, reads in lieu of the underscored words in the proposed amended paragraph above indicated, "for each subdivision of 40 acres."

After reciting the history of the occasion that gave rise to the circular of July 9, 1894, you stated as follows:

To require the non-mineral affidavits to specify "each subdivision of forty acres" would disturb the established practice of this office, require new affidavits in State and railroad selections, and compel a new form of affidavit to be made in these cases.

After an examination of the question it appears to me that the proposed amendment of said paragraph will operate as effectually to protect the government against the selection of mineral lands by railroads and states under their grants as it now does in the present form.

Said paragraph is therefore hereby amended so as to read as follows:

That all lists which have been heretofore prepared in accordance with the rules, regulations or instructions of the Secretary of the Interior, where such rules have been complied with (such as furnishing affidavits showing the non-mineral character of the lands in accordance with the instructions of the Interior Department) and such mineral affidavits furnished *for each and every legal subdivision* shall be excepted from the terms of the foregoing regulations.

It is also hereby ordered that the form of the non-mineral affidavit now in use in your office be amended as follows: After the following clause in the body of the affidavit "but with the object of securing said land for agricultural purposes", you will insert the following: "and the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof."

PRACTICE—NOTICE OF APPEAL—JURISDICTION.

VAN DYKE *v.* LEHRBASS.

An appeal will not be entertained, if notice thereof is not served on the opposite party within the time allowed for filing the same.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 19, 1897. (E. B., Jr.)

In the case of Frank H. Van Dyke *v.* Albert Lehrbass, involving the homestead entry No. 6484 of the latter, made November 6, 1891, for the SW. $\frac{1}{4}$ of section 8, T. 17 N., R. 3 E., Wausau, Wisconsin, land district, said Van Dyke has filed a motion to dismiss the appeal of Lehrbass, on the ground that no copy of the appeal was served upon appellee within the time allowed for filing the same.

It appears that on November 19, 1896, your office, on appeal by Lehrbass, affirmed the decision of the local office, holding that Lehrbass had failed to reside upon his homestead as required by law, and that his entry should therefore be canceled. On November 21, 1896, the local office notified Lehrbass by mail of your office decision and of his right of appeal therefrom, enclosing a copy of the decision. This notice, it is alleged under oath by Van Dyke, and not denied by Lehrbass, the latter received on November 24th following. On February 8, 1897, the following notice was served on Van Dyke by Lehrbass:

In the matter of the homestead entry of A. Lehrbass No. 6484, to the SW. $\frac{1}{4}$ of Sec. 8, township 17 N., R. 3 E.—

TO FRANK H. VAN DYKE,

Contestant,—

Take Notice, That on affidavits of which the following are copies, I have and do hereby appeal from the decision of the Register & Receiver of the Land Office at Wausau, Wisconsin, denying said H. E., to the Secretary of the Interior at Washington, D. C., for a reversal of said decision, and the allowance of my said H. E. February 4th, 1897.

(Signed) ALBERT LEHRBASS,
Appellant.

With this notice were what purport to be copies of affidavits of eight persons, including Lehrbass and his daughter, relative to Lehrbass' residence and improvements on the land. A duplicate of the above notice, to which were attached what appear to be the originals of the above copies of affidavits, sworn to before "Richard Smith, Ct. Com. Juneau Co. Wis.," was filed in your office on February 11, 1897. Said Smith is the attorney of record for Lehrbass.

Under the rule in *Murphy v. Logan* (19 L. D., 478), allowing seventy days within which to file appeal from a decision of your office when notice of the same is given through the mails by the local office, the time within which appeal from your office decision in this case might have been filed expired on January 30, 1897. Notice of appeal was not,

therefore, given the appellee within the time required by the rules of practice (Rules 87 and 93), which make it necessary that a copy of the notice of appeal and specification of errors shall be served on the opposite party within the time allowed for filing the same.

It is unnecessary, in view of the foregoing, to discuss the inherent and obvious defects in the appeal itself. Notice of the appeal having been given too late, the Department is without jurisdiction, under its rule, to entertain the same (*Gregg v. Lakey*, 16 L. D., 39).

The motion is allowed, and the appeal dismissed.

INDIAN LANDS—ALLOTMENT RIGHTS—ADVERSE CLAIMS.

PHILOMME SMITH ET AL.

The burden of proof rests upon one who attacks an approved allotment, alleging a superior right to the land covered thereby.

An allotment duly made and approved must be regarded as a judicial determination that the allottee is entitled to an allotment in the reservation involved, and such question, so determined, must thereafter be held *res judicata*.

A departmental determination that an applicant for the right of allotment is entitled to recognition, so far as tribal relationship is concerned, removes such question from further consideration in subsequent proceedings involving the assertion of said right.

An allotment made and approved on the selection of the allotting agent, and without a formal selection on the part of the allottee, is not for such reason invalid.

An adverse claim set up against an approved allotment by another applicant for the right of allotment and based on alleged prior selection and improvement of the tract in question, can not be recognized, in the absence of an affirmative showing of injustice done, amounting to a fraud upon his equitable rights in the premises.

The relinquishment of an allotment is inoperative if not approved by the Department.

Assistant Attorney-General Van Devanter to the Secretary of the Interior,
April 19, 1897. (E. M. R.)

I am in receipt, by reference from you, of the report of the Commissioner of Indian Affairs, of date March 16, 1897, together with a request for an opinion "as to the rights of Philomme Smith *et al.* and Mrs. Louisa Morrisette *et al.*, to the allotments of lands claimed by them respectively on the Umatilla reservation."

The record shows that on July 1, 1893, Assistant Attorney-General Hall rendered an opinion in which he held that these parties were not entitled to allotments in the Umatilla reservation; but, subsequently, the matter being before him on review, he reversed his holding and decided that they were so entitled.

The matter having been referred to his successor, Assistant Attorney-General Little, an opinion was rendered by him on August 6, 1896, in which the conclusion reached by Assistant Attorney-General Hall in his last-mentioned opinion, was affirmed and the suggestion made that

inasmuch as it appeared that the showing then before the Department was *ex parte* in character, a hearing be had to determine the question as to whether these applicants were entitled to have allotted to them the various tracts selected by them. Accordingly, a hearing was duly had and the allottees hereinafter referred to were called upon to show cause why the allotments made to them should not be canceled and these petitioners awarded the land.

In this connection, it appears that Philomme Smith claims the SE. $\frac{1}{4}$ of Sec. 20, T. 3 N., R. 34 E., Oregon. This tract has been allotted to Heyutsemilkin, an Indian, and the allotment was approved by the Department April 12, 1893, and, by the approval of the Department, leased for two years from March 1, 1894.

Charles Smith, a minor child of Philomme Smith, claims the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 29, of said township and range. The NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, same section, is claimed for Maggie Smith, minor child of Mrs. Smith. The SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the said section is claimed for Jennie Smith, minor child of Mrs. Smith. The SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section, is claimed for Lura Smith, minor child of Mrs. Smith, all of which four forties were allotted to Martha Hebeart, a Walla Walla Indian, and approved by the Department April 12, 1893.

The NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 29, of the same township and range, is claimed for George Smith, minor child of Mrs. Smith. The SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, is claimed for Soffa or Sophia Smith, a minor child of Mrs. Smith. The W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section is claimed for James Smith, minor child of Mrs. Smith, which eighty, with the two above mentioned forties, were allotted to Margaret Bourner, a Walla Walla Indian, approved by the Department April 12, 1893, and, by its approval, were leased for two years commencing on November 1, 1894.

The W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 29, is claimed for William Smith, minor child of Mrs. Smith. The NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ was allotted to Mary B. Guyott, a minor child of Mary Guyott, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ to Carrie Chalifoe, a minor child of Julia Ann Chalifoe. The portion allotted to Mary B. Guyott was leased, with the approval of the Department, for three years from March 1, 1894.

Mrs. Louisa Morrisette, or Marcette, claimed the NE. $\frac{1}{4}$ of section 14, T. 3 N., R. 3 E., which tract was allotted to Charles McWhirk and the allotment was approved by the Department April 12, 1893.

Mrs. Mary Pecar, daughter of Louisa Morrisette, and over eighteen years of age, claims the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 29, and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 32. These tracts were allotted to Mary Guyott and approved by the Department April 12, 1893, and by its approval have been leased for three years from March 1, 1894.

August Meshee, or Misplay, a minor child of Mrs. Mary Pecar and grandson of Louisa Morrisette, claims the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, and John Meshee or John Albert Misplay claims the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$

of said section, both of which tracts were allotted to Louis Chalifoe, and approved by the Department on April 12, 1893.

It thus appears that there are eight contests in this proceeding between as many, or more, parties, and involving different tracts of land.

The hearing ordered by the Department in carrying out the suggestion of Assistant Attorney-General Little was had before the Indian agent at the Umatilla agency in Oregon, to which place and before whom the various parties were cited to appear. On February 17, 1897, in rendering his opinion, the Indian agent said:

If settling on land before allotment in good faith, and by direction of the chief of the tribe, whose word seems to have been law at that time, and making valuable improvements on the same gives an Indian a right to that particular land, then the allotments to the different parties of the land so claimed, by reason of priority of occupancy and improvement by Mrs. Philomme Smith ought to be canceled and Mrs. Smith and children allotted thereon, and I so recommend.

As to Mrs. Morrisette's claim, I am not so positive, and cannot, from the evidence, make a conclusion in the matter, and respectfully submit the same without recommendation.

In the letter of the Commissioner of Indian Affairs of date March 16, 1897, it is stated as a reason for making no finding of facts upon the various issues joined, that—

As the claims of Mrs. Smith and Mrs. Morrisette *et al.* to the land involved, were passed upon by the Assistant Attorney-General for this Department in his said opinion dated August 6, 1896, concurred in by the Department, and in view of the instructions contained in departmental letter of September 24 last, it is thought proper to submit the new evidence in these cases to the Department without comment or recommendation, to the end that the Department may reach such conclusions in the matter as may be justified by the evidence submitted by the allottees when considered in connection with the opinion of the Assistant Attorney-General and the evidence submitted before the same was rendered, by the petitioners.

It is to be regretted that the Commissioner of Indian Affairs made no findings of facts to assist in determining the vexed questions of fact presented by this voluminous record and its complicated issues.

It appears that the standing of the parties has been misunderstood. It is set out in the record that Smith and Morrisette *et al.* are the claimants and the allottees are the contestants. This is an error and one of moment. The contestants are Smith and Morrisette *et al.* and the allottees are the defendants. Upon the attacking party rests the burden of proof. The fact that these allottees were called upon to show cause why their allotments should not be canceled in no wise affected their status. It is the duty of these contestants to affirmatively show such a state of facts as will necessitate the cancelling of the allotments already made. It was not even incumbent upon the defendants to enter an appearance; had they not done so it would have been no less the duty of these contestants to present the requisite showing of superior rights.

Much testimony was introduced at the hearing for the purpose of showing that certain of the allottees were not entitled to allotments on

this reservation. The allotments have been duly made and approved by the Department. The determination that those allotted were so entitled was a judicial one, and the question thus raised became *res judicata* and will not now be entered into in these proceedings.

On the other hand, an attempt is made to show that Philomme Smith and Louisa Morrisette are not Indians entitled by reason of tribal relationship to allotments. In so far as they are concerned, this Department by approval of the opinion of Assistant Attorney-General Little, *supra*, has determined that question in the affirmative and that issue is therefore concluded.

Aside from this it is doubtful if the allotments heretofore made could be attacked in the manner set out in these proceedings.

The question for determination presented by this record is: Are the petitioners entitled to have the allotments made and approved, canceled by reason of superior equities existing in them?

The act authorizing these allotments is that of March 3, 1885 (23 Stat., 340), and provides:

That the President of the United States cause lands to be allotted to the confederated bands of Cayuse, Walla Walla, and Umatilla Indians, residing upon the Umatilla reservation in the State of Oregon as follows, of agricultural lands:

To each head of a family, one hundred and sixty acres; to each single person over the age of eighteen years, eighty acres; and to each orphan child being under eighteen years of age eighty acres; and to each child under eighteen years of age, not otherwise provided for, forty acres.

Allotments to heads of families and to children under eighteen years of age belonging to families shall be made upon the selections made by the head of the family; allotments to persons over eighteen years of age not classed as heads of families shall be made upon the selections of such persons; and allotments to orphans shall be made upon selections made by the agent in charge, or other person duly authorized by the Department. . . .

Before any allotments are made, a commission of three disinterested persons to be appointed by the President shall go upon said reservation and ascertain as near as may be the number of Indians who will remain on said reservation and who shall be entitled to take lands in severalty thereon. . . . Said commission shall report to the Secretary of the Interior the number and classes of persons entitled to allotments, as near as they may be able to.

April 24, 1891, this Department approved the instruction issued to Messrs Bushee and Eddy, allotting agents upon this reservation, found in letter books 215-216, contained in Vol. 108, page 307, of the Land Division of the office of Indian Affairs.

Some stress has been laid by the contestants upon the fact that no formal selections of their allotments were made by some of these allottees prior to the making thereof. I am of opinion that there is no invalidating consequence by reason of allowing the allotting agents to select, and the approval of such selections when made.

In the case of Louisa Morrisette *v.* McWhirk, involving NE. $\frac{1}{4}$, Sec. 14, T. 3 N., R. 34, the evidence shows that in 1889 Charles McWhirk, the defendant, selected this land and that subsequently it was allotted

to him. The land was first claimed by one Maria Bushman, who afterwards married Morrisette. She improved the land by building a fence and cultivation. Before her death she expressed the desire that this allottee should have the land; thereupon, he came from Montana, where he resided, to this reservation and asserted claim to the land, which, as already set out, culminated in the allotment being duly made. It appears from the record that this plaintiff, Mrs. Louisa Morrisette, formerly Mrs. Ceror, married Morrisette after the death of Maria Morrisette, and asserted claim to this land subsequently in point of time to such assertion by the defendant. She did not in any way during her lifetime, as far as this record shows, make any improvements upon this land, and she never lived thereon.

In the case of *Philomme Smith v. Heyutsemilkin*, involving the SE. $\frac{1}{4}$ of Sec. 20, the same township and range, it appears from the record that at the time of the allotment to the defendant the land had been selected by Mrs. Smith, and that a barn had been built thereon, some fencing done, and a well dug, with probably some ploughing. There is absolutely no evidence offered by this contestant as to the value of these improvements and there is nothing in the record from which it can be judged.

This Department has determined that these plaintiffs (Mrs. Morrisette and Mrs. Smith) are entitled to allotments. That action was in nowise a determination that they were entitled to allotments to these tracts; that question depends solely upon the special equities present in them arising from their actions upon, and in reference to, these several tracts.

It is a familiar rule of the Department that needs no citation of authority, that the establishment of a reservation prevents the acquirement of individual rights inharmonious with the purposes of its formation.

The object to be attained by making this reservation was to have a general home for these Indians until the allotment in severalty. Under these circumstances, was it possible for one to acquire a personal property right prior to the time of allotment by mere selection and slight improvements? It was the duty of the allotting agents in the first instance, to set apart the allotments. Until this was done, it may be said in general, that no rights could be acquired by an individual. By this it is not meant that the acts of these officials in making allotments could not be reviewed by the Commissioner of Indian Affairs, or by this Department, but that in the absence of an affirmative showing of injustice done, amounting to a fraud upon their equitable rights by reason of the amount and extent of improvements placed thereon by some one other than the allottee, the acts of allotment should stand.

To hold that rights could be acquired by selection and improvement in the face of adverse action by the allotting agents, would be, in effect, to say that the establishment of the reservation was without force and effect in setting aside the land so withdrawn for the purposes in view,

and would be to apply the ordinary doctrine of settlements as applicable to the pre-emption and homestead law, which was clearly never contemplated.

Applying these views to the causes at bar it is easy to see that Louisa Morrisette was not entitled to the allotments asked for. There are no equitable rights in her, so far as this record discloses, such as demand the cancellation of the allotment heretofore made. Her selection of this land—even if that gave her any rights—was subsequent to that of McWhirk. I am, therefore of opinion that the allotment should stand.

A somewhat different case confronts us in the case of *Smith v. Heyutsemilkin*. As has been seen, that allotment was made after its selection by Mrs. Smith and after some improvements had been placed upon the land by her, yet the record fails absolutely to disclose the value of these improvements. It has been already said that mere selection and slight improvements would not suffice to defeat an allotment made in due form and which has received the approval of the Department.

The burden of proof rested with the contestant. Upon her the duty lay of affirmatively presenting a case that would demand the cancellation of the allotment. She has had her day in court, carrying with it the opportunity and obligation of presenting her case fully, and in the entire absence of any showing as to the value of these improvements the allotment made must stand.

In the case of Charles Smith, Maggie Smith, Jennie Smith and Lura Smith *v.* Martha Hebeart, now Martha Bonifer, involving the NE. $\frac{1}{4}$ of Sec. 29, it appears that prior to the allotment made the defendant, these plaintiffs—minor children of Philomme Smith—had this land selected for them by Mrs. Smith, who, prior to the time of allotment, had the house in which they lived, built thereon. As in the case, *supra*, no evidence whatever is introduced as to the value of this house, or the other improvements in the way of fencing and cultivation. For the reasons above given, the allotment will stand.

It appears in the case of George Smith, Soffa Smith and James Smith *v.* Margaret Bourner, involving the NW. $\frac{1}{4}$ of Sec. 29, that the land was selected for them the plaintiffs, by Mrs. Smith whose minor children they are, prior to the allotment to the defendant. Aside from some fencing and cultivation no improvements have been placed on this land by the plaintiffs. A house was built by the defendant. In consideration of these facts it is apparent that the allotment should stand.

In the contest of William Smith *v.* Mary B. Guyott and Carrie Chalfoe, involving the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 29, the plaintiff does not live upon this land. There is no evidence of the value of improvements upon the land, if any, and the allotment should stand.

In the case of Mary Pecar *v.* Mary Guyott, now Mary McIntyre, involving the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of Sec. 29 and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of

Sec. 32, the plaintiff is the daughter of Louisa Morrisette. One Pross Pecar was living on the defendant's land at the time of the allotment. The Pecars did not claim the land. They wanted to be paid for the house and fence. A law suit resulted and the Pecars got the crop for one year in settlement for the improvements. Mrs. McIntyre went into possession. It would seem from this that no good reason appears for disturbing the rights of the allottee.

August Meshee or Misplay, and John Albert Meshee or Misplay *v.* Louis Chalifoe involves the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 32. The evidence shows that these contestants were aware, or their natural guardian was aware, that this land was claimed by the defendant at the time they first asserted right thereto. They can not, in consequence, set up an equitable claim to the land in view of the fact that it was subsequently allotted to the defendant.

It appears from the evidence submitted at the hearing that William, George and Soffa or Sophia Smith, and Louisa Morrisette are dead. The question arises, therefore, whether their heirs are entitled to have land allotted to them. In the instructions issued to Messrs. Bushee and Eddy, allotting agents hereinbefore referred to, it was said (page 314) "all persons *now living* whose names appear on the census rolls of 1887, are entitled to and will be given allotments;" and further on therein it is more fully and specifically stated (page 320):

Since the foregoing was prepared my attention has been called to a recent inspection report at the Unatilla agency, by Inspector Gardner, in which he observes that a question which greatly concerns the Indians is "whether or not a person living at the time of making the agreement, and who has since died, is entitled through his or her heirs to receive an allotment of land." The inspector states that he informed the Indians that in his opinion deceased parties had no right and that allotments would only be given to those living at the time of making the allotments. Upon this subject I have to say that allotments will be made only to those who are living when the allotments come to be made. The heirs of an Indian who was living at the date of the acceptance of the act of 1885 by the Indians and who has since died cannot have the allotments to which the deceased party would have been entitled had he lived.

These instructions have been approved by the Department and it may be that the heirs of those mentioned would not be entitled to have allotments made. On the other hand, the true test in such cases may not depend upon the person in whose behalf the allotment is asked being alive when the specific allotment asked for is made. It may be sufficient if such person was alive when the allotment should have been made. It will be time enough to consider this question when it is presented by the applications of the heirs of these parties.

There is contained in the record the relinquishment of Charles McWhirk and Martha Bonifer. The former sets out that since the time of his "allotment of and to said lands (it) has been contested by Louise Morrisette (Marcette) who claims a right to the same premises," and in consequence recites "that it is my desire that the allotment made to me

of the north-east quarter of section fourteen (14) in township three (3) north of range thirty-four (34) east of the Willamette meridian, be canceled and vacated," on the express condition that he be allotted a certain tract of land thereafter described.

The relinquishment of Martha Bonifer, formerly Hebeart, was also upon the express condition that she receive a particular tract of land. On December 15, 1896, subsequently to the relinquishment which bears date December 9, 1896, she made an affidavit to the effect that said relinquishment was the result of annoyances to which she had been subjected on account of adverse claims to the land allotted to her, and representations that she could get other land equally good, and she requested that said relinquishment be disregarded.

No right of relinquishment exists in an Indian. It may be that such action, with the approval of the Department, might be taken, but in the absence of such approval the act of the Indian is valueless to clear the record of the allotment, or in anywise affect its validity. *Ex parte* George Price (12 L. D., 162). No good reason appearing why the allotments made to these Indians should be canceled, no reason is seen for approving the relinquishments made. Aside from the general views here expressed, it does not affirmatively appear from this record that the relinquishments—even if the Indians had the authority to make and execute them—have ever become effective or operative, because of the fact that they were conditioned upon obtaining certain lands. It is not shown that this Department is in position to award them the land for which they applied.

Approved, April 19, 1897.

C. N. BLISS,
Secretary.

INDIAN LANDS—ALLOTMENT—ACT OF MARCH 2, 1889.

J. H. SCISSON.

Under section 8, act of March 2, 1889, all "Indians receiving rations" at a reservation, on the date of the President's order directing allotments thereof, are entitled to recognition under said order.

Assistant Attorney-General Van Devanter to the Secretary of the Interior,
April 19, 1897. (W. C. P.)

I am in receipt of the papers in the matter of the application of J. H. Scisson, a mixed blood Sioux Indian, for allotments to his two minor children upon the Rosebud reservation, with a request from First Assistant Secretary Sims "for an opinion as to whether the children alluded to in the within letter are entitled to allotments on the Rosebud reservation."

By the act of March 2, 1889 (25 Stat., 888), certain portions of the great reservation of the Sioux Indians in Dakota were set apart as reservations of the Indians receiving rations at the several agencies

within said "great reservation," and provision was made for the cession of the remainder of said reservation to the United States. It was provided in said act (Section 8), that the President should, whenever in his opinion any of said reservations was advantageous for agricultural or grazing purposes, and the Indians were sufficiently advanced in civilization, cause the lands of such reservation to be allotted to the Indians located thereon. It was further provided (Section 13) that any Indian receiving and entitled to rations and annuities at either of the agencies named in said act, at the time the same should take effect, but residing upon any portion of said "great reservation" not included in either of the separate reservations therein established, might at his option have his allotment upon the land where he was thus residing.

J. H. Scisson, a mixed blood Sioux Indian drawing rations at the Rosebud agency, elected to take his allotment upon the ceded lands, and the same was awarded to him. Afterwards he was married, and before the President's order, dated June 22, 1893, directing the allotment of lands upon the Rosebud reservation, two children were born to him.

Section 8 of said act, so far as it is necessary to consider it in this case reads as follows:

That the President is hereby authorized and required, whenever in his opinion any reservation of such Indians, or any part thereof, is advantageous for agricultural or grazing purposes, and the progress in civilization of the Indians receiving rations on either of said reservations shall be such as to encourage the belief that an allotment in severalty to such Indians, or any of them, would be for the best interest of said Indians, to cause said reservation, or so much thereof as is necessary, to be surveyed, or resurveyed, and to allot the lands in said reservation in severalty to the Indians located thereon as aforesaid.

The phrase—"Indians located thereon as aforesaid"—does not of itself furnish a description of the persons entitled to allotments, but refers to a class previously described. Nowhere in said act, however, before this, is the word "located" used in describing the connection of the Indians with any reservation. The various reservations are set apart for the Indians "receiving rations and annuities" at certain agencies, and in said section eight it is provided that allotments shall be made when the "Indians receiving rations" upon any specified reservation shall be deemed prepared therefor. Naturally the condition of the persons entitled to take allotments would be taken as the best criterion for determining the time at which such allotments should be made, and therefore when the law provides that the condition of "Indians receiving rations upon any of said reservations" shall be the criterion for deciding as to when allotments shall be made on that reservation, it must be presumed that the persons thus described are the ones entitled to allotments. The only logical conclusion to be drawn from the language used is that the phrase "Indians located thereon as aforesaid" refers to the preceding descriptive phrase "Indians receiving rations" and is defined thereby.

These children were, at the date of the President's order directing allotments to be made on the Rosebud reservation, receiving rations there and, so far as the facts before me show, were entitled to allotments, unless it be that the fact that they were not actually residing within the boundaries of that reservation debars them from participating in the division of the lands therein. If the conclusion reached herein as to the proper construction of the law be the correct one they are not thus barred.

In my opinion, and I so advise you, these children are, so far as the record before me shows, entitled to allotments upon the Rosebud reservation.

Approved, April 19, 1897.

C. N. BLISS,
Secretary.

RAILROAD AND WAGON ROAD GRANTS—CONFLICTING LIMITS.

EASTERN OREGON LAND COMPANY.

Action will be suspended on all entries allowed for lands within the conflicting limits of the grants for The Dalles Military Wagon Road Co., and the Northern Pacific R. R. Co., pending a judicial determination of the status of said lands.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 21, 1897. (F. W. C.)

With your office letter of March 19, 1897, was transmitted a petition, filed on behalf of the Eastern Oregon Land Company, successor to The Dalles Military Wagon Road Company, requesting that action be suspended upon all entries allowed for lands within the conflicting limits of the grants for The Dalles Military Wagon Road Company and the Northern Pacific Railroad Company. Upon this said petition your office makes no recommendation.

The material facts governing the rights of The Dalles company in the premises are similar to those in the case of the conflict between the grants for the Northern Pacific Railroad Company and the Oregon and California Railroad Company, which were considered in departmental decision of February 17, 1892 (14 L. D., 187), in which it was held (syllabus):

The grant of the odd numbered sections within the overlapping primary limits of the Northern Pacific, and Oregon and California roads, east of Portland, Oregon, was for the benefit of the former company under the act of July 2, 1864, and the forfeiture thereof by the act of September 29, 1890, is to the extent of the withdrawal made under the sixth section of the act of 1864; and under said act of forfeiture no rights of the Oregon and California road are recognized within said conflicting limits.

Within the conflict last referred to, a large quantity of land had been patented on account of the Oregon and California Railroad grant, and

suit was instituted to restore the title of said tracts to the United States.

It appears that upon an application filed on behalf of the Oregon and California Railroad Company, for the suspension of action under the decision of February 17, 1892 (*supra*), the local officers were directed by your office to withhold the lands within the primary limits from entry, and such lands as had been selected within the indemnity limits; which action was approved by this Department.

The Eastern Oregon Land Company, successor to The Dalles Military Wagon Road Company through purchase, it appears from the petition, instituted two suits against E. I. Messinger and John D. Wilcox, in the circuit court of the United States for the district of Oregon, to set aside patents which had been issued under the land laws to said parties for lands within the overlapping limits of the grants for the said The Dalles Wagon Road Company and the Northern Pacific Railroad Company; that said court rendered a *pro forma* decree dismissing the bills, but upon appeal to the circuit court of appeals for the ninth circuit, the decrees were reversed; said circuit court of appeals holding that the lands in question belonged to the Eastern Oregon Land Company and that they had been wrongfully opened to settlement and wrongfully sold and patented by the United States.

It is stated in the petition that it is the intention of the defendants to appeal the said suits at once to the supreme court of the United States.

In view of the action taken upon the petition of the Oregon and California Railroad Company, and of the decision of the court as to the rights of the petitioners, I have determined to grant their request, and have to direct that you give proper directions to the local officers to carry into effect the suspension, and that all action upon entries heretofore allowed be suspended to await the result of the decision of the supreme court in the case referred to.

ACCOUNTS—ADJUSTMENT OF DEPUTY SURVEYOR'S CLAIM.

JAMES H. MARTINEAU.

The adjustment of deputy surveyors' accounts is made upon the intrinsic evidence furnished by the field notes of survey, sworn to and returned by the deputy, and not upon independent supplemental statements.

Secretary Bliss to the Comptroller of the Treasury, April 21, 1897.

(W. V. D.)

(W. M. B.)

This Department is in receipt of your office letter of February 20, 1897, wherein you state that there is pending in your office an "appeal from the settlement by the Auditor for the Interior Department of the

supplemental account of James H. Martineau, U. S. deputy surveyor for Arizona under contract No. 30, dated June 21, 1893."

The question involved, as appears from your said office letter, is whether or not should be paid to Martineau the sum of \$71.72 claimed by him as compensation for the resurvey of the exterior township line in T. 4 N., R. 1 E., and for the partial survey and resurvey of the exterior township line in T. 3 N., R. 3 E., Territory of Arizona.

In your above referred to letter you say:

As the lines originally rejected were not shown in the deputy's field notes, their subsequent acceptance must have been based on independent supplemental evidence. The action of the Commissioner seems therefore to have been in conflict with the decision of your office in the account of Pearson (22 L. D., 471). I am aware that this decision was subsequently reviewed and somewhat modified, but do not understand that the point now under consideration was overruled; nor have I been pointed to any subsequent decision of your office overruling that in the Pearson case , before acting upon Mr. Martineau's appeal I have deemed it proper to bring the case to your attention, thinking that the action of the General Land Office in allowing Mr. Martineau's supplemental account may have been inadvertently taken, and, if not, to request that the information upon the lines originally rejected were subsequently allowed be given me, and also to be informed whether the policy of your Department in the matter now under consideration has been changed since the Pearson case was decided.

The items for which the stated compensation is claimed, are as follows: resurvey of 6 mls. .02 chs. 16 lks. of township exterior line in T. 4 N., R. 1 E., and survey and resurvey of 3 mls. 41 chs. 52 lks. of township exterior line in T. 3 N., R. 3 E.

It appears from reports contained in letters of the chief of division of public surveys and the Acting Commissioner of the General Land Office, dated May 9, 1896, and March 9, 1897, respectively, herewith transmitted, that the acceptance by the General Land Office of the above described lines, and allowance of compensation claimed therefor, as stated in referred to supplemental account for surveys made in pursuance of supplemental special instructions issued under contract No. 30, were not based upon independent and supplemental evidence, but were, as a matter of fact, based upon the intrinsic evidence furnished by the field notes now on file in the General Land Office. How it happened that the designated lines were not originally accepted by the General Land Office, and payment allowed therefor, is fully explained in letters and reports above referred to, it appearing that the failure to take such action was caused by a misunderstanding between the division of public surveys and the division of accounts of the General Land Office. Upon the showing made it appears that deputy Martineau is entitled, under the rule laid down in departmental decision of April 24, 1896, in the case of *ex parte* George W. Pearson (22 L. D., 471), to the compensation claimed.

Referring to said departmental decision of April 24, 1896, and replying to your inquiry as to whether this Department has changed its policy and ruling, as enunciated in said decision, with regard to the

adjustment of deputy surveyors' accounts upon the intrinsic evidence furnished by the field notes sworn to and returned by such deputies, and not upon independent supplemental statements—forming no part of the field notes—where the original field notes are defective and fail to conform to *special instructions*, which said instructions, by the act of October 1, 1890 (26 Stat., 650), are made and accepted as a part of every surveying contract, I will state that the ruling in said departmental decision of April 24, 1896, in the cited case has not been revoked, but is still adhered to.

The particular point or question to which you invite attention and which was considered somewhat at length and passed upon in said departmental decision of April 24, 1896, was not discussed or specifically ruled upon in the reviewing decision of October 3, 1896, hence the decision of the former date upon said question or point can not be considered as having been overruled by that of the latter date.

PENWELL *v.* CHRISTIAN.

Motion for review of departmental decision of July 1, 1896, 23 L. D., 10, and for rehearing, denied by Secretary Bliss, April 21, 1897.

ABANDONED MILITARY RESERVATION—ENTRY. APPRAISAL—FINAL PROOF.

GEORGE H. DOE.

Final proof can not be submitted on a homestead entry made under the act of August 23, 1894, of lands within an abandoned military reservation, prior to the appraisal of the reservation.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 21, 1897. (E. B., JR.)

This is an appeal by George H. Doe from your office decision of November 23, 1895, affirming the rejection by the local officers of his application, filed June 6, 1895, to be allowed to offer final proof in the matter of his homestead entry No. 2404, made June 6, 1895, under the act of August 23, 1894 (28 Stat., 491), alleging settlement March 1, 1876, for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 31, T. 13 S., R. 15 E., in the abandoned Fort Lowell military reservation, Tucson, Arizona, land district. The ground of rejection of said application by the local office was that the lands in said reservation had not been appraised.

It is admitted by appellant that the lands in said reservation had not been appraised when he asked to be allowed to offer final proof, and the only question is, whether he should be allowed to offer such proof prior to an appraisement.

Under the said act, persons making homestead entry of such lands as are covered thereby are required to pay—

not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry, and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior. (Act of August 23, 1894, *supra*.)

In pursuance of this provision of the act, Mr. Secretary Smith directed, February 18, 1895, that, in disposing of the lands in the abandoned Fort Bridger military reservation—

the homesteader be given the option in making payment upon his entry of these lands, of making his payments in five equal annual payments to date from the time of the acceptance of his final proof tendered on his entry, and that the rate of interest upon deferred payments be charged at the rate of 4 per cent per annum (20 L. D., 118).

Under these instructions the first payment becomes due one year after acceptance of final proof. As both said reservations are subject to disposal under said act, your office very properly, in the absence of any other specific regulation for the disposal of the former reservation lands, applied to them the rule of February 18, 1895 (*supra*). As they had not been appraised when Doe applied to be allowed to submit final proof, his application was properly denied. The action of your office in the premises is accordingly affirmed.

On July 29, 1896, your office submitted the report of the appraisement under the act of July 5, 1884 (23 Stat., 103), of the lands in the Fort Lowell reservation, and also of the government buildings on the reservation. The appraisement of these lands, embracing an estimated area of 51,631.36 acres, ranging in value from ten cents to fifteen dollars per acre, was, on August 18, 1896, approved by the Department in the following language:

The appraisal of the lands to be disposed of, so far as it relates to the tracts valued at and above the minimum price, is accepted, and the price of the tracts valued below the minimum price is fixed at \$1.25 per acre.

At the same time, instructions to the local officers at Tucson for the disposal of these lands, submitted by your office, following the instructions of the Department dated April 9, 1895 (20 L. D., 303), for the disposal of the lands in the Fort Rice and Fort Bridger abandoned military reservations, were approved.

It thus appears that the objection to the submission of final proof by Mr. Doe, upon his homestead entry, which was the occasion of his appeal, no longer exists. He may therefore proceed to offer final proof, subject, of course, to any valid objections thereto that may exist.

HOMESTEAD ENTRY—ALIENATION.

SWAZE v. SUPRENANT.

The execution of a deed to a half interest in the land covered by a homestead entry, prior to the submission of final proof, defeats the right to patent, though it may appear that the entryman had lived on the land for five years prior to alienation, and that the grantee under the deed is asserting no claim thereunder.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 21, 1897. (C. J. W.)

April 27, 1887, Alexander Suprenant made homestead entry, No. 3428, for E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 21 and W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 22, T. 2 N., R. 7 W., Helena, Montana, alleging settlement in 1884.

The entry was canceled as to the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 21, T. 2 N., R. 7 W., by your office letter "G" of January 15, 1890, for conflict with pre-emption cash entry, No. 3391, by Frederick L. St. Onge. By your office letter "C", of date July 20, 1894, Suprenant's entry, then comprising the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 22, T. 2 N., R. 7 W., was canceled because of failure to submit final proof within the statutory period, but said entry was reinstated by office letter "C" of September 21, 1894, and the entryman given sixty days within which to submit his final proof.

On October 26, 1894, he gave proper notice of his intention to make final proof on the 8th of December following, before the clerk of the district court of Silver Bow county, Montana, in which said land is situated.

On the day indicated he appeared with his counsel and witnesses and submitted his final proof.

It does not appear that any affidavit of contest was filed, but Joseph Swaze appeared before the officer, with his attorney and witnesses, and after the final proof blanks were filled, both parties submitted additional evidence. From this evidence it appeared, *inter alia*, that, the entryman had joined with Swaze, the protestant, and others, on October 8, 1890, in a location of the Jersey Blue placer claim, which includes the land covered by the homestead entry. It further shows that on May 15, 1889, Suprenant executed a mortgage to John E. Loyd upon the NW. $\frac{1}{4}$ of Sec. 22, T. 2 N., R. 7 W., to secure the payment of a promissory note, and further that on March 11, 1889, he executed a deed in the nature of a quitclaim to one Jean Baptiste Guay for a half interest in and to a ranch containing one hundred and sixty acres, known as the sheep ranch situated at the fork of Blacktail creek with Little Blacktail creek, including the land covered by the entry.

On March 17, 1895, the local officers rendered a joint decision recommending the acceptance of the final proof, and that the protest be dismissed.

From this decision Swaze appealed to your office.

On February 7, 1896, your office considered the case and held the homestead entry for cancellation on the ground that the entryman had, before making final proof, parted with a half interest in the land covered by it, by deed of alienation.

From this decision Suprenant has appealed to the Department.

It is somewhat difficult to determine from the record how Swaze obtained standing as a party to the case, but it appears from a stipulation signed by the attorneys, representing the parties, that Swaze was claiming the land as a mineral locator and was thereby entitled to be heard. As his right to offer testimony was not questioned, but is conceded by the stipulation, he will be treated as having the standing of a protestant against the final proof. The hearing involved three questions:

First, the character of the land, whether agricultural or mineral. Second, the *prima facie* sufficiency of the final proof offered by the entryman. Third, the good faith of the entryman.

It was properly found both by the local officers and your office, that the land was agricultural and not mineral. It is not seriously disputed that the formal final proof offered shows *prima facie* a compliance with the requirements of the law upon the part of the entryman. If the final proof is to be rejected it must be on the ground of the bad faith of the entryman. This, it is alleged, must be imputed to him on account of two transactions which it is charged are incompatible with good faith. These transactions are the execution of a mortgage on the land covered by his homestead and the execution of a deed to a half-interest in it, before offering his final proof. The transaction in reference to the mortgage seems to have been regarded by your office as insufficient to show bad faith, in the light of the explanations given by him in his testimony and by the mortgagee in his testimony. It is not deemed necessary to consider the grounds of the conclusion reached in reference to this matter, or to consider it separately from the other acts of the entryman impeaching his good faith. The record affords abundant evidence that the entryman is uneducated and easily misled, and that he understands but imperfectly the transactions about which he testifies.

In passing upon any question as to his good faith, his ignorance of the law; his surroundings and liability to be imposed upon, may be considered, but he must be credited with capacity to understand the plain duties required by law of all homestead entrymen, or he would be deemed incapable of making a valid entry. He must be presumed to have known that it was unlawful to sell and convey an interest in the land covered by his homestead entry before he had earned the title by compliance with the homestead laws. It is true that he disputes the correctness of the deed and insists that it was to be for an interest only in the improvements. The terms of the deed (a copy of which is appended to the record) are so plain and explicit that the theory of the

defendant can get no support from the construction of the instrument. It purports to be an absolute deed to a half interest in the land it describes as well as in the improvements and appurtenances. No witness is called to impeach its correctness, except the defendant himself, and his statements are too vague and uncertain to authorize the deed to be disregarded. It is insisted in the argument filed that the entryman had in fact earned his title before the deed to Guay was executed, by five years of residence upon the land prior thereto. If this was conceded he would still not be authorized to sell and convey his homestead before offering final proof. It is insisted that Guay has abandoned any claim he may have had by virtue of the deed, and has left the entryman in sole possession, but this does not mend the broken law.

I see no escape from the conclusion that the entry has been forfeited, and your office decision is accordingly affirmed.

PRACTICE—NOTICE OF APPEAL—RAILROAD GRANT—ADJUSTMENT.

STAPLES ET AL. v. ST. PAUL AND NORTHERN PACIFIC R. R. CO.

Notice of an appeal served upon the land commissioner and agent of a railroad company is a proper and legal service on such company.

The grants to the St. Paul and Northern Pacific R. R. Co., and the Northern Pacific R. R. Co., were made by different acts of Congress, and are entirely separate and distinct, and the lease of its road and franchises by the former company to the latter, will not justify the Department in holding that rights granted to the company first named can only be exercised by its lessee.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 22, 1897. (E. M. R.)

This case involves certain lands lying in sections 19 and 21, T. 132 N., R. 31 W., St. Cloud land district, Minnesota.

The record shows that by letters dated March 21, and 22, 1894, the local officers transmitted to your office the appeals of Staples *et al.*, from their action of January 9, and 25, 1894, rejecting the application of Willis L. Staples to enter, under the homestead law, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and lots 1 and 2, Sec. 19, T. 132 N., R. 31 W.; the NE. $\frac{1}{4}$ of Sec. 21, T. 132 N., R. 31 W., by Elizabeth Bowman; and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lot 6, Sec. 19, T. 132 N., R. 31 W., by Gust Johnson.

On October 5, 1894, your office decision was rendered in favor of these applicants, together with Julia A. Warriner and Gust Bydberg.

These lands are within the twenty mile primary limits of the grant to aid in the construction of the Northern Pacific Railroad under the act of July 2, 1864 (13 Stat., 365), as shown by its map of definite location filed November 21, 1871, but were not included within the limits of the grant as shown by the maps of general route, which took effect on August 13, and October 12, 1870. They are likewise within the fifteen

miles indemnity limits of the grant to aid in the construction of the Brainerd Branch of the St. Paul and Pacific, now the St. Paul and Northern Pacific Railroad Company, under the act of March 3, 1857 (11 Stat., 195), as shown by the map of definite location filed March 28, 1858.

The latter company selected this land as indemnity on December 31, 1877, by its list No. 2.

Your office decision of October 5, 1894 (*supra*), held that these lands were excepted from the grant to the Northern Pacific Railroad Company at the date of the definite location on November 21, 1871, by reason of the withdrawal then existing in behalf of the St. Paul and Pacific Railroad Company, and held that the selection by that company of December 31, 1877, was superseded by the selection of December 4, 1889.

The selection of 1877 did not contain a specification of losses as a basis for the selection, because there was no requirement for the specification of losses until the circular of November 7, 1879. (*Clancy et al. v. Hastings and Dakota Railway Company*, 17 L. D., 592.)

The supplemental list of December 4, 1889, contained a specification of losses, but as it contained less lands than the list of 1877 (due to the fact that certain of the selections of 1877 had in the meantime been canceled), your said office decision held that this variance amounted to an abandonment of the selection of 1877; further, that the selection of 1889 was not effective to reserve the lands, in view of the revocation of the withdrawal of May 22, 1891, because it did not comply with existing regulation in stating the losses tract for tract with the selected land, and accordingly reversed the action of the local officers and directed that the application of the parties be allowed.

On January 31, 1895, a motion for review having been filed by the St. Paul and Northern Pacific Railroad Company, your office decision was rendered, in which was reversed, in part, the decision of October 5, 1894; it being found that your office had inadvertently overlooked the fact that the company had, on February 12, 1892, perfected its selection by the filing of a re-arranged list containing a proper designation of losses arranged tract for tract as required by the regulations of this Department, and accordingly overruled so much of said former decision as rejected said list, and in consequence thereof rejected the homestead applications of these appellants, but declared final so much of said former decision as held that these lands were excepted from the grant to the Northern Pacific Railroad Company, no motion for review or appeal as to said portion of said decision having been made, and held that said holding had become final.

Subsequently, to wit, on November 4, 1895, a motion for review of said last above named decision having been made, by attorney for the homestead applicants, your office decision adhered to its decision upon review.

The contention in said last motion for reconsideration of your action, was upon the ground that the St. Paul and Northern Pacific Railroad Company had been to all intents and purposes merged into and become a part of the Northern Pacific Railroad Company, under a lease executed by the first named company to the Northern Pacific on or about June 1, 1883, of its line and franchises, for a term of 999 years; that said lease was to all intents and purposes a complete sale of the said St. Paul and Northern Pacific Company to the said Northern Pacific Company; that the St. Paul and Northern Pacific Company had abandoned any attempt or pretence at separate organization of its land grant, and the same was now attended, to, and a part of, the grant to the Northern Pacific Railroad Company; and that the Northern Pacific Company claims to control the grant to the St. Paul and Northern Pacific Company, but as in this case the rights of the Northern Pacific Company having been passed upon adverse to said company, and it not setting up any claim to this land under the grant to the Northern Pacific Railroad Company, the lands now involved are free from any claim by either company.

There is contained in the record a motion to dismiss the appeal of the appellants herein, on the ground that it was not served upon F. M. Dudley, the attorney of record in this case for the St. Paul and Pacific Railroad Company, but was served upon one W. H. Phipps of St. Paul, Minnesota.

It appears that the party served is the Land Commissioner and Land Agent of the Northern Pacific Railroad Company and the St. Paul and Northern Pacific Railroad Company.

In the case of Northern Pacific Railroad Company *v.* Walters *et al.* (23 L. D., 331), it was held, *inter alia* (syllabus): "Notice of an appeal served upon a duly recognized agent of a railroad company is a proper and sufficient service." See also the case of Boyle *v.* Northern Pacific Railroad Company (22 L. D., 184), wherein it was held (syllabus): "Notice of an appeal duly served on a general land agent of a railroad company is sufficient service on said company."

The position of counsel is therefore not well taken, and the appeal is properly before the Department.

The ground of review of your decision of January 31, 1895, urged by counsel for the homestead claimants, appears to be unsound. The grants to the two roads were made as separate grants, under different acts of Congress, having individual and distinct limits, and the fact that one of these companies leased its road and franchises to the other does not appear to be sufficient to hold that rights granted by the act to aid in the construction of the St. Paul and Northern Pacific Railroad can only be exercised by the Northern Pacific Railroad Company.

After an examination of the case, I concur with your office that this land is not subject to homestead entry, and the decision appealed from is accordingly affirmed.

HOMESTEAD ENTRY—SETTLEMENT RIGHT—CANCELLATION.

· GOURLEY *v.* COUNTRYMAN (ON REVIEW).

The cancellation of a homestead entry as to part of the land covered thereby, on account of an adverse claim, will not prevent the entryman from subsequently asserting his right as a settler to the entire tract covered by his original entry, as against a third party.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 22, 1897. (C. W. P.)

On March 3, 1897, your office transmitted, on the part of George W. Countryman, a motion for review of the decision of the Department, rendered on January 18, 1897, in the case of William Gourley against the said Countryman (24 L. D., 49).

The land involved is the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 28, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma Territory.

With the exception of the second and fifth grounds, the errors assigned relate entirely to matters of law and fact which were fully considered by the Department when the case was decided. No new question of law or fact is presented for consideration by them. And no reason is shown for a departure from the rule that in such cases motions for review must be denied. (Shields *v.* McDonald, 18 L. D., 478.)

The second and fifth grounds are: 2. In not holding that Gourley had exhausted his homestead rights by his entry for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 28, etc.; 5. In not holding that Gourley being a resident on the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and his homestead entry being embraced in that tract only, his settlement was only co-extensive with the boundaries of the land embraced in his entry, and gave him no right to the land.

It is the general rule in the administration of the homestead laws, that if a party of his own volition enters a less quantity of land than he is entitled to, his election to take such less quantity is to be considered as a waiver of his claim for a larger quantity (General Circular, October 30, 1896, p. 33). And the question in this case is, whether or not Gourley has elected to take only eighty acres and thus waived his claim to a larger quantity, within the meaning of the above rule. I think he has not. When he made his original entry he intended to take the maximum to which he was entitled. The cancellation of that entry as to the eighty acres cannot under the circumstances of this case be considered as a waiver on his part of his right, under the homestead laws, to the full quantity of one hundred and sixty acres, or as an exhaustion of his homestead right.

The fifth ground is not tenable for the reason that Gourley's original homestead entry covered the entire one hundred and sixty acres—a technical quarter section.

The motion, not showing proper grounds for review, is denied.

HOMESTEAD—RESIDENCE—SECTION 5, ACT OF MARCH 3, 1891.

CLARK v. MANSFIELD.

An applicant for the right of homestead entry who has continuously resided on the land embraced within his application for a period of five years, and applied to enter during said period, is not thereafter required to maintain residence as a prerequisite to patent.

The prohibitory provision in section 2289 R. S., as amended by section 5, act of March 3, 1891, that "no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law," is no bar to the allowance of an entry based upon an application made prior to the passage of said amendatory act, and strictly in compliance with the laws and regulations then in force.

No settlement right is acquired by trespass upon the lawful possession of another.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 22, 1897. (J. L.)

This case involves the SE. $\frac{1}{4}$ of section 21, T. 16 N., R. 44 E., Walla Walla land district, Washington, containing one hundred and sixty acres of land. This tract lies outside of the withdrawal on the original map of general route of the Northern Pacific Railroad Company, filed August 13, 1870; within the limits of the unauthorized withdrawal on the amended map of general route filed February 21, 1872; and within the indemnity limits on the map of definite location filed October 4, 1880. It was selected by the company on March 20, 1884.

On February 24, 1883, William S. Hurlbert presented his application to make homestead entry of said tract, alleging settlement prior to October 1, 1880, and continuous residence. The local officers rejected it, on the ground that the tract was within the withdrawal which took effect on February 21, 1872, for the benefit of the Northern Pacific Railroad Company. Hurlbert appealed. Your office reversed the action of the local officers, and held the company's selection of said tract for cancellation with a view to allowing Hurlbert's application to make entry. The railroad company appealed to the Department. On February 21, 1894, first, and afterwards on October 14, 1895, this Department affirmed the decisions of your office; and on February 8, 1896, the company's selection of said tract (made March 20, 1884) was canceled, and Hurlbert was awarded the right to make homestead entry of said land, and the case was closed.

Pending said proceedings to wit: on August 15, 1887, Secretary Lamar directed

that all lands withdrawn and held for indemnity purposes under the grant to the Northern Pacific Railroad Company be restored to the public domain and opened to settlement under the general land laws, except such lands as may be covered by approved selections.

He further directed that:

As to all lands covered by *unapproved* selections applications to make filings and entries thereon may be received, noted and held subject to the claim of the com-

pany, of which the claimant must be distinctly informed and memoranda thereof entered upon his papers. Whenever such application to file or enter is presented alleging upon *prima facie* showing that the land is, from any cause, not subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service, within which to present objections to the allowance of such filing or entry.

Then followed further directions by the Secretary as to the mode of procedure in the case (see 6 L. D., 91-92-93).

After the promulgation of said order, to wit on October 27, 1887, Girard Clark filed his application to make homestead entry of said tract, alleging settlement on March 1, 1884, and continuous residence and cultivation thereafter; and that the tract was not subject to selection by the Northern Pacific Railroad Company because one William Hurlbert, a duly qualified homestead entryman, in the year 1878, (long before the company made its selection), settled upon said tract and continuously resided upon and cultivated the land until the day of Clark's settlement thereon. Said application was filed, noted and held in the local office subject to the claim of the railroad company. Notice thereof was served upon the company. And on December 6, 1887, the company filed its protest against said application, on one of its printed forms, alleging that its map of definite location was filed on October 4, 1880, and that it had selected said tract as indemnity on March 20, 1884. The local officers did not then order a hearing, doubtless because of the case of Hurlbert *v.* the company then pending on appeal as above stated.

In the meantime, on March 8, 1894, George T. Mansfield filed his application to make homestead entry of said tract, alleging settlement on March 4, 1894, and subsequent residence. The railroad company was notified of this application also, and on April 15, 1894, filed its usual protest against the same.

On April 23, 1894, after the first decision of the Department in the Hurlbert case had been promulgated, the local officers ordered a hearing of the case of Girard Clark *v.* The Northern Pacific Railroad Company, upon the protest filed on December 6, 1887; and directed that the testimony be taken before William A. Inman, a notary public residing at Colfax, Washington. On May 11, 1894, George T. Mansfield filed his application to be allowed to intervene in said hearing, and to set up a superior right in himself to enter said tract of land. His application was allowed by the local officers.

On May 28, 1894, all three of the parties appeared before the notary at Colfax, Clark and Mansfield in person with their attorneys, and the railroad company by its attorney. The taking of testimony was commenced on May 28, and concluded on May 31, 1894. All parties were fully heard.

On July 27, 1894, the local officers found the facts as follows:

1st. That the first settlement was made on this land in December 1877 by one Debolt who shortly thereafter abandoned it.

2nd. That in the spring of 1878, William Hurlbert made settlement on the land, which he followed with actual residence and cultivation and improvement of the same until February 1884, at which time he sold his improvements on the land to Girard Clark, one of the parties hereto.

3rd. That said Hurlbert claimed the land under the homestead law and was qualified to make entry of the land thereunder.

4th. That in the month of February 1884, Girard established actual residence on the land, which he maintained until about the 25th day of March 1889, during which time he fenced and broke the entire tract with the exception of about twenty acres fenced and broke by Hurlbert, his grantor. Clark also made other valuable improvements on the land during this time in the way of buildings.

5th. That about March 25, 1889, Clark moved from this land and established his residence on another farm some miles distant from the land in contest, where he continued to reside up to March 6, 1894.

6th. That Clark has never abandoned said land or relinquished his right thereto; but has at all times held possession thereof; and has farmed, cultivated and cropped the same continuously up to the date of this hearing.

7th. That on March 4, 1894, the land was in the quiet and peaceable possession of Clark. That it was enclosed and had a growing crop of wheat to the amount of one hundred and forty acres sown by Clark the fall before.

8th. That at the time Mansfield entered upon the land he had actual notice of Clark's right thereto.

And thereupon the local officers recommended, that the selection of this tract by the railroad company be canceled; that the application of Mansfield be rejected; and that Clark be allowed to make his homestead entry.

The railroad company and Mansfield both appealed to your office.

On July 15, 1896, your office reversed the decision of the local officers solely upon the ground that Clark is now the proprietor of more than one hundred and sixty acres of land in the State of Washington, and is therefore disqualified from making a homestead entry. After making a recapitulation of the facts proved, substantially agreeing with the findings of the local officers, your office in its decision proceeded as follows:

It is clearly shown by the testimony submitted at the hearing in this case, that Girard Clark is the proprietor of more than one hundred and sixty acres of land in the State of Washington, which, under section 2289 of the U. S. Revised Statutes, as amended by the fifth section of the act of March 3, 1891 (26 Statutes 1095), disqualifies him from making a homestead entry.

Therefore, your decision is reversed, and the homestead application of Girard Clark is hereby held for rejection.

Your office further decided that it was not—

Necessary to take any further action upon said selection (by the Northern Pacific Railroad Company) to the extent of the tract involved in this case, as such selection as regards the land in question, was canceled by letter "F" of February 8, 1896, as the result of the case of said company against William S. Hurlbert, and which result is fully set forth in this decision; the railroad claim to this land has been eliminated.

You will advise Girard Clark of this decision, and allow him the usual time, sixty days after notice, within which to appeal to the Honorable Secretary of the Interior.

Should this decision become final George T. Mansfield will be permitted to make homestead entry for this land. You will advise him of this action.

From said decision Clark has appealed to this Department. The railroad company has not appealed. The case is now a controversy between Girard Clark and George T. Mansfield, alone.

The evidence shows the following facts:

Clark bought Hurlbert's improvements on February 4, 1884, for \$300 in cash, and settled on the tract the same day. Before the 10th day of February he had completed the removal of his wife and children and household goods and established his residence on the tract. He resided there continuously and exclusively until the 25th day of March 1889, a period of five years and forty-three days; during which time he got the whole quarter section under cultivation and securely fenced; and built new structures, made his improvements worth \$1,000, and raised crops worth from \$2,000 to \$3,000 per annum: About the middle of February 1889, he bought from a Mr. Ladd a farm containing 268 acres, five miles distant from his home by the road. After that date he cultivated and improved both farms, spending part of his time with his family on each tract. In the spring during the plowing and seeding, in the summer during the harvesting, and in the fall of the year during the plowing and seeding again, he remained with his family at his home place and boarded his hired men. After work was done he went with his family to the Ladd farm, and worked there; and generally remained there during the winter. He continued to live in this manner—alternating between the two places—until March 6, 1894, when he went with his family to his homestead, and remained there continuously and exclusively until the time of the hearing. During the five years between 1889 and 1894 he continued to cultivate and improve the home place, kept up his fences, and made crops worth from \$2,000 to \$3,000, every year, except one, when he fallowed the whole tract to let the land rest.

Mansfield claims, (1) that Clark's manner of life during the five years aforesaid was equivalent to a change of residence, to an abandonment of his homestead claim, and to a restoration of the tract to the public domain as unoccupied land subject to entry by any qualified person; and (2) that by his (Mansfield's) settlement on March 4, 1894, and his residence thereon for four days, until the date of filing his application, he acquired a better right than Clark's.

While it is true that residence under the homestead law must be continuous and personal, it is also true that residence once established can be changed only when the act and intention of the settler unite to effect such a change. (Secretary Lamar in *Anderson v. Anderson*, 5 L. D., 6, and in *Penrose's case*, 5 L. D., 179. See also *Patrick Manning's case*, 7 L. D., 144-5, and *Alfred M. Smith's case*, 9 L. D., 146-148.)

The whole evidence by a clear preponderance proves that Clark did not intend to change his residence; that he did not intend to abandon his homestead on which he had resided for more than five years, and which he had rendered very valuable by improvements and cultivation.

Moreover, after Clark had resided upon his homestead for more than five years, he was not required to reside there any longer. In the case of *Lawrence v. Phillips*, 6 L. D., 140-143, this Department after quoting section 2297 of the Revised Statutes said:

It seems clear from this section that residence upon the homestead is not required after the expiration of the five years, as a prerequisite of obtaining patent to the land; nor does a change of residence after that period forfeit a right already acquired.

The railroad company's selection being canceled, it is evident, in view of the law above quoted and the third section of the act of May 14, 1880 (21 Statutes 140), and the facts shown by the evidence, that Girard Clark is now entitled to make homestead entry of the tract of land in contest, and to offer final proof immediately, unless he be disqualified as indicated in your office decision.

By the 5th section of the act of March 3, 1891 (26 Statutes 1095), Congress after re-enacting the first five lines of section 2289 of the Revised Statutes enacted a new law in the following words:

But no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law.

When Clark on October 27, 1887, filed his application to make homestead entry, in strict compliance with the laws and regulations then in force, he acquired homestead rights in the tract of land described, which were good against all the world, and were unquestioned except by the Northern Pacific Railroad Company which then had pending an application to make indemnity selection of said tract. Said selection was unlawful and invalid for three reasons. (1) Because of William S. Hurlbert's settlement on the tract in the year 1878, prior to the filing of the map of definite location, and his continuous residence thereon: (2) Because said selection was made by the company while Hurlbert's appeal involving the company's right to that very tract of land was pending before the Department: And (3) Because on March 20, 1884, when said selection was made, Clark was and for forty-four days had been a *bona fide* settler and resident on the tract. According to law and the facts of the case, Clark was then and there, to wit: on October 27, 1887, entitled to have his application allowed and to make his homestead entry. But action upon his application was suspended by Secretary Lamar's order above quoted, until the company's claim should be disposed of by this Department. This was not done until February 21, 1894, more than six years after the date of Clark's application to make entry. Then Clark promptly secured a hearing, and a judgment of the local officers in his favor. Clark is not responsible for the delay. He has been guilty of no laches. He has diligently prosecuted and insisted upon his rights, which must be determined and measured by the laws as they were on October 27, 1887, when he did all that he could do, or be required to do, to perfect the homestead entry, which he had initiated on February 4, 1884 by settlement and

continuous subsequent residence. The act of March 3, 1891, above quoted is not applicable in this case. Clark is now entitled to a decision recognizing and establishing his rights as they were at the time of the filing of his application to make entry. (*Ard v. Brandon* 156 U. S. 537-543, *Pfaff v. Williams*, 4 L. D. 455-457, *Williams v. Clark*, 12 L. D. 173-175, *Patrick Kelly* 11 L. D. 326-328, *Goodale v. Olney* 12 L. D. 324-325, *Rice v. Lenzshek* 13 L. D. 154, *E. S. Newman* 8 L. D. 448-450 and *McDonald v. Jaramilla* 10 L. D. 276-278.)

For the foregoing reasons this Department decides, that your office erred in holding that Clark was disqualified from perfecting and making his homestead entry in this case, by reason of the fact that at the time of the hearing he was, and is now, the proprietor of more than one hundred and sixty acres of land in the State of Washington.

The intervenor, George T. Mansfield, has failed to show by the evidence a superior right or any right at all to make entry of said tract. According to his own personal testimony his pretended settlement was made under the following circumstances:

He first saw the land on March 2, 1894 (testimony p. 105), although he had been living at Colfax within six miles of the tract for about three years, carrying on business as bar-keeper and horse-trader (p. 115). On Sunday March 4, 1894, between nine and ten o'clock A. M., he made his alleged settlement (pp. 105 and 110). It was a stormy day (p. 114). Snow covered the ground and hid the growing crop (pp. 107 and 110). With a team and wagon containing himself and one Charley Shroll, and a stove, a bedstead, bedding and some food, and a large tent, Mansfield drove across an adjoining field belonging to a Mr. French (p. 112), and drove either over or through Clark's fence, to reach Clark's land. On page 110 of the testimony, Mansfield relates it thus: "I went through the fence. There was no fence visible. For 25 or 30 yards there was a large snow drift at the place." On the evening of March 4, after he had got his foundation laid and his tent up, he went with his team to Riverside to fetch his wife and children. Returning with them he was refused permission to pass through the gate, and was obliged to go around through Mr. Parvin's place, and crawl through the wires of Clark's fence, to reach his tent. (pp. 114 and 115.)

Mansfield acquired no rights by reason of his unlawful trespass upon Clark's homestead as shown by the testimony (*Atherton v. Fowler*, 90 U. S., 513).

Your office decision of July 13, 1896, is hereby reversed. Mansfield's application to make homestead entry of said tract is hereby rejected, and Clark's application to make homestead entry of said tract, filed October 27, 1887, will be allowed, if he be otherwise qualified.

PRACTICE—MINING CLAIM—PROTEST—APPEAL.

GLADYS A. MINING CO. *v.* GROSS.

On appeal from the refusal of the local office to entertain a protest against a mineral application, the appellant is not required to serve the applicant with notice thereof.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (P. J. C.)

It appears that S. E. Gross filed mineral application No. 1696 for the Milwaukee and other mining claims, in Pueblo, Colorado, land district, and, after the period of publication, there was a protest filed by the Gladys A. Mining Company, which was dismissed by the local officers. The company filed its appeal, and your office dismissed the same, for the reason that notice thereof was not served on the applicant; and also held that the charges were insufficient to warrant the ordering of a hearing.

The protestant appealed, and a motion has been filed to dismiss the appeal, for the reason that notice thereof was not served on the applicant.

In view of the fact that the protestant has, since taking its appeal, filed a formal withdrawal of its protest against this entry, it would hardly seem necessary to discuss any other feature of this case, but it may not be amiss to call your attention to the fact that it has been decided, in the case of Henry C. Evans (23 L. D., 412), that

On appeal from the denial of an application to contest an entry, the appellant is not required to serve the entryman with notice thereof.

Hence, the action of your office in dismissing the appeal because service thereof was not made on the appellee was erroneous.

The decision of your office, however, that the charges in the protest do not state a cause of action, is affirmed.

Notwithstanding there has been filed a withdrawal of the protest, it is deemed advisable to pass upon the sufficiency of the protest, for the reason that the Gladys Company, in its withdrawal, seems to rely on the decision of *Gowdy et al. v. Kismet*, etc. (22 L. D., 624), concerning the requirements of publication notice. But since the withdrawal was filed that decision has been modified (24 L. D., 191). That the protestant may not, therefore, have its case disposed of under a mistaken view of the requirements in regard to the contents of publication notices, the matter in controversy is disposed of on its merits.

PRACTICE—NOTICE BY PUBLICATION—MOTION TO DISMISS.

POPP v. DOTY.

Service of notice by publication is defective, if a copy of the notice is not mailed by registered letter to the defendant at his post-office of record.

On objection to the service of notice the contest should be dismissed, if the ground of objection is well taken, and the contestant does not, at such time, apply for an alias notice.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (C. W. P.)

This case involves the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 21, and the N. $\frac{1}{2}$ of of the SW. $\frac{1}{4}$ of Sec. 28, T. 13, R. 5 E., Oklahoma land district, Oklahoma Territory.

On October 27, 1891, Samuel A. Doty made homestead entry No. 2011 of said land.

On October 2, 1893, Fred Popp filed affidavit of contest, charging abandonment. Notice was issued for a hearing on September 26, 1894, and on affidavit of Popp, that he was unable to find the defendant, service of notice was directed to be given by publication. At the hearing the defendant appeared by his attorney specially, and moved that the contest be dismissed on the ground that no proper notice of contest had ever been served upon him. Said motion was overruled, and the contestant called as a witness in his own behalf. The attorney for the defendant objected to the taking of any testimony and refused to continue in attendance.

On February 2, 1895, the local officers decided in favor of contestant, and, upon appeal, your office, on October 2, 1895, remanded the case to the local office for further hearing, on the ground that the notice of contest was defective. Popp appeals to the Department.

The record shows that the name of Doty's post office of record was changed from "Four Mile" to "Miami," Indian Territory; and that due publication of the notice was made.

Popp's attorney made affidavit that he presented a letter addressed to Doty at "Four Mile", Indian Territory, to the postmaster at Oklahoma City, and requested him to register same, but that the postmaster returned said letter, for the reason that there was no such post office. On the other hand, R. A. Davis, registering clerk at Oklahoma City post office, made affidavit that he never refused said letter, and if such a letter had been presented he would have accepted and registered the same, or given information as to the proper place to send it.

Popp, in his appeal, excepts to the consideration of the latter affidavit, on the ground that he was not served with a copy. But it appears to have been filed in the local office long before the decision was rendered by the register and receiver, and the objection applies equally to the affidavit of Popp's attorney, which does not appear to have been served on Doty or his attorney.

Independently of these affidavits, it appearing that a copy of the notice was not mailed to Popp by registered letter at his post office of record, as required by Rule 14 of Practice, the motion of the defendant should have been granted and the contest dismissed. In order to gain jurisdiction of the parties where notice is served by publication, it is necessary to follow strictly the requirement of the rule.

Upon the presentation of the motion to dismiss, if Popp had applied for an alias notice, the same would have been granted; but he elected to stand upon the sufficiency of the notice, and it being fatally defective, no jurisdiction thereunder was acquired by the local officers. Under the circumstances, the contest must fall.

Your office decision is accordingly modified, and the contest dismissed.

HOMESTEAD COMMUTATION—ACT OF JUNE 3, 1896.

ANDERS G. HASSELQUIST.

An order directing the cancellation of a prematurely commuted homestead entry will not defeat action under the confirmatory provisions of the act of June 3, 1896, if such order has not become final.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (W. C. P.)

Anders G. Hasselquist has filed an appeal from your office decision of December 17, 1895, holding for cancellation his commutation cash entry for the SE. $\frac{1}{4}$ of Sec. 26, T. 37 N., R. 8 E., Wausau, Wisconsin land district.

Hasselquist made homestead entry for this land on June 20, 1891, alleging settlement December 20, 1890, and was allowed to commute said entry to cash entry on August 28, 1891, the final proof showing residence on the land from December 29, 1890. Your office by decision of February 21, 1893, held that inasmuch as the original entry was made after the passage of the act of March 3, 1891 (26 Stat., 1095), the claimant must show residence and cultivation for a period of fourteen months to entitle him to commute the same. Upon appeal to this Department that decision was affirmed August 20, 1895. No motion for review of that decision having been filed, your office, by letter of December 17, 1895, held said entry for cancellation, and directed the local officers to notify the entryman that unless he should furnish supplemental proof as required or appeal from said decision holding his entry for cancellation within sixty days, it would be canceled without further notice.

The appeal forwarded is in the following words:

The above named Anders G. Hasselquist hereby respectfully appeals to the Hon. Secretary of the Interior from your decision in the above entitled matter, dated December 17, 1895, holding said entry for cancellation, and assigns as grounds for appeal that he believes his title to be valid under his commutation entry. Under

that belief, and after the commutation receipt had been issued, he sold said land in good faith, and the purchaser thereof has not had his day in court.

The fact that the land was transferred after issuance of final certificate affords no grounds for reversal of the decision holding the entry for cancellation. A purchaser of land prior to issuance of patent takes only the interest of his grantor and is charged with notice of the law and the supervisory control of the Commissioner of the General Land Office over the action of the local officers. (*Bender v. Shimer*, 19 L. D., 363.)

While the above in the general rule, and while under that rule the appeal here presents no sufficient ground for the reversal of the action of your office, yet the facts presented by the record in this case seem to bring it within the confirmatory provisions of the act of June 3, 1896 (29 Stat., 197), the first section of which reads as follows:

That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by the homestead entryman on the land prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs, and legal representatives, as of the date of such final certificate of entry and a patent issue thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman subsequent to the date of such final certificate: *Provided*, That this act shall not apply to commutation and homestead entries on which final certificates have been issued, and which have heretofore been canceled when the lands made vacant by such cancellation have been re-entered under the homestead act.

If this entry comes within the purview of said law it was confirmed notwithstanding the decision of this Department directing its cancellation. The decision of your office, holding said entry for cancellation, is set aside and the case is returned to your office for further consideration and appropriate action under said confirmatory act.

TIMBER LAND—SETTLEMENT CLAIMS.

BUCKLEY v. MURPHY.

The right to take lands chiefly valuable for the timber thereon under the settlement laws is limited to claims asserted in good faith for the purpose of securing a home.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (J. L. McC.)

The case above entitled is one of a considerable number of cases in which pre-emption filings were made, or attempted to be made, on the

morning of the day when lands were opened to entry or filing, in township 66 N., R. 19 W.; Ts. 67 N., Rs. 18, 19, and 20 W.; Ts. 68 N., Rs. 18, 19, and 20 W.; T. 67 N., R. 21 W., all in the Duluth land district, Minnesota.

Lands in the eight townships above described were opened to filing or entry on eight successive days in June, 1893.

On the day when each township was opened to filing or entry, a considerable number of pre-emption declaratory statements were received at the Duluth land office, by mail, which delivered the same at about eight o'clock a. m. The aggregate number of filings thus received were one hundred and twenty-four. They were at once noted on the respective plats and tract-books of the township named.

The declaratory statements above referred to were accompanied by notices of the pre-emption claimant's intention to make final proof.

When the door of the local office opened, at 9 o'clock a. m. of the days respectively when the townships above named were opened to entry, a line of applicants was found who presented applications to enter under the timber and stone act certain described lands embracing a part of those already applied for (*supra*) by applicants under the pre-emption law. The timber land applications were rejected, by the local officers, because they held that the applications of the pre-emption claimants to make final proof so far reserved the land covered thereby as to prevent its being properly entered by others, pending the consideration of said applications. (See case of L. J. Capps, 8 L. D., 406.)

Counsel for certain of the timber land applicants reported the above facts, in substance, to your office, and asked for information. Correspondence between your office and the local officers ensued, as the result of which your office sent instructions to the local officers, the gist of which is contained in the following extract from your office letter of July 19, 1893:

In my opinion the instructions on page 64, circular of February 6, 1892, clearly intended that no steps toward making final proof on filings should be taken until after the expiration of three months from the filing of the township plats of survey in your office. This rule was doubtless intended to allow adverse claimants an opportunity to place their claims of record; and this object would be defeated by permitting publication of notice of intention to submit final proof, which would constitute a segregation of the land, and thus debar the entry or filing of another within the three months. . . . You will therefore vacate any notice of intention to make final proof which is now being published in opposition to this opinion; and if no objection exists at the expiration of three months from date of filing plat of survey in your office, notice of intention to submit final proof can then be given.

The above instructions were carried into effect, and the timber-land applicants for land covered by pre-emption filings were allowed to complete their filings by paying their fees.

On September 23, 1893 (a few days before the expiration of the three months above mentioned), the register of the Duluth land office wrote to your office, recommending that a special agent be detailed to super-

vise an investigation of these claims, intimating that there was an attempt to defraud the government, the extent and particulars of which it would be difficult to determine in the absence of reliable testimony, as in nearly all cases tried before the office the testimony was directly contradictory; that the government would be better able to arrive at the facts of the case

by an examination of the land before the claimants got away, for it is a well known fact that ninety per cent of the entrymen in this district under the homestead or pre-emption law abandon their claims as soon as final proof is made and are thereafter hard to find; and if found they all stick together and help each other out, and the government is beaten.

The above recommendation was denied by your office letter of November 3, 1893, in which the local officers were directed as follows:

You are advised that any filings placed of record prior to the opening of your office on the day when said lands became subject to filing and entry are illegal, and final proof can not be based thereon. In such cases you will allow the claimant of record whose filing or entry is legal to publish notice of intention to submit final proof, duly citing all adverse claimants of record in accordance with the ruling in *Reno v. Cole* (15 L. D., 174), and advise the claimant whose filing was erroneously placed of record that his right, so far as requiring him to place his claim of record within three months after filing of the plat of survey is concerned, will not be affected by the erroneous action of your predecessor. Should there be cases in which each of two or more claimants have a legal filing or entry covering the same land, any or all of them who desire to do so should be allowed to publish notice of his intention to submit final proof, duly citing the adverse claimants; and if a protest is filed in either case, the hearing should be had on or subsequent to the date the last claimant offers his proof.

Other correspondence ensued, which it is not necessary to set forth in detail. It is sufficient to say that each of the pre-emption claimants, as suggested above, filed an amended pre-emption declaratory statement; that a considerable number of these pre-emption claims were contested by claimants under the timber and stone act; that hearing followed to determine their respective rights; and that, whatever the decision of the local officers might be, an appeal was (generally) taken to your office, and from your office to the Department.

The land in the several townships hereinbefore described is situated in the northeastern part of Minnesota. In numerous cases coming before the Department on appeal, it is shown by competent witnesses that there are from fifteen hundred or two thousand to three thousand dollars' worth of timber on each quarter section. The pre-emptors or their witnesses testify that it will cost fifty or sixty dollars per acre to clear the land of its timber; and that, after it has been so cleared, it will be worth for agricultural purposes five or six dollars per acre.

These statements are substantially corroborated by the investigation of the government and the records of this Department. According to the forestry map prepared to accompany the United States census reports, this region is among the most heavily timbered of any except a narrow strip close upon the Pacific coast. Its growth of pine timber

is unsurpassed anywhere. This land is comparatively worthless, however, for anything except timber. Surveyors recognize four grades of fertility in soil. The field notes of survey for the townships now under consideration report the soil as being, almost universally, fourth grade (the poorest quality). Thus, of township 68 N., 20 W., the surveyor says: "The soil is of a very poor quality, also being stony; the entire township is covered with a heavy growth of timber." The line as surveyed between sections 11 and 20, he says, "leaves swamp and begins to ascend a rocky ridge, through heavy timber." Between sections 10 and 11 of the same township, he reports the line runs along "the top of a granite ledge; . . . soil fourth rate, stony." Of township 66, range 19, the surveyor reports: "This township is mainly rolling, and is heavily timbered, with a mixed growth; there is considerable pine on the ledges and rolling ground. Pelican river, flowing across the SE corner, affords the means for lumbering." Of township 68, range 18, the surveyor reports: "This township is heavily timbered; it is mostly rolling and broken, except the swamps, of which there are quite a number. The soil is sterile." Such expressions are repeated by the score throughout the several townships here under consideration. This reference to the character of these lands is pertinent in view of the ruling of the Department that,

While lands chiefly valuable for timber and stone, and unfit for ordinary agricultural purposes, are not excluded from settlement by the act of June 3, 1878, yet settlements on such lands should be carefully scrutinized, as the exception in said act is in favor of the *bona fide* settler; [and] a settlement for the purpose of securing the timber on the land, or for any other purpose than establishing a home, is not a *bona fide* settlement within the meaning of the act. (Syllabus to *Wright v. Larson*, 7 L. D., 555.)

The lands here in controversy are distant, in an air line, from forty to fifty miles, and by the nearest practicable route from fifty to seventy miles, from the nearest village, post office, or market—to wit, Tower, Minnesota. Every article needed by the pre-emptor in supporting his own existence or improving his claim must be brought this distance, partly by steamer across Vermillion lake; partly by canoe down Vermillion river; thence by wagon for another part of the way; and finally "packed" by the pre-emptor upon his own back for a distance of from five to fifteen miles, dependent upon the location of his claim.

The most of these pre-emption claimants allege as an excuse for their almost continual absence from their claims, and for not having built better houses or made more extensive improvements, the fact that they were very poor. But it is shown, in most of the cases of this class now before me, that each of these pre-emption claimants paid certain so-called "locators" from fifty to one hundred and sixty dollars, for showing them what tracts were vacant. (This aside from the services of a surveyor, subsequently, to find the quarter-section corners and "stake out" the claim.) If these pre-emption claimants were so poor, and were in good faith seeking homes for themselves and their families,

it seems unaccountable that they should pay such a price for being led into the almost inaccessible depths of a vast wilderness, to one of the most infertile portions of the continent, and pay for such lands by taking it under the pre-emption law, when in order to reach them they were compelled to cross hundreds of thousands of acres of more productive land, less difficult to prepare for cultivation, and open to homestead settlement and entry "without money and without price" (except the fees and commissions of the local officers).

It is worthy of notice that in none of the contests herein referred to does it appear that the pre-emption claimant, if married, had brought his wife, or any other member of his family to the land. In such cases there is generally some excuse presented, more or less plausible on its face, for the wife's absence. A physician's certificate showing that the wife has been continuously ill and unable to remove to her husband's "home" during the years of his alleged residence upon his pre-emption claim, appears to be as uniform and indispensable an adjunct as an affidavit of citizenship.

Twenty or more of the one hundred and twenty-four pre-emption claims hereinbefore referred to have been contested by timber-land applicants. The testimony given by the opposing parties in these cases is usually conflicting, and irreconcilable upon any theory consistent with the veracity of the respective witnesses. The pre-emption claimants and their witnesses testify to amply sufficient residence, cultivation, and improvement to warrant the issue of final certificate and patent. The contesting timber-land claimants testify that the "house" built by the pre-emption claimant is a small and uninhabitable "shanty"; that there has been no "improvement" beyond the cutting down of trees about the shanty sufficient to furnish the logs to build it; and that the alleged "residence" on the part of the pre-emptor has consisted of occasional and rare visits to the land in controversy.

The leading witnesses for each pre-emption claimant whose filing is alleged to be fraudulent are almost uniformly other pre-emption claimants who are also charged with fraud. Thus in the case of Halstein Svergen, now before me, his witnesses are Simon Maley and Peter Eck, whose cases are also now before me, their pre-emption final proofs having been protested on charge of fraud, and John Quaderer, whose filing was ordered canceled upon that ground by departmental decision of October 3, 1896 (342 L. & R., 149). And so on, throughout the entire list.

While the preceding history of transactions connected with the opening to filing and entry of the townships hereinbefore named, can not properly be considered as evidence controlling individual cases, yet it shows a condition of affairs of which the Department, in its general supervision of the disposal of the public lands, must take notice, in connection with the facts disclosed upon the examination and consideration of the record in each case.

In the particular case which the Department is now called upon to consider, Barbara Murphy, on June 16, 1893, filed pre-emption declaratory statement for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 34, the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 35, T. 67 N., R. 19 W. This filing being held illegal because of having been received and allowed by the local officers before nine o'clock of the day when the land became subject to filing and entry, she made a second filing on December 28, 1893. She based her right to file such pre-emption declaratory statement upon the alleged settlement by her husband, John H. Murphy, in December, 1890.

On August 2, 1893, William Buckley filed timber-land statement for the same land.

This conflict of claims resulted in a hearing, at which testimony was taken that elicited the following facts:

The land in controversy is rolling, rough, and rocky; it has no value whatever except for the pine timber growing upon it. At the date of the pre-emptor's final proof and of the hearing there was no sign of cultivation of any part of the land; the only improvement was that the underbrush had been cut from about half an acre of the land; the only indication that any one had ever settled or resided upon the land was a log shanty, estimated to have cost \$18 or \$20. This shanty had a new floor in it—but this floor had been put in after the date of the timber-land entry. This had not been done by the pre-emption claimant's husband, for he had died a year and a half before it was placed there; and not by the pre-emption claimant herself, for she had never heard of its existence.

Mrs. Murphy, the pre-emption claimant, testifies that she and her husband were married in Michigan in 1882; that they moved to Duluth in 1883; that at the date of her husband's alleged settlement on the land in controversy (December 26, 1890), he and she were "living together right along" in West Duluth (between 125 and 150 miles from the land), where he was engaged in his business as carpenter, and continued to live together "right along" until his death (September 17, 1892); she knows that he left home with the avowed intention of going to the land in controversy *once*; she never went to the land, and does not know where it is.

The local officers, as the result of the hearing, rendered joint decision, recommending that Mrs. Murphy's pre-emption filing be canceled. She applied to your office, which, on February 25, 1896, affirmed the judgment of the local officers. Thereupon she appeals to the Department.

Her counsel, in said appeal, copies, verbatim or in substance, each sentence of the finding of your office decision, and alleges that it was an error; but he makes no reference to any testimony showing it to have been erroneous. He complains that your office erred "in refusing credit at final proof for residence prior to filing"—but ignores the fact that the testimony does not show an hour's residence prior to filing. At

the hearing, he drew from the pre-emption claimant a statement of the fact that she was a widow, in poor circumstances, with three little children; but this does not warrant your office or this Department in awarding to her a quarter-section of the public land without compliance with the law in any respect or degree upon her part or that of her deceased husband.

The decision of your office was clearly correct, and is hereby affirmed.

SETTLEMENT RIGHT—OKLAHOMA LANDS.

FRAZIER ET AL. v. TAYLOR.

Under the conditions attendant upon the opening of lands to settlement in Oklahoma the sticking of a stake may be recognized as initiating a settlement right, as against competing settlers on the day of opening, but such act will not be available as against subsequent settlers if not followed, within a reasonable time, by additional acts evidencing an intention to make a bona fide settlement.

Secretary Bliss to the Commissioner of the General Land Office, April
(W. V. D.) 29, 1897. (G. C. R.)

James M. Frazier has appealed from your office decision dated October 8, 1895, which dismisses his contest against the homestead entry made October 16, 1893, by Willie G. Taylor, for the SW. $\frac{1}{4}$ of Sec. 28, T. 28 N., R. 1 W., Perry, Oklahoma.

Your said office decision reversed the finding of the register and receiver, which sustained the contest, and recommended the cancellation of the entry.

It appears that Alexander H. Sims also filed a contest, but upon the day of hearing (October 31, 1894,) he made default, and his contest was dismissed.

The land is a part of the Cherokee Outlet, and was opened to settlement September 16, 1893,—one month before Taylor made entry.

There is little or no controversy over the facts, which appear to be as follows:

Frazier had learned that the land was vacant, unimproved and uninhabited, and on October 1, 1893, he, in company with his father, mother, two brothers and a sister, settled upon it. He was twenty-six years old, and unmarried. He took with him to the land eight head of horses, a plow, wagon and harness, household goods, etc. He erected a tent, into which he and his father's family moved. With the assistance of his father and brother, he at once erected a house, fourteen by sixteen feet, which was completed for occupancy in about one week from date of settlement. At date of hearing, he had fenced about ninety acres of the land, had broken fifty acres and had sowed twenty acres to wheat. He, with his father's family, thereafter continuously resided on the land, and had purchased additional farming implements. The next day after he settled, he went to Perry to make

entry of the land; he remained there three or four days and returned to the land, being unable, for some reason, to obtain his entry; he assisted in the improvements, until October 16, 1893, when it appears that he presented his homestead application for the land; finding that Taylor on that day had made entry thereof, he at once filed his contest affidavit, alleging, in substance, his prior settlement upon the land, and that he had made the improvements above described. The testimony shows that he in fact was the prior settler, and that Taylor, the entryman, never made any settlement, or performed any act showing his intention to settle, until October 24, 1893.

It appears that Taylor made the race, with other intending settlers, on September 16, 1893; that he stuck a stake on another tract, where it remained until September 27, 1893; he then learned that another person had preceded him to that tract, and on the next day (September 28) he took the same stake and stuck it on the adjoining tract—supposing he had placed it on the land in controversy.

He testified that the stake was two and a half feet long, three inches wide, and had attached thereto a white muslin flag; inscribed on the flag and on the stake were the words: "This claim taken by W. G. Taylor." When, on October 1, 1893, Frazier erected his tent on the land, he discovered this flag, and saw Taylor's name, with the inscription as given above. Frazier began to investigate the situation of the lines and corners, and admits that he then thought that Taylor's flag was on the land; he thereupon plowed a furrow on what he supposed was the west line of the claim, and this furrow was west of the place where Taylor had stuck the stake. Subsequently, he had a surveyor run out the lines of the land, when he discovered that Taylor's flag had been placed about six rods west of the west line of the land. Neither Taylor nor his witnesses denied that the flag was in fact placed on the tract adjacent to and west of the one in controversy, although Taylor doubtless thought he had placed it on the land he afterwards settled on, being the land in question. From September 28, the day Taylor thought he placed his flag on the land, until October 5, following, he was not on the land; but upon the latter date he went to the land, and informed Frazier's brother, then on the land, and living in the tent erected by contestant, that he (Taylor) claimed the tract, and called attention to the flag.

It will not do to say that the mere placing of a flag on the public land is such an evidence of settlement as will in all cases defeat the rights of one who in good faith settles upon the land subsequently. In the general rush for lands on the day of opening, when thousands are competing, he who reaches the land first and gives notice of his intention to settle by the mere sticking of a stake will by such slight act defeat a slower man in the race. But such an act should in a reasonable time be followed by the performance of additional acts, evidencing the settler's intention to make a bona fide settlement.

Even if Taylor had, in fact, put his stake on the land, he at once left the tract to go to see his "cousin"; he did not return to the land until six days had elapsed; he gives no reason for not performing some substantial act of improvement, and he still postponed his settlement or doing anything more in relation to the land until after Frazier had been there more than three weeks.

Under this state of facts, Frazier has the superior right to the land. Your said office decision is accordingly reversed. Taylor's entry will be canceled, and Frazier's application will be allowed.

TIMBER LAND PURCHASE—APPLICATION.

COFFIN *v.* NEWCOMB.

An applicant for the right of timber land purchase must show that the land applied for is free from adverse occupancy, and that he has made no other application to purchase under the timber land act.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (J. L.)

This case involves the NE. $\frac{1}{4}$ of section 26, T. 12 N., R. 1 E., Humboldt meridian, Humboldt land district, California.

On June 16, 1885, William H. Newcomb made homestead entry No. 2440 of said tract.

On June 17, 1885, William H. Coffin filed his pre-emption declaratory statement No. 5672 for said tract, alleging settlement on March 20, 1885.

The official map of said township was suspended on February 15, 1886, and the suspension was removed on June 14, 1892. In the interval one Silas W. Epps contested Newcomb's entry. Said contest was dismissed by departmental decision of April 14, 1891 (217 L. and R., 170), holding in substance that during the period of suspension settlers were not obliged to reside upon, or improve and cultivate their claims.

On August 4, 1892, Newcomb filed his relinquishment to the United States, and his entry was then canceled. On August 5, 1892, in accordance with the act of June 3, 1878 (20 Stat., 89), entitled "An act for the sale of timber lands in the States of California" etc. etc., Newcomb filed his application to purchase said tract for \$2.50 per acre, and also his sworn statement as required by the second section of that act; and on the same day, August 5, 1892, the register issued the notice for publication required by the third section of the act, and fixed October 21, 1892, as the day for Newcomb to make his final proof, and requested all persons claiming adversely to file their claims.

Coffin appeared and filed his claim under his preemption declaratory statement aforesaid, and filed his protest alleging in substance (not literally) the following grounds of objection to Newcomb's proposed timber entry:

- (1) That he (Coffin) settled upon the land in March, 1885.

(2) That the survey of the township was suspended in 1886.

(3) That the suspension was removed in June 1892.

(4) That on the second day of August 1892, he (Coffin) again took up his residence upon said land and is now living upon said land with his family consisting of a wife and three children.

(5) That said Newcomb made his timber filing upon said land on the 5th day of August, 1892; and that he (Coffin) was an actual settler upon said land, and that there were improvements upon said land, at the time when said timber filing was made.

(6) That said land is agricultural land and not timber land.

Wherefore Coffin prayed that the timber filing of Newcomb be canceled, and that he (Coffin) be allowed to complete his pre-emption claim and enter the land.

On October 22, 1892, Newcomb offered his proof as advertised; a hearing was had, and witnesses were examined and cross-examined in the presence of both parties and their attorneys.

On January 12, 1894, the local officers recommended that Newcomb be allowed to complete his timber purchase, and that the contest of Coffin be dismissed.

Coffin appealed; and while his appeal was pending in your office, to wit: on April 16, 1894, Coffin filed a motion for a rehearing or new trial of the case, upon the ground of newly discovered evidence, supported by affidavits and copies of official records.

On June 21, 1895, your office denied the motion for a rehearing, affirmed the decision of the local officers, approved Newcomb's final proof, and held Coffin's declaratory statement for cancellation.

Coffin has appealed to this Department.

Newcomb filed a carefully prepared answer to Coffin's motion for a rehearing. A comparison of the motion and the answer shows the following undisputed facts:

(1) On October 2, 1884, Newcomb filed an application to purchase the NW. $\frac{1}{4}$ of section 10, T. 11 N., R. 3 E., Humboldt meridian, under the timber land act of June 3, 1878, and also his duplicate "sworn statement" as required by said act. (2) Notice of the application was duly published for sixty days. (3) In the meantime, on December 11, 1884, the survey of that township was suspended. (4) On January 3, 1885, the sixty days for publication of notice having expired, Newcomb tendered proof and payment. (5) A new map of the township was filed on November 22, 1889. And (6) "said statement was never withdrawn from the land office and is now on file therein among the papers of said office."

In explanation of said admitted facts Newcomb in his answer said:

November 22, 1889, a new survey and plat was filed, changing the lay of the rivers and streams in said township, and also changing the location of said NW. $\frac{1}{4}$ of said section 10 over a mile from where it lay on the old plat. Affiant further says that immediately after the new survey was filed in the local land office, he went upon the NW. $\frac{1}{4}$ of said section 10 as shown by the new plat and found the same to be entirely

different land from that he had sought to purchase from the government; that the said claim as located on the new plat has no timber upon it and was entirely worthless to this affiant or to any one else; that when applications were received upon the new survey, there was a great rush and a great crowd of people seeking to file upon the lands in said township, and affiant was prevented from filing upon the land covered by the NW. $\frac{1}{4}$ of said section ten as it appeared on the old plat; that affiant accordingly made application to get his right to file a timber claim back, and he was informed by S. C. Boom, the then register, and R. W. Hutchins the then receiver of the land office, and by B. F. Bergen the then special agent of the Land Department, that no action upon the part of the affiant was necessary, that if the new survey changed the location of his claim, he was at liberty to abandon his filing without prejudice to his filing another timber application.

An examination of the old and new maps of said township together, does not corroborate but contradicts Newcomb's statement that the new map changed the location of the NW. $\frac{1}{4}$ of section 10 over a mile from where it lay on the old map. In fact the change, if any, was slight and inconsiderable. And an examination of the tract book in your office shows, that said quarter section is yet vacant, and unclaimed by any other person; so that it remains reserved by Mr. Newcomb's application to purchase and publication of notice.

The facts stated and verified *prima facie*, in support of the motion for a rehearing, were newly discovered evidence in respect to which Coffin had not been guilty of laches. They are material and important in this case. Your office erred in denying the motion for a rehearing; and in assuming without inquiry that Newcomb's explanation was true, and in holding that his failure to purchase the tract formerly applied for under the said act was due to no fault of his own, and in concluding that his rights in the premises were not prejudiced thereby.

The "act for the sale of timber lands" aforesaid, in section 2, requires, that the applicant shall file under oath a written statement in duplicate, setting forth, among other things, (1) that the tract is uninhabited, (2) that it contains no improvements except for ditch or canal purposes, "save such as were made by or belonged to the applicant," and (3) that "deponent has made no other application under this act." Each one of these specifications is an essential condition precedent to the acquisition of a right to make a timber purchase. Section 3 of the act requires the applicant to prove that the tract was "unoccupied and without improvements other than those excepted." The record and the testimony in the case show beyond doubt, (1) that on August 5, 1892, when Newcomb filed his timber purchase application and sworn statement, the tract was, and since August 2, 1892, had been, occupied and inhabited by Coffin, (2) that there were on the tract improvements, which had not been made by and did not belong to Newcomb, and (3) that Newcomb had made another application to purchase timber land under the act of June 3, 1878. In consequence of the failure of each one of these three conditions precedent it follows, that Newcomb's application to purchase the tract in controversy must be denied. Moreover his allegation that "the tract is unfit for cultivation" is not sustained

by a preponderance of the evidence, and it is discredited by the fact that he made homestead entry of the tract in 1885, and resided upon it until some time after the suspension of the township map in February, 1886.

It is proved that Coffin made his first notorious settlement on March 20, 1885, by cutting down trees and making four logs, which he laid in the form of a square foundation for a house, in a conspicuous place on the tract. Within three months thereafter, on June 17, 1885, he filed his declaratory statement at the land office. In the month of August 1885 he returned to the land and began to cut brush for a clearing, but was taken sick in the woods and was obliged to stop work. The map was suspended in February 1886. After he was informed of the removal of the suspension, on August 2, 1892, he returned to the tract and resumed his residence thereon, occupying and living in a house or cabin built by one Hildreth. He immediately began to build for himself a house twenty-four feet long by sixteen feet wide; and to clear a patch for a garden. In September he moved his family consisting of his wife and three children upon the place, and he and they continued to reside there until the day of the hearing, with intent to maintain his home there to the exclusion of a home anywhere else. Coffin's claim appears to have been made and prosecuted in good faith. It is based upon his settlement made and his pre-emption declaratory statement filed in 1885; and also upon his rights as a *bona fide* settler, occupant and resident on and after August 2, 1892.

The act of Congress under which Newcomb claims, in section 1 provides: "That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States." Newcomb's application to purchase being eliminated from this controversy, Coffin remains in possession free to prosecute his claim either as a pre-emption or as a homestead, as he may be advised.

See cases of *Hughes v. Tipton*, 2 L. D., 334, and *Block v. Contreras*, 4 L. D., 380; Also *Crooks v. Hadsell*, 3 L. D., 258; *Houghton v. Junett*, 4 L. D., 238 and *F. E. Habersham*, 4 L. D., 282, and many other cases since in accordance with the views herein expressed.

It does not seem necessary to prolong this controversy by directing a rehearing as asked by Coffin.

Your office decision is hereby reversed. Newcomb's final proof is rejected, and his application to purchase the NE. $\frac{1}{4}$ of section 26, T. 12 N., R. 1 E., Humboldt meridian, California, is hereby denied. Coffin is left at liberty to prosecute his claim to said tract under the pre-emption or homestead laws as he may be advised.

RAILROAD GRANT—CERTIFICATION—SCHOOL INDEMNITY SELECTION.

ST. PAUL AND SIOUX CITY R. R. CO. *v.* STATE OF MINNESOTA.

A certification under the act of August 3, 1854, of lands on account of a railroad grant that were, at the date of the grant, embraced within a pending *prima facie* valid school indemnity selection, is no bar to the subsequent approval of such selection.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (F. W. O.)

The St. Paul and Sioux City Railroad Company has appealed from your office decision of January 3, 1896, holding for cancellation its listing of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 15, T. 104 N., R. 36 W., Marshall land district, Minnesota.

This listing was first held for cancellation by your office decision of November 5, 1892, for conflict with the indemnity school selection made December 9, 1863. The company appealed, and in its appeal urged that no such selection had been made by the State as described in your office decision, whereupon, by departmental letter of March 8, 1895, you were directed to make further examination of the records, relative to the posting of said school selection, in order to test the correctness thereof, and to make due report to this Department. By your office letter of March 26, 1895, report was made that a careful examination disclosed no such selection by the State, and that the posting, therefore, was deemed to be an error; further, that from a report of the State Auditor it appeared that there was no record by the State of any such selection.

Acting upon this report, by departmental decision of April 13, 1895 (not reported), your office decision of November 5, 1892, was reversed and you were directed to examine the listing by the company with a view to its submission for the approval of this Department. In November, following, the State school list of December 9, 1863, was found in your office, and on November 19th this Department was advised thereof; whereupon, by departmental decision of December 18, 1895, the decision of April 13, 1895, was revoked and you were directed to readjudicate the matter in the light of all the facts presented. It was under this order that you have again considered the matter and again held for cancellation the company's listing holding the land to have been excepted from its grant; from which action it has appealed to this Department.

The land is within the ten mile or primary limits of the grant for said company under the act of May 12, 1864 (13 Stat., 74), and is opposite the portion of the road shown upon the map of definite location filed June 28, 1865, upon which withdrawal was ordered August 10, 1865.

The tract under consideration was selected by the State of Minnesota December 9, 1863, in lieu of a deficit in township 104 N., range 34 W.,

prior to the passage of the act making the grant and the definite location filed thereunder. The State Land Commissioner, in his letter of November 4, 1895, claims that this selection was really made in lieu of the deficiency in township 104 N., range "36" W., and that the substitution of range "34" W., as it appears in the list, was due solely to a clerical error, which, your office decision states,

appears to be true, from the fact that the township plat shows no deficit in township 104 N., range 34 W., as above stated, while the plat of township 104 N., range 36 W., shows a deficit of 62.48 acres—the quantity reported in said list.

Relative to the railroad claim, it appears that on August 23, 1867, the State listed the entire section 15, township 104 N., range 36 W., which list was approved by the Department December 6, 1867. In this list approved in 1867 there appears to have been errors, and a new list correcting the errors was submitted for approval, which was approved June 10, 1866. This latter list included all of said section 15 except the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ —the tract now under consideration.

In the company's appeal it is urged that, as this tract was originally certified on account of the grant, it has passed beyond the jurisdiction of this Department; further, that the State's indemnity selection was invalid because the basis originally assigned did not exist, and that a substitution could not be made in the presence of the adverse claim made by the company.

The certification referred to was under the provisions of the act of August 3, 1854 (10 Stat., 346), which statute was considered by the supreme court in the case of *Weeks v. Bridgeman* (159 U. S., 541), in which it was held that certifications under that act are of no operative effect if the land in fact was excepted from the operation of the grant. The sole question for consideration, therefore, is, Did the State selection serve to except the tract from the grant for said company? If it did, the subsequent approval of the land on account of the railroad grant could not prevent the approval of the land to the State on account of its selection; and the question of the amendment of said selection by the State is solely one between the United States and the State.

As thus presented the case is in all important particulars similar to that of the *Southern Pacific Railroad Company v. State of California* (4 L. D., 437), in which it was held—

In the case at bar the selection was allowed and was *prima facie* valid, and the fact that long after the date of said grant and the time when the company's right attached, it was discovered that said selection was invalid, can not affect the company's claim. Its right had already been fixed, and the selection of said tract being intact upon the record, was such an appropriation of the land as excepted it from the grant. Such was the doctrine announced by this Department in the case between the same parties, reported in 3 L. D., 88.

Your office decision holding the tract under consideration to have been excepted from the company's grant, and holding for cancellation its listing thereof, is accordingly affirmed.

OKLAHOMA TOWNSITE—ADDITIONAL ASSESSMENT.

CITY OF GUTHRIE.

In the disposition of town lots under the act of May 14, 1890, an additional assessment, for the legitimate purposes of the act, is authorized where such action operates uniformly upon all lots alike; but there is no authority for such an assessment where the burden falls upon the unclaimed lots alone.

Secretary Bliss to the Commissioner of the General Land Office, April 29, (W. V. D.) 1897. (P. J. C.)

On August 13, 1894, the city attorney of Guthrie, Oklahoma, addressed a communication to your office, in the nature of a protest against the action of townsite board No. 6, in the matter of its settlement with the city on account of the sale of unclaimed lots, alleging that the board had made erroneous assessments against the fund realized from the sale, thereby diminishing the amount to the extent of several hundred dollars that should have been turned into the city's treasury. Your office, on September 7, 1894, denied the claim, and, in a rather informal way, the matter was brought to the attention of the Secretary of the Interior. The subsequent action of the Department will be recited later on in its chronological order.

By section 4 of the act of May 14, 1890 (26 Stat., 109), it was provided:

That all lots, not disposed of as hereinbefore provided for, shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of any such town.

The instructions of your office of March 31, 1893 (16 L. D., 341), in relation to this particular section, were that:

All moneys for which lots may be sold shall be paid to the disbursing officer of the respective boards, who will issue his receipt therefor, and from the proceeds of such sales, all expenses attending the sale and conveyance of the lots sold shall be paid, and all assessments upon the lots sold shall be deducted from such proceeds.

Upon the conclusion of each sale the board will report to this office the result thereof, the amount of money received from the sale of the lots, the expenses attending the sale and conveyancing, the amount of assessments upon the lots sold, and all claims by members of the boards for compensation for work in connection with such sales.

In pursuance of this act, and the instructions, the board on August 26, 1893, sold some unclaimed lots in East Guthrie, and on October 14, 1893, sold others in Capitol Hill and West Guthrie, and the recapitulation of its report to your office on these sales is as follows:

CAPITOL HILL.

Valuation of the lots sold \$14,900.

Total amount realized.....	\$1, 378. 50
Cost of publication notice.....	\$37. 34
Notary fees	7. 75
Clerk hire	5. 44
Original assessments	149. 00
7½ pr. ct. additional assm't on \$14,900 on original valuation..	1, 117. 50
	<hr/> 1, 317. 03
	61. 47

EAST GUTHRIE.

Valuation \$2,950.00.

Amt. of additional assess't (22½ % on valuation)		\$663.75
Pub. notice of sale	\$36.75	
Pd. W. B. Cherry, notary & clerk	7.75	
Original assessments	29.50	
		<u>74.00</u>
Total		<u>737.75</u>
Total am't of sales		811.00
Total bro't down		<u>737.75</u>
Balance due city gov't		73.25

WEST GUTHRIE.

Valuation \$1,300.

Total amount realized		\$188.25
Publication notice	\$3.91	
Notary fees (5 deeds)	1.25	
Clerk hire56	
Original assessments	19.50	
12½ pr. cent additional assessment on \$1,300, original valuation.	162.50	
		<u>187.72</u>
Balance due townsite		0.53

It will be seen that the total amount realized from the sale was \$2,377.75, and of this sum but \$135.25 was tendered the city, which it declined to receive.

The contention is, that there is no authority for levying the "additional assessments," as shown above. The other items of expense as reported are not objected to.

It appears by a letter from the chairman of the board, dated October 10, 1893, transmitting his report of the sale in East Guthrie, that the additional assessment was made to meet "current expenses." It is charged by the city that the additional assessment in each case was made for the purpose of covering expenses of the board in other matters, aside from those connected with these identical sales, and the money thus obtained was used in this way to the detriment of the city.

On January 30, 1895, Mr. Secretary Smith considered the matter, and held that under the regulations of November 30, 1894 (19 L. D., 334), the board had the authority "to make the additional assessments, which seem to have been rendered necessary by its financial embarrassment." Inasmuch as there was no detailed statement of the actual expenses incurred by the board in making these sales, the whole matter was returned to your office that such an account be stated and then transmitted to the Department for further action.

On January 26, 1897, your office transmitted the reports of the board, the recapitulations of which are quoted above, and, in addition, a report from the board of the time consumed by each member in connection

with the sales. By this latter statement it is shown that the board charges for forty-two days' service, at \$17 per day, which amounts to \$714. It will be observed that in its original report the board does not make any charge "for compensation for work in connection with such sales," as required by the instructions.

The Department took up the matter for consideration, and, on February 6, 1897, Mr. Secretary Francis again sent the matter back to your office for additional information as to the time actually spent by the board in connection with the sales; also to submit a statement of these accounts in conformity with the circular of March 31, 1893.

The whole matter is now before the Department for consideration, and, under the statement of the accounts as submitted by your office, as requested by departmental letter of February 6, 1897, there would be nothing due the city, the amount realized falling short of expenses and assessments about \$89.00. The difference between the two statements is accounted for by the fact that your office adds the per diem compensation of the board, which the latter omitted.

Aside from the fact that the reports of the board were not in conformity with the regulations, in that they did not include the time occupied by its members in connection with the sales, the real point in issue is, whether the board was justified in levying the additional assessments that have been so potent a factor in exhausting the funds that otherwise would have been turned over to the city.

It will be observed that the additional assessments made are not uniform; that against Capitol Hill being seven and a half per cent; East Guthrie twenty-two and a half per cent, and West Guthrie twelve and a half per cent. We are not advised fully the exact purpose for which they were made, but it appears that there was financial embarrassment with the present board by reason of the mismanagement of its predecessor, and that these assessments were levied for the purpose of meeting the current expenses of the board.

By informal inquiry in your office, it is learned that there were no other lots in its control upon which any such assessments were made by the board.

The decision of the Department of January 30, 1895, in this matter, holding that more than one assessment might be made, is based on paragraph 11 of the regulations of November 30, 1894. While it is true that this circular was not in force at the time of the transaction now under consideration, yet the ruling made there might be construed to apply to the circular of March 31, 1893. In this latter circular it is said: "And all assessments upon the lots sold shall be deducted from such proceeds," thus, in effect, authorizing more than one assessment.

But it is apparent that in that decision it was only contemplated that such assessments should be levied as were authorized by law, because your office was called upon to give a detailed statement of the transactions, for the very purpose, it will be assumed, of ascertaining

whether there was any violation of the law or regulations. In view of the showing now made to the Department for the first time, the question arises whether these assessments were authorized.

In my judgment, there was no warrant for this action in the case at bar, either under the law or the instructions. The net proceeds of these sales were in contemplation of the statute a donation to the municipalities, and any diversion of the funds, after paying the legitimate expenses attending the sales and the original assessment required to meet the items contemplated by statute, enumerated in the eleventh paragraph of the circular, November 30, 1894, was illegal. Ample provision is made for the compensation of townsite boards and for their current expenses in each individual case in which they are called upon to act officially, and there would seem to be no excuse for appropriating from the fund arising from such sales money to pay "current expenses" or for any other purpose not immediately connected with the sales.

There can be no objection to making more than one assessment for the legitimate purposes of the act, where it is made uniform, so that the burden will fall on all lots alike, but to make the unclaimed lots alone, as in this case, bear all the burden of the shortage, is, in my judgment, wholly unwarranted.

I can not agree to a construction of the law that will place it in the power of a townsite board to arbitrarily make assessments as their caprice or interest might suggest.

The result of the action of the board in this case was to make the municipality bear the burden of the former delinquencies, and thus deprive it of the fund Congress contemplated should go into its treasury.

The board did not in making its report include its per diem compensation, as required, but evidently paid its members out of the additional assessment. An examination of its weekly reports of service, submitted at the time, shows that individual members put in a total of thirty nine days, amounting in the aggregate to \$228.00, and the settlement should be made on this basis.

Eliminating the additional assessments from the accounts, the settlement should, in my judgment, be upon the following basis:

CAPITOL HILL.

To amount from sale of lots	\$1,378.50
By am't paid for publishing notice of sale	\$37.34
" " notary fees	7.75
" " clerk hire	5.44
" " J. B. O. Landrum, trustee, 9 days at \$7 per day	63.00
" " John T. Taylor, trustee, 17 days at \$5 per day	85.00
" " amount of original ass't on lots sold	149.00
	<hr/>
	347.53
Balance due the city	1,030.97

WEST GUTHRIE.

To amount rec'd from sale of lots.....		\$188.25
By am't paid notary fees	\$1.25	
" " clerk hire56	
" " J. B. O. Landrum, trustee, 3 days at \$7 per day	21.00	
" amount of original ass't on lots sold	19.50	
		<u>42.31</u>
Balance due the city		145.94

EAST GUTHRIE.

To amount rec'd from sale.....		\$811.00
By am't paid publishing notice of sale.....	\$36.75	
" " notary public and clerk.....	7.75	
" " Hugh McCurdie, trustee, 1 day at \$5 per day	5.00	
" " John T. Taylor, trustee, 8 days, at \$5 per day	40.00	
" " J. B. O. Landrum, trustee, 2 days at \$7 per day	14.00	
" amount of original ass't on lots sold.....	29.50	
		<u>133.00</u>
Amount due the city		678.00

This makes a total due the city of \$1,854.91.

The action of your office approving the accounts of board No. 6, in the sale here under consideration, is reversed, and the settlement will be made in accord with this decision.

RAILROAD GRANT-INDEMNITY SELECTION-SPECIFICATION OF LOSS.

BROWN v. NORTHERN PACIFIC R. R. Co.

Railroad indemnity selections, made under the departmental order waiving specification of loss, are valid, and while of record a bar to the allowance of adverse claims. A subsequent designation of losses in bulk in support of such selections, and rearrangement of the losses so designated, tract for tract, to correspond with the selections, can not be regarded as an abandonment of the company's right under the selections as originally made.

Indemnity selections, regular and legal under the existing construction of the grant at the time when made, should be protected under a changed construction of the grant.

Secretary Bliss to the Commissioner of the General Land Office, April 29, (W. V. D.) 1897. (J. L. McC.)

Philander N. Brown has appealed from the decision of your office, dated December 28, 1895, holding for cancellation his homestead entry for the SW. $\frac{1}{4}$ of Sec. 31, T. 132, R. 55, Fargo land district, North Dakota.

The tract lies within the indemnity limits of the Northern Pacific Railroad. It was selected by the company per list No. 7, on April 9, 1883; re-arranged October 12, 1887; February 23, 1892; and November 26, 1895.

On October 14, 1895, Brown made homestead entry for the tract in controversy.

The list filed on April 9, 1883, was not accompanied by a list of the losses within the primary limits which served as bases for the selections. Such a list was in accordance with and (if in other respects proper) recognized as valid by the departmental instructions of May 28, 1883 (12 L. D., 196).

The list filed on October 12, 1887, contained a designation of losses, as required by departmental circular of August 4, 1885 (4 L. D., 90). Such losses were, however, set down "in bulk"—not arranged tract for tract with the corresponding selections.

The list filed February 23, 1892, contained a designation of losses arranged tract for tract, as required by the Department in the case of the Northern Pacific Railroad Company *v.* John O. Miller (11 L. D., 428), and of the Florida Central and Peninsular Railroad Company (15 L. D., 529).

The re-arranged list of November 26, 1895, was rendered necessary by the departmental decision of November 13, 1895 (21 L. D., 412), holding that the grant for the Northern Pacific Railroad Company did not extend east of Superior, Wisconsin.

The appeal contends that Brown's homestead entry (of October 14, 1895, *supra*,) was allowed "prior to any *valid* selection by the company," and that "it was error to hold that a subsequent selection can in any way affect" said entry.

The above is tantamount to an allegation that the several selection lists filed by the company prior to October 14, 1895, were invalid. This contention, however, can not be sustained. The Department has decided, in the case of O'Brien *v.* Northern Pacific Railroad Company (22 L. D., 135), as correctly summed up in the syllabus:

Indemnity selections made under the departmental order waiving specification of loss are valid, and while of record a bar to the allowance of adverse claims. A list in bulk of lost lands filed thereafter in support of such selections does not invalidate the same; nor can a subsequent re-arrangement of said list, tract for tract, to correspond with the selections, be regarded as an abandonment of the company's right under its original action.

It is not alleged, and it does not appear from the record, that the company has ever done anything that can be construed as an abandonment of its selection of the tract in controversy in 1883; and said selection has since that date remained of record, a notice and a bar to the allowance of any adverse claim.

The appellant contends that the selection of 1883,

having been voided by the decision of the Honorable Secretary, dated November 13, 1895, it was error to hold that such alleged selections are a bar to appellant's entry.

This language undoubtedly refers to the decision in the case of the Northern Pacific Railroad Company (21 L. D., 412, *supra*), holding that said company had no grant east of Superior City, and that losses

alleged to have occurred east of Superior City could not be made the basis for indemnity selections in North Dakota.

The allegation that the selection of 1883 was voided by said decision is incorrect. It expressly directed "that the company be allowed sixty days for notice of" said "decision within which to specify a new basis for any of its indemnity selections voided" thereby. In the case of list No. 7, here under consideration, notice was given to the company, as above directed; and within much less than the sixty days prescribed by the Department, the company specified new bases for its selections. Said selections, having been regular and legal under the existing construction of the grant at the time when made, should be protected under the changed construction. (See *Gamble v. Northern Pacific Railroad Company*, 23 L. D., 351.)

The company's selection of the tract in controversy therefore appears to be in all respects valid; Brown's entry for the land covered thereby was improperly allowed; and the decision of your office holding said entry for cancellation is hereby affirmed.

STATE BOUNDARY—RIVER—CHANGE OF CHANNEL.

OPINION.

The boundary between the Indian Territory and the State of Texas is the line of the middle of the main channel of Red river as it existed when Texas was annexed to the United States, and subsequent sudden changes in the current or main channel of said river will not in any way affect the location or position of said boundary line as it lay upon the earth's surface when established.

Assistant Attorney-General Van Devanter to the Secretary of the Interior.
(J. L.)

I have received by reference from your office, certain letters referred to you by the Director of the United States Geological Survey, as follows, to wit:

Four letters from C. H. Fitch, topographer in charge, dated respectively, February 24, March 27, April 3, and April 5, 1897:

A letter from the Commissioner of Indian Affairs dated March 16, 1897:

Two letters from Oscar Jones, United States surveyor, dated respectively March 7, and March 29, 1897:

A letter from W. S. Post, topographer, dated April 1, 1897:

Also two diagrams, showing "cut-offs" in the course of the Red river, which is the boundary between the Indian Territory and the State of Texas:

And I am requested to answer the following question: "Where the Red river, which constitutes a boundary of the State of Texas, has changed its course, will the old bed of the stream remain the boundary, or must the present channel be regarded as such?"

The diagrams show the locations of four cut-offs within a distance of less than forty miles west of the boundary of the State of Arkansas. The most easterly (marked C) is in T. 11 S., R. 27 E.; and it transferred in the year 1895, from the Territorial to the Texan side of the river, a very considerable body of Indian land, in the shape of a pear with a narrow neck or stem. The most westerly (called the "Watson cut-off"), is in T. 7 S., R. 21 E.; and it transferred, probably in the year 1890, from the Texan to the Territorial side of the river a body of Texan land of similar shape. The other two cut-offs (marked A. and B. respectively), are situated in T. 8 S., R. 22 E., and T. 10 S., R. 25 E.; and both transferred in the year 1866, Texan land to the Territorial side of the river. The letters before me show, that all of the cut-offs were caused suddenly by floods and overflows of the waters of Red River; aided probably in one instance by a ditch which the occupants of the land had cut across the narrow neck of the peninsula.

Texas was admitted into the Union by joint resolution of Congress approved December 29, 1845 (9 Statutes 108), in accordance with a joint resolution approved March 1, 1845, (5 Statutes 797). At that time the boundary between Texas and the United States was defined as follows:

The boundary line between the two countries, west of the Mississippi, shall begin on the gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the *western bank* of that river, to the 32nd degree of latitude; thence, by a line due north, to the degree of latitude where it *strikes* the Rio Roxo of Natchitoches or Red river; then *following the course* of the Rio Roxo westward to the degree of longitude 100 west from London and 23 from Washington; then *crossing* the said Red river, and running thence by a line due north to the river Arkansas; thence *following the course of the southern bank* of the Arkansas, to its source in latitude 42 north; and thence by that parallel of latitude to the South Sea. . . .

All the islands in the Sabine, and the said Red and Arkansas rivers, throughout the course thus described to belong to the United States. See treaty with Spain of February 22, 1819 (8 Statutes 254-256), treaty with Mexico of April 5, 1832 (8 Statutes 374), the convention with Mexico of April 21, 1836 (8 Statutes 461), and the convention with Texas of October 13, 1838 (8 Statutes 511).

By the act of July 5, 1848, (9 Statutes 245), Congress voluntarily ceded to Texas one half of Sabine Pass, one half of Sabine lake, and one half of Sabine river from its mouth as far north as the thirty second degree of north latitude. And in the year 1850, by agreement between the United States and the State of Texas (9 Statutes 446, and 1005), the boundaries west of the 100th meridian were changed. But no change has been made in the boundary extending from the 94th to the 100th meridian following the course of Red river. I therefore assume that the boundary between the Indian Territory and the State of Texas, is the line of the middle of the main channel of Red river as it meandered in 1845, when Texas was annexed.

I am respectfully of opinion that a change in the current or main channel of the river does not change or in any way affect the location or position of the boundary line, as it lay upon the earth's surface

when established by the treaties. The river was only a land-mark. The removal of a land mark will not change the line.

On November 11, 1856, Attorney General Caleb Cushing furnished the Secretary of the Interior with his official opinion and advice respecting the question now under consideration (8 Opinions of Attorney General 175). After discussing the legal effect of changes happening by accretion—by gradual and insensible accession and abstraction of mere particles—Mr. Cushing on page 177, said:

But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory the river thus breaks a way, suffers injury by the loss of territory, greater than the benefit of retaining the natural river boundary, and that *boundary remains in the middle of the deserted river bed.*

In the case of *Missouri v. Kentucky*, (11 Wallace 395-401), decided in December 1870, the supreme court of the United States, after reciting that the middle of the bed of the main channel of the Mississippi river was the ancient boundary between Kentucky and Missouri as established by treaties, said:

If the river has subsequently turned its course, and *now* runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States, and the island does not, in consequence of this action of the water, change its owner.

The forty first Congress recognized this rule of law, and legislated accordingly. The boundaries of the States of Iowa and Nebraska and the Territory of Dakota cornered, at the junction of the Big Sioux river with the Missouri river. The middle of the Missouri was the boundary line between Nebraska and Dakota. The river made a bend or loop southward enclosing a peninsula, which was about $2\frac{1}{2}$ miles long and 23 chains and 60 links wide across its neck, and contained 890.12 acres. This peninsula belonged to Dakota. Sometime between 1867 and 1869, the river cut for itself across the neck, a new and main channel, and thus added (so to speak) to the Nebraska side, not only the acres contained in the peninsula, but many more acres contained in the abandoned bed, which soon became dry and arable. In order to end controversies and prevent litigation, Congress by the act of April 28, 1870, (16 Statutes 93) ceded to the State of Nebraska jurisdiction over all the land which the river had cut off from the territory, and established the middle of the new channel as the boundary between the State and the Territory. (See *Phillips v. Sioux City and Pacific Railroad Company*, 22 L. D. 341.

There is no occasion for the Secretary of the Interior to pronounce at this time a formal decision of the question propounded to me. Out of the condition stated, many classes of questions will arise as the settlement of the country progresses; questions concerning the political jurisdiction of the authorities of the State and of the Territory respectively; questions affecting the rights of inhabitants of the Territory

who owned land which abutted upon the river as it formerly ran; questions affecting the rights of citizens of Texas similarly situated; and questions affecting the rights of those citizens of Texas or inhabitants of the Territory, whose lands have been washed away, and either totally or partially destroyed, by the new channel. All these questions can be best determined as they arise, and after hearing the persons interested in them.

I respectfully advise that the surveyors in the field should be instructed to trace, survey, meander and mark with appropriate monuments, (1) the line of the middle of the main channel of the river as it formerly ran; (2) the left bank of the old channel; and (3) the left bank of the new channel; so that township maps may be made showing the fractional subdivisions which will be made necessary by the closing of the surveys on each one of said meandered lines, respectively: They should also be instructed to find out, as far as practicable, the names of all persons claiming lands abutting upon either channel, and the size, location and shape of their respective claims; and to procure, by the affidavits of intelligent and reliable persons or otherwise, other information as to facts and dates likely to be useful in determining any of the questions that may hereafter arise for consideration by the Secretary.

The Director of the Geological Survey, will give all necessary and proper instructions to his subordinates.

Approved April 29, 1897.

C. N. BLISS, *Secretary*.

RAILROAD GRANT—INDEMNITY SELECTION SPECIFICATION OF LOSS.

NORTHERN PACIFIC R. R. CO. *v.* FIEBIGER.

On the rearrangement, tract for tract, of indemnity selection lists, where the losses were originally designated in bulk, the assignment of a loss not included in the original designation works an abandonment of the original selection, to the extent of the tracts selected on account of the new basis.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (F. W. C.)

The Northern Pacific Railroad Company has appealed from your office decision of January 4, 1895, holding for cancellation its indemnity selections covering lots 1 and 4 and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 29, T. 54 N., R. 19 W., Duluth land district, Minnesota, and permitting the homestead entry of Edward Fiebiger, covering said land, made November 4, 1887, to stand.

This tract is within the forty mile or second indemnity belt of the grant for said company. Lots 1 and 4 and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 29, were included in the company's list of selections made

April 23, 1883; and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 29 was included in the list of selections made October 17, 1883.

Both the company's lists were accompanied by a designation of losses, in bulk, equalling the selections, but were not arranged tract for tract with the selected lands.

On June 19, 1891, the company filed a re-arrangement of its list 8, in which the same losses were used as those contained in the original list of April 23, 1883, and arranged tract for tract with the selected lands.

On April 11, 1893, the company filed a re-arrangement of its list of October 17, 1883; and in this re-arranged list the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 19, T. 52 N., R. 13 W., is made the basis for the selection of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 29. This loss was not contained in the original list of October 17, 1883, and must therefore be treated as a new selection as of the date of its presentation (April 11, 1893).

So far as the same losses were used in the re-arranged lists as were contained in the original lists, the original selection is not invalidated, and the company's rights date as of the filing of the original lists. See *O'Brien v. Northern Pacific R. R. Co.* (22 L. D., 135); *St. P., M. & M. Ry. Co. v. Lambeck* (Id., 202).

Fiebiger's entry having been made November 4, 1887, the same might be permitted to stand as to the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 29, included in the selection of October 17, 1883, which was abandoned by the company's re-arranged list of April 11, 1893. As to the balance of the land covered by his entry, the company's selection of April 23, 1883, takes precedence. His entry will therefore be canceled, unless, after due notice, he elects to retain the said SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$.

Your office decision is accordingly modified.

TIMBER LANDS—SETTLEMENT CLAIM.

FERST *v.* SOLBERG.

Land covered by the bona fide settlement claim of a pre-emptor is not subject to timber land purchase; and the applicant for the right of purchase cannot take advantage of irregularities in the assertion of the pre-emption claim.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (C. J. W.)

September 11, 1893, Felix Ferst filed timber and stone statement No. 1316 for NE. $\frac{1}{4}$ of Sec. 23, T. 67 N., R. 20 W., Duluth, Minnesota.

June 20, 1893, Hans Solberg filed declaratory statement No. 5908, and on January 11, 1894 filed a new declaratory statement, No. 6072, for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of same section. Notice of intention to take final proof issued to both parties, August 10, 1894.

August 10-20, and 22, 1894, the proofs of both parties were submitted, and hearing had before the local officers. March 8, 1895, the

receiver filed his decision, rejecting the proof of Felix Ferst, and approving the proof of Hans Solberg. On March 22, 1895, the register filed his decision, rejecting the proof of Hans Solberg, and approving the proof of Felix Ferst. Ferst appealed from the decision of the receiver, and Solberg from that of the register. Ferst also filed a motion to dismiss Solberg's appeal.

October 21, 1895, your office overruled the motion to dismiss Solberg's appeal, and passed upon the case, affirming the decision of the receiver, approved the final proof of Solberg and rejected the final proof of Ferst, for the land covered by the filing of Solberg.

From this decision Ferst has appealed, upon the following grounds—

I. Error in finding that "the evidence of the timber claimant and his witnesses is very unsatisfactory indefinite and uncertain."

II. In holding that the timber claimant and his witnesses did not find all the improvements claimed by the pre-emption claimant, and in not finding that a considerable portion of said improvements if on the land, were made subsequent to the inspection of timber claimant and his witnesses and subsequent to the initiation of the contest.

III. In finding that the testimony does not show that the pre-emptor voted in Duluth twice after he established his alleged residence on the land; and in not finding that the circumstances of his having voted once in said city was evidence which, taken in connection with other proven laches of said claimant and contradictions in his testimony, was sufficient to impeach his residence and good faith.

IV. In finding that "the evidence establishes the good faith of the pre-emptor."

V. In finding that the land is chiefly valuable for agricultural purposes.

VI. In not affirming the decision of the register in rejecting the final proof of the pre-emptor and awarding the land to the timber claimant and appellant herein.

The local officers having filed disagreeing opinions in the case, under Rules 48 and 49 of Practice, your office properly overruled the motion to dismiss the appeal of Solberg and considered the whole case.

The land in question became subject to entry by the filing of the plat of survey at 9 o'clock on June 20, 1893. Solberg's application and affidavit were received by mail on that day, previous to 9 o'clock, and placed of record. Your office by letter "G" of November 3, 1893, directed the local officers to notify Solberg that his filing was illegal, but that he would be permitted to make a second filing and that he would not be affected by the requirement that his claim should be placed of record within three months after the filing of the plat of survey, where the failure resulted from the erroneous action of the local officers. Solberg was accordingly notified that he would be allowed until January 15, 1894 to legalize his filing by making a new declaratory statement, which was filed January 11, 1894. No new affidavit of form (4 102b) was then filed, and on August 20, 1894, at the time his final proof was taken he was allowed to make and file said affidavit. Your office held that the affidavit filed by Solberg with the illegal declaratory statement, followed within a short time after notice of its illegality by the second filing, was sufficient evidence of Solberg's qualification to make the filing. The issue is not between settlers or between

rival applicants to enter for homestead purposes, but between a pre-emption claimant who makes settlement on the land for homestead and agricultural purposes, and an applicant to purchase the land, as land unfit for agriculture and chiefly valuable for its timber, under the act of June 3, 1878 (20 Stat., 89). A proviso to the act subordinates it to any *bona fide* claim under any law of the United States, and to the improvements of any *bona fide* settler. The land subject to sale as timber land must be uninhabited and without improvements. The proof in this case shows that at the time of Ferst's application to purchase, it was settled upon by Solberg, and was improved by him, and was not subject to sale under the law. While the evidence is somewhat confused as to the precise date of Solberg's settlement, there is no doubt but the settlement antedated Ferst's application to purchase, and that the land was at that time improved. That it had some improvements on it is apparent from Ferst's own testimony. I have caused an examination of the field notes of the survey of the township embracing the land in question to be made. In the report of the surveyor, made July 5, 1892 (nearly a year prior to the date of the opening of those lands to entry and settlement), at the end of his field notes, he gives a list of the settlers whom he found in the township, and amongst others is the name of Hans Solberg. He adds the memorandum: "These settlers have good improvements." This circumstance is entitled to consideration, with the evidence of the pre-emptor.

The evidence furnished by Solberg shows his improvements to be worth about \$300, and it indicates that his settlement was made with the intention of making the land his permanent home. The defect in the declaratory statement filing of Solberg is not available to Ferst. He is not a settler, and can take no benefit from Solberg's failure to file in three months after the filing of the plat of survey. It was permissible for Solberg to perfect his filing at the time he offered his final proof. (Ellen Barker, 4 L. D., 514). It is insisted that Solberg's residence on the land is contradicted and overcome by his admission that he voted in Duluth in 1892. This is not a conclusive presumption as was held in the case of the State of California *v.* Sevoy (9 L. D., 139). This case is also authority for perfecting the filing by amendment. There is in the record sufficient support for your office decision, and it is affirmed.

REPORT OF SPECIAL AGENT-ATTORNEY.

ALBERT H. HORTON.

An attorney in good standing before the Land Department is entitled to inspect reports of a special agent on which final action has been taken by the General Land Office adverse to the interests of his client.

Assistant Attorney-General Van Devanter to the Secretary of the Interior. (P. J. C.)

I am in receipt, by reference from the Hon. First Assistant Secretary of the Interior, of a request from Albert H. Horton, asking that a former order of the Commissioner of the General Land Office, refusing to communicate to him, as attorney for J. P. Pomeroy, the specific grounds of alleged frauds and irregularities of one W. R. Hill in making homestead entries in Kansas be modified.

Briefly stated, it appears that Hill, acting as guardian for minor heirs of deceased soldiers, made quite a number of homestead entries for said heirs, and, as made, transferred the land to Pomeroy. The entries went to patent.

Upon an investigation by a special agent of the land office, the several entries were reported to be fraudulent in their inception, for reasons which are immaterial to this opinion.

It is ascertained from inquiry in the office of the Commissioner that on this report his office was in the act of recommending the institution of an action against Pomeroy to cancel these patents, when a request was made that action be suspended to allow Pomeroy to investigate the matter, and by letter of February 24, 1897, to Hon. Charles Curtis, member of Congress from Kansas, action on the reports was "suspended thirty days within which Mr. Pomeroy may surrender the patents in the cases," and, if no action was taken within that time, suit would be instituted.

It appears that Mr. Horton, as attorney for Pomeroy, sent a request to the Commissioner, asking that he "be advised of the specific grounds of irregularities and fraud in each case," and by letter of March 23, 1897, the Commissioner declined to furnish the information. He then addressed a letter to the Hon. First Assistant Secretary of the Interior, referring to the former correspondence, and asked that the Commissioner's order be "changed or modified, so that, as attorney for Mr. Pomeroy, I may have the information requested, and may also have sixty days additional time for further examination." This was referred to the Commissioner for report, and by his letter of April 21, 1897, his report was transmitted to the First Assistant Secretary, and by him referred to me for an opinion, as before stated.

The question submitted to me is, whether the Commissioner should furnish the information on file in his office in regard to these entries.

The matter of allowing attorneys before the Department to inspect the records of the Commissioner's office was fully discussed in the case of W. H. Lamar (5 L. D., 400). It appears that Mr. Lamar applied for permission to examine a record for the purpose of determining whether he would accept a retainer in the case, and the privilege was denied him by the Commissioner; whereupon he appealed to the Department, and it was decided that he had the right to do so. In discussing the matter, Mr. First Assistant Secretary Muldrow said:

Attorneys have always been allowed by the courts to enter a special or limited appearance, and it would seem that attorneys practicing before this Department, in good standing, ought to be allowed to inspect the records of your office, including all papers upon which action has been taken affecting the rights of parties. The mere fact that a case is pending in one division of your office rather than in another can make no difference in the principle. It ought not to be presumed that attorneys of good standing in this Department will disregard their obligations to be faithful to the Department as well as to their clients.

No good reason is shown why an attorney practicing before this Department should have any less privileges than would be accorded to any other reputable person seeking to inspect the records of your office. While it must be conceded that a large discretion should be given to your office, yet that discretion is a legal one and should be exercised in accordance with the regulations of the Department. When, therefore, any attorney practicing before this Department represents that he has been applied to by a party in interest to appear for such party in any case pending in your office, and that he desires to inspect the record of such case to learn the nature thereof and ascertain the amount of fee to be charged for his services in appearing for such party, such attorney should be allowed to inspect the record and all papers upon which action has been taken by your office adverse to the interest of such party.

It seems to me that this ruling can with propriety be applied to the case at bar, so soon as it reaches the proper stage. It is evident in the Lamar case that action had been taken against his client that was adverse to his interest. After action has been taken by the Commissioner's office, such as ordering a hearing with the view of canceling an entry, or recommending a suit to be brought to annul a patent, there seems to be no substantial objection to allowing an inspection of the records of the Commissioner's office. Before such final action has been taken, the manifest impropriety of permitting the records to be examined is clearly apparent, because until that time the record is confidential, which may or may not on examination result in final action adverse to the party, but thereafter the reports cease to be privileged and confidential, so far as the interests of the parties affected thereby are concerned.

Applying this test to the case at bar, it would seem as if such final action had not yet been taken by the Commissioner's office as to warrant the granting of the request of Mr. Horton. It is true the Commissioner had prepared a letter recommending the Secretary of the Interior to request the Hon. Attorney General to bring suit to cancel the patents, but that letter has not been formally transmitted to the

Secretary of the Interior for consideration, and until that is done, in my judgment, such final action has not been taken as contemplated.

I am therefore of the opinion that, if the Commissioner of the General Land Office is still of the opinion that suit should be brought and formally recommends it, then the matter would be in such condition as would permit "an attorney in good standing before the Land Department" to inspect the record, but until that is done, the records should be regarded as confidential.

Approved, April 30, 1897:

C. N. BLISS,

Secretary.

RAILROAD GRANT—INDEMNITY—ACT OF JUNE 22, 1874.

OREGON AND CALIFORNIA R. R. CO.

An indemnity selection under the act of June 22, 1874, based on a relinquishment, necessary for the protection of entrymen, under the rulings then in force as to the date when the rights of the company attached, should not be defeated by a changed ruling as to the attachment of rights under the grant, where the lands so selected have been sold by the company, and the grant is not enlarged by the approval of the selection.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (F. W. C.)

The Oregon and California Railroad Company, has appealed from your office decision of January 17, 1896, holding for cancellation a certain list of selections made March 14, 1877, under the provisions of the act of June 22, 1874 (18 Stat., 194), covering lands to the amount of 1081.74 acres within the Oregon City land district, Oregon.

On October 29, 1869, this company filed in your office a map showing the definite location of its line of road from Portland to Jefferson, in T. 10 S., R. 3 W.; the distance covered by said location being about sixty-one miles. Said map was transmitted to this Department November 4, 1869, and returned with the approval of Secretary Cox January 29, 1870.

Section 2 of the act of July 25, 1866 (14 Stat., 239), making the grant under which the company claims, after describing the extent of the grant, provides, that upon filing

in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located, and within the limits before specified.

It appears that in the case of *Swift v. California and Oregon Railroad Company* (2 Copps Land Laws 733), involving a consideration of the grant in question, it was held that the right of the land grant company attaches to the granted land "upon the filing of the map of survey of its road;" it having then done all within its power to identify the land.

Under this ruling the right of the company opposite the lands in question attached October 29, 1869, at which date, it appears from an abstract furnished by your office, that five of the tracts relinquished and made the bases for selections under the act of 1874, were free from adverse claims, to wit, the NE. $\frac{1}{4}$ of Sec. 1, T. 4 S., R. 1 E.; the NE. $\frac{1}{4}$ of Sec. 3, T. 4 S., R. 1 E.; the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 2, 3 and 4, Sec. 7, T. 4 S., R. 4 E.; the NW. $\frac{1}{4}$ of Sec. 7, T. 4 S., R. 2 E.; and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 27, T. 2 S., R. 4 E. Subsequently, and prior to January 29, 1870, entries were allowed upon these lands, and upon the request of your office the company relinquished in favor of those entries under the provisions of the act of June 22, 1874 (*supra*), and on March 14, 1877, as before stated, made its selections now under consideration.

In the case of California and Oregon Railroad Company v. Pickard (12 L. D., 133) it was held that the right of the company under the grant of July 25, 1866 (*supra*), does not attach until the map of definite location has been accepted by the Secretary of the Interior, which in the case under consideration was on January 29, 1870. At that date the lands relinquished by the company were embraced in entries of record, and for that reason your office decision appealed from holds the lands relinquished were excepted from the company's grant; that its relinquishment was unnecessary, and that no right was gained by its selection under the act of June 22, 1874 (*supra*).

This act provides—

That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided*, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes: *And provided further*, That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a pre-emption or homestead settler after the location of the line of the road and prior to the notice to the local land office of the withdrawal of such lands from market.

From the recital above made it is apparent that under the ruling in force at the time the company relinquished upon the request of your office, its rights were held to have attached on October 29, 1869; consequently its rights were superior to those who entered after that date, and following its relinquishment it made due selection under the act above quoted.

This selection was made, as before stated, in 1877, and remained unacted upon until considered in the decision of your office appealed from. In the mean time the company reports that it has sold part of the lands selected, and the ruling as to the time of the attachment of rights has been changed. Under these circumstances it would seem that the company's selection should be approved; especially as the grant is not enlarged thereby. Should these selections fail, the company would nevertheless be entitled to select other lands within its indemnity limits.

This might not now be possible, for the indemnity withdrawal, which was recognized in 1877 at the time of these selections, has been revoked since 1887 and the lands within said limits disposed of as other public lands.

As to the tracts selected in lieu of those before described, your office decision is therefore reversed.

The remainder of the tracts relinquished and made the bases for the selections under consideration, the abstract shows, were covered by homestead entries both on October 29, 1869, and July 29, 1870, so that the tracts were clearly excepted from the company's grant under either ruling, and its relinquishment, as to said tracts, was unnecessary and conferred no right of selection upon the company.

As to the tracts selected in lieu of these tracts, your office decision is affirmed.

PRACTICE—NOTICE—AFFIDAVIT OF CONTEST—CORROBORATION.

VINCENT *v.* GIBBS.

The Rules of Practice do not require that the notice of a hearing should be served within the jurisdiction of the local office from which it is issued.

A notice of contest is sufficient if it substantially follows the affidavit of contest.

A motion to dismiss a contest for informality in the affidavit of contest, and the want of a corroboratory affidavit, may be properly overruled by the local office, as its jurisdiction is not dependent upon the affidavit of contest, but upon the service of notice.

Secretary Bliss to the Commissioner of the General Land Office, April 29, 1897. (W. V. D.) (C. W. P.)

October 23, 1893, Ira L. Gibbs made homestead entry No. 2070 of the SE. $\frac{1}{4}$ of Sec. 25, T. 27 N., R. 13 W., Alva land district, Oklahoma.

On November 2, 1893, Thomas H. Vincent filed affidavit of contest, alleging, in substance, that he is qualified to make entry for said tract; that at one o'clock and twelve minutes after noon of September 16, 1893, he settled on the land for the purpose of making it a home; and that he was the first settler thereon.

On October 15, 1894, a hearing was had, at which both parties were present, in person and by counsel.

Before the testimony was submitted Gibbs' counsel appeared specially, and filed a motion to quash the notice of contest, for the reasons: (1) that the same was not served on Gibbs within the jurisdiction of the land office, at Alva, Oklahoma Territory; (2) does not correspond with the allegations in the affidavit of contest; and (3) fails to show that Vincent is entitled to enter the land.

This motion the local officers overruled, and Gibbs excepted.

Gibbs' counsel then filed a motion to dismiss the contest, for the reasons (1) that the notice was not properly served, and (2) does not correspond with the affidavit of contest; (3) that the affidavit of contest does not show that Vincent is qualified to make entry; (4) that said affidavit is not properly corroborated, in this, that the corroborating affidavit does not show the date when signed, or that an oath had been administered to the witness; and (5) because no return or service of notice had been made to the local office.

Vincent then asked to have the officer before whom the affidavit was made affix his signature to the jurat, which the local officers granted, overruling Gibbs' objection thereto, and to which he excepted.

The local officers then overruled the motion to dismiss, and Gibbs excepted.

On April 3, 1895, the local officers rendered a decision, finding that Vincent's right to the land is superior to that of Gibbs, and recommending that Gibbs' homestead entry be held subject to said right. Gibbs appealed.

Your office affirmed the judgment of the local officers. Gibbs appeals to the Department.

The motions to quash and to dismiss the contest were properly overruled.

1. The rules of practice do not require that the notice of hearing should be served within the jurisdiction of the register and receiver.

2. The objection that the notice of contest does not correspond with the contest affidavit, and does not show that the contestant is qualified to enter the land, if successful, is without force. The qualification of the contestant is sufficiently set forth in his affidavit of contest, and the allegation of priority of settlement in the notice of contest is substantially the same as the allegation in the affidavit of contest. Rule 8 of practice, paragraph 6, only requires that the notice shall give the name of the contestant, and *briefly* state the grounds and purpose of the contest.

3. The objection to the affidavit of contest that it was not properly corroborated, and to the action of the local officers in allowing the notary to insert the date and affix his signature to the affidavit of contest, affords no ground for reversal of the decision of the local officers, for the reason that an affidavit of contest, while provided for in the rules of practice, is not essential; jurisdiction is obtained by service of notice. Consequently, it is not necessary to consider the action of

the local officers in allowing the notary to insert the date and affix his signature to the jurat.

The last objection, that no return of service of notice had been made to the local officers, is contradicted by the record.

There being no error in the proceedings, and the evidence supporting the concurring decisions of your office and the local officers in favor of the contestant, your office decision is affirmed.

PRACTICE—CERTIORARI—ADVERSE RIGHT.

BUTLER v. ROBINSON.

Rule 85 of Practice operates as a supersedeas for the time specified therein, but is not a limitation upon the power of the Secretary of the Interior to grant an application for certiorari even though not filed within that time.

Delay in the application for a writ of certiorari, and the allowance of an adverse entry under the Commissioner's decision complained of, will not defeat the right of the applicant to a decision on the merits of the case, where the rights of third parties are not affected thereby, and the status of the adverse party is not due to any neglect or delay on the part of the applicant, and where the entry of such party is made with full notice of the applicant's rights in the premises.

Secretary Bliss to the Commissioner of the General Land Office, April 29,
(W. V. D.) 1897. (E. B., Jr.)

On September 12, 1890, J. M. Robinson made timber culture entry No. 2912 for lots 1, 2, 3, 4, 5 and 6, of Sec. 8, T. 16, S., R. 1 W., S. B. M., Los Angeles, California, land district. On April 24, 1893, William J. Butler initiated a contest against said entry, wherein non-compliance with the timber culture law generally, and specifically as to plowing and cultivating during the first and second years after entry, were charged. After hearing, the local office, on January 15, 1894, decided the case in favor of the contestant. On March 5, 1895, your office, finding among the papers transmitted by the local office no appeal filed within the time allowed by the rules of practice, declared the decision of the local office final as to the facts, under Rule 48 of Practice, canceled the entry and closed the case.

Your office, having on June 12, 1895, denied Robinson the right of appeal from its previous decision, Robinson, on December 12, 1895, filed an application for certiorari; which was granted by the Department January 25, 1896 (22 L. D., 67). In allowing the application for certiorari, the Department held that Robinson had filed an appeal in time from the decision of the local office, and that the same had been duly served upon Butler's attorney; and further, that—

it is plain upon the face of their decision that the local officers, in densest ignorance of the demands of the timber culture law, found bad faith on the part of the defendant, and recommended the cancellation of his entry, for not having done what the law does not require him to do.

Under such circumstances, the contingency having arisen which is contemplated in the first clause of Rule 48 of Practice—gross irregularity being suggested on the face of the papers—the decision of the local officers ought not to have been considered final as to the facts, even if the defendants had not appealed.

On June 9, 1896, when the case came before the Department under the writ, the only question considered was this;—

Does the evidence show non-compliance on the part of the entryman with the timber culture law as to plowing and cultivating during the first and second years after entry, that is, during the years ended September 12, 1891, and 1892, respectively? reviewing the evidence the Department said—

In reviewing the evidence the Department said—

The good faith of the entryman is not successfully impeached by the evidence. On the contrary it is manifested by the quadruple quantity of land plowed the first year, and by planting trees two years earlier than the law requires, thrice the acreage required for the third year and five acres more than the law requires during the entire four years ordinarily to be spent, according to the law, in the preparation of the ground and the planting of trees. That the soil was in condition for the planting of trees at once upon plowing, is explained by the fact that the tract had previously been in possession of other parties and cultivated by them.

And thereupon the decision of your office was reversed and you were directed to cancel Butler's homestead entry, made March 23, 1895, under your office decision, and to reinstate Robinson's entry.

The case now comes again before the Department under an order, dated December 16, 1896, entertaining a motion by Butler for a review of the decision of June 9, 1896, upon his contention that Robinson's application for certiorari was not only filed out of time, but that, in the meantime, the former had made homestead entry of the tract involved in the exercise of his right as successful contestant under your office decision, and that therefore certiorari ought not to have been allowed nor the Department have considered the case thereunder, regardless of alleged laches by Robinson in the matter of his said application.

The appeal by Robinson from the decision of the local office, which the Department, as before stated, held to have been duly served and to have been filed in time (March 1, 1894), was not received by your office from the local office until May 2, 1895. Between March 1, and April 25, 1894, inclusive, several motions for review and re-hearing were filed by Robinson and denied by the local office, as set out—except the denial of April 25, 1894,—in the decision of January 25, 1896 (*supra*).

On March 18, 1895, there was filed in the local office by Robinson the following paper—

UNITED STATES LAND OFFICE,
Los Angeles, Calif.

WILLIAM J. BUTLER }
vs. } Motion for Review & Appeal.
J. M. ROBINSON, }

To the Hon. COMMISSIONER OF THE GENERAL LAND OFFICE,
Washington, D. C.

Comes now the defendant J. M. Robinson and moves the Hon. Commissioner of the Gen'l Land Office for review and appeal from the decision of the Hon. Commissioner

of the Gen'l Land Office of March 5th, 1895, dismissing said cause and demands investigation and review of same on the following grounds:

1st. That Commissioner erred by reason of the law and the facts & the whole thereof.

2nd. That appeal was duly filed in time as shown by the records and files of office.

3rd. That if records do not show appeal in due form and in time, claimant charges loss or abstraction of the same.

4th. Claimant avers the fact to be that appeal was written, copied and attached to papers and forwarded to local land office and the same was forwarded within the 40 days allowed in such cases, affiant believes they were forwarded to the local office about the last of February, 1894.

That this application is not made for delay but in good faith that justice may be done claimant.

J. M. ROBINSON.

Subscribed and sworn to before me this day of March, 1895.

(SEAL)

P. P. BRUNER,

Notary Public in and for San Diego Co., Calif.

A copy of this paper was duly served on S. S. Knowles, the local attorney of Butler. On March 18, 1895, Robinson also filed in the local office final proof in the matter of his entry under the fifth proviso of section 1 of the act of March 3, 1891 (26 Stat., 1095). On May 11, 1895, the resident attorney of Robinson filed, and duly served on Butler's said attorney, an appeal from your office decision of March 5, 1895. In said decision of June 12, 1895, your office, treating said paper as a motion for review of its previous decision, considered the entire record and held the notice of Robinson's appeal of March 1, 1894, from the decision of the local office, not to have been duly served, denied what it regarded as the motion for review, and declined to forward said appeal of May 11, 1895, on the ground that the case had been closed "under Rule 48 of Practice." On June 13, 1895, your office notified Mr. Keigwin, the resident attorney of Robinson, that the motion for review had been denied, but made no allusion to its action concerning the appeal from its previous decision. Under date of July 27, 1895, the local office reported that Robinson was duly notified, "by registered mail on the 21st ultimo," of your office decision of June 12, 1895, and had since taken no action. On September 11, 1895, your office, having discovered that it had failed to notify Mr. Keigwin of its refusal to forward the appeal filed by him, in a letter (H) to the local office, after briefly reviewing the history of the case, said—

In view of your report, and as no further action has been taken before this office, said decisions of this office are considered final and the case is finally closed and timber culture entry No. 2912 remains canceled.

Of this letter finally closing the case, and of its refusal on June 12, 1895, to forward to the Department the appeal filed by him May 11, 1895, your office notified Mr. Keigwin on the day of its date.

Robinson's only explanation of his delay in applying for certiorari is that it was due to his surprise at the action of your office, to sickness, and to inability to raise money to pay Mr. Keigwin to further prosecute the

case and to communicate with the latter, by reason of his absence from this city when the money had been raised, until about the middle of November 1895.

The foregoing is the somewhat remarkable history of this case. It appears therefrom that Robinson duly appealed from the local officers' adverse decision of January 15, 1894, and that the paper filed by him on March 18, 1895, whether regarded as a motion for review of your office decision of March 5, 1895, or as an appeal therefrom, was filed in time. Regarded as a motion for review, while pending said paper stopped the running of time against the filing of an appeal (Rule 79) from the decision last mentioned, and so brought the appeal filed May 11, 1895, within the time allowed for appeal. Or, regarded as an appeal, said paper was sufficient for the protection of the rights of Robinson. It further appears that, as the Department held in its decision of June 9, 1896, Robinson had duly complied with the requirements of the timber culture law during the period covered by Butler's contest.

Had the appeal of Robinson, whether as of March 18, or May 11, 1895, come before the Department, as it should regularly have done, a decision thereon, in the light of the events, must surely have been in his favor, resulting in the cancellation of Butler's entry and the reinstatement of Robinson's entry, which is the action the Department has actually directed. Should Robinson be now deprived of the fruits of his years of faithful compliance with the timber culture law, by means of a wrongful judgment by your office and the entry based thereupon, simply because, when he had repeatedly failed to secure justice in the regular and ordinary way, he delayed for the considerable period shown by the record to invoke the somewhat extraordinary and only remaining remedy of certiorari? Or will the ends of justice be more nearly attained by adhering to the action heretofore directed by the Department? These are the general questions which now confront the Department.

The contention of Butler's motion, hereinbefore stated, was urged by him in a motion filed by him December 31, 1895, to dismiss Robinson's petition for certiorari, and was therefore before the Department when certiorari was allowed, but it is not discussed in the decision of January 25, 1896 (*supra*), which granted the petition. Rule 85 of Practice is invoked by Butler in support of the proposition that only twenty days after the denial of the right of appeal by your office are allowed within which to apply for certiorari. It is well settled that said rule merely operates as a supersedeas for the time above indicated, and is not a limitation upon the power of the Secretary to grant an application for certiorari, even though not filed within that time (*Denman v. Domenigoni*, 18 L. D., 41; *Henry D. Emerson*, 20 L. D., 287).

The other branch of Butler's contention, namely, that his homestead entry as successful contestant under your office decision of March 5, 1895, and the alleged laches of Robinson in delaying to apply for certiorari, should have constituted a bar to the relief afforded Robinson by

the Department, is also not well grounded. In *Denman v. Domenigoni, supra*, in construing Rule 85 of Practice, the Department, in connection with the holding therein, as hereinbefore indicated, said:

Rule 85 is a limitation on the time within which the Commissioner of the General Land Office is required to suspend action on the case at issue, and after the expiration of that time, if writ of certiorari has not been applied for, your office might take such action as would preclude the granting of the writ, but where there is no evidence that such action has been taken, I find no authority in the Rules of Practice to deny the application.

And in *Henry D. Emerson, supra*, it was likewise said, that the rule does not bar a party

from the right to invoke the supervisory authority of the Secretary at any time prior to the execution of the judgment of the Commissioner.

The judgment of cancellation of Robinson's entry, and the allowance of Butler's entry, were in no way brought about by Robinson, nor are they connected with any laches on his part. This judgment and entry both long antedated the denial of Robinson's right of appeal. They were executed before neglect or omission of any kind in connection with the application for certiorari is chargeable against Robinson. If such judgment and entry could operate as a bar to certiorari in any such case, or to the invoking of the supervisory power of the Secretary, the injured party would be absolutely without remedy. This would be a case of a wrong without a remedy, contrary to one of the fundamental principles of jurisprudence. No action was taken by your office nor by Butler after the denial of Robinson's right of appeal which in any way changed the relation of the parties or the legal aspect of the case. No right of an innocent third party is involved. The case is still between the original parties litigant. Butler's only standing here at this time is due to advantage he has taken of the unfortunate judgment of your office, which upon an incomplete record and in ignorance of the true status of the case, applied a rule which would not otherwise have been applied. Butler, however, was not in ignorance of the true state of the case. He knew of serious objections which might be urged to the judgment of your office and against his entry. He had notice of Robinson's appeal of March 1, 1894, and the appeal or motion for review of March 18, 1895, before he made his entry. He took large chances against the maintenance of the integrity of his entry. If he thereafter made improvements upon the land, as he alleges, it was in full view of the risk he had taken, and he can not now complain if he is the losing party. Robinson's appeal or motion for review of March 18, 1895, alone, should have been sufficient to cause the local offices to deny an entry of the land by Butler until the same had been finally disposed of.

The only foundation for the charge of laches against Robinson is the allegation of Butler that he has brought under cultivation a few acres of the land since the denial of Robinson's right of appeal. The house and stable, or at any rate the house, which he alleges he has built

thereon, was erected before the time of such denial. The value of all the improvements made by Butler on the land, he does not attempt to show. Several parties make affidavit in behalf of Robinson that said house is not worth to exceed \$100, and that the new lands plowed or cleared by Butler amount only to about two and one half acres. Be this as it may, however, I do not think Butler's improvements, in connection with the delay of Robinson in applying for certiorari, warrant a judgment in favor of the former.

In view of the foregoing, and after very careful consideration of the entire case, I am clearly of opinion that the ends of justice between these parties require that the motion for review should be denied; and it is so ordered.

CERTIFICATES OF LOCATION—SPECIAL ACT OF JUNE 6, 1894.

WESLEY MONTGOMERY.

An application for the issuance of certificates of location under a special act of Congress authorizing and requiring the Commissioner of the General Land Office to permit the person named therein "to enter one hundred and sixty acres of public land subject to entry under the homestead law," must be denied, where the act contains no provision in terms authorizing such action, and furnishes no basis for the exercise of discretionary power in that respect.

Secretary Bliss to the Commissioner of the General Land Office, April 30,
(W. V. D.) 1897. (C. J. G.)

The act of Congress approved June 6, 1894 (28 Stat., 987), entitled "An Act for the relief of Wesley Montgomery," is as follows:

That the Commissioner of the General Land Office be, and he is hereby, authorized and required to permit Wesley Montgomery, of Adams County, State of Nebraska, to enter one hundred and sixty acres of public land subject to entry under the homestead law, not mineral nor in the actual occupation of any settler, in lieu of the northeast quarter of section twenty-three, of township twenty-eight north, of range fourteen west, in Iroquois county, Illinois, which land was entered by said Wesley Montgomery on February twentieth, eighteen hundred and seventy-four, under the homestead laws, in accordance with instructions of the Commissioner of the General Land Office to the register and the receiver of the date of August ninth, eighteen hundred and seventy-three, the title to which land failed because of a prior disposition of the same, which did not then appear upon the records of the Land Office: *Provided, however,* That the said Wesley Montgomery shall not have made any other entry of land of the United States under the homestead laws: *And provided further,* That a final certificate and patent shall issue to the said Wesley Montgomery upon such entry as he may make hereunder without proof of residence and cultivation.

Under date of January 4, 1896, the said Montgomery filed in your office an affidavit wherein he requests, after stating his qualifications under said act of Congress, that he be permitted, for the sake of greater convenience and to avoid expense, to select and enter the land to which he is entitled under the act, by a duly appointed agent or attorney. He further requests, in order that he may have the full benefit of the

provisions of said act, that he be permitted to enter the said land in separate forty acre tracts, and that certificates be issued by your office authorizing him to make such entries in person or by a duly appointed agent or attorney.

In the attorney's letter accompanying said affidavit it was contended that, in view of the remedial nature of the said act of Congress it is entitled to the broadest and most liberal application, "to the end that the beneficiary may in a measure at least receive compensation for the rights and property he was forced to relinquish through the acts of the government agents." It was likewise contended that the Commissioner of the General Land Office is vested with discretionary authority to determine the manner in which the said act may be carried into effect.

In alleged support of the above contentions a number of grants made under Indian treaties, or by acts of Congress, are cited as being substantially analogous to that made to Montgomery, and under which grants certificates or scrip were issued. Reference is also made to a number of departmental decisions authorizing the cancellation of scrip of larger denomination and the reissue of same for smaller tracts.

In a letter dated March 20, 1896, your office declined to comply with the petitioner's request. A motion for review of this decision was filed, which was denied by your office on April 13, 1896.

An appeal has been filed in this Department.

In your office decision of March 20, 1896, it was held that the act of June 6, 1894, *supra*, contemplated an entry by Montgomery under the homestead law; that it was not the intention of the act to give him any broader right to the land to be selected and entered thereunder, than he had to the land on which he had settled and resided, with the exception that he was relieved from the conditions of said homestead law in the matter of residence and cultivation.

On the other hand it is contended by the appellant that the words employed in the act, "subject to entry under the homestead law," refer to the *land* to be entered, not to the *right* of entry, and were used simply to designate the *character* of the land granted; that they do not refer to the *manner* of entry. Attention is also called to the fact that the bill as at first presented contained the words, "to enter, under the homestead law." From this it is argued that the object of amending the bill was to permit Montgomery to take one hundred and sixty acres of land without any qualification as to how said land was to be entered.

While, as contended by the appellant, the only condition or restriction contained in the act for his relief against the exercise by him of the right granted, is that he "shall not have made any other entry of land of the United States under the homestead laws," yet, at the same time, the only privilege granted or exception made in his case from the regular homestead entryman, is that "a final certificate and patent shall issue to said Montgomery upon such entry as he may make hereunder without proof of residence or cultivation." To accord the appel-

lant privileges not specifically granted by the act, simply because they are not specifically forbidden, would be as unwarranted as to impose certain requirements upon him simply because the said act does not specifically except him therefrom. No authority can be derived from the act of relief for the issuance of certificates of location or scrip, and the language of said act furnishes no basis for the exercise of discretionary power in that regard. The act in my opinion provides for the entry of one hundred and sixty acres of public land subject to entry under the homestead law, the entryman only being excepted from certain conditions enumerated in the provisos to said act. This view would seem to be substantiated in one of the said provisos wherein the words "such entry" are employed, those words evidently having reference to the prospective entry provided for in the granting clause, and thus contemplating only one entry thereunder.

In view of the conclusion herein reached it is unnecessary to consider the cases cited by appellant, they not being deemed particularly applicable to the case under consideration.

The real question involved in Montgomery's application is as to the authority of your office, under the act, to issue certificates at all, regardless of whether they are for forty acres or one hundred and sixty acres. Hence, the request in the said appeal for the issuance of *one* certificate must also be denied. There is no authority in the act of relief for the issuance of certificates as requested, the party being entitled according to the language of the act to land only, unless the operation of said act is to be extended beyond its words, which, in view of the fact that such construction is not necessary to render effective the provisions of the act, would seem to be unwarranted.

Your office decision, to the extent of matters herein considered, is hereby affirmed.

APPLICATION FOR SURVEY ERRONEOUS MEANDER.

N. F. KELLY.

An order may properly issue for the survey of a tract of land omitted from the original survey through the erroneous meander of a slough instead of a river proper.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (W. A. E.)

By your office letter of March 16, 1897, was transmitted for departmental action the application of N. F. Kelly for the survey of a tract of land on the St. Francis river, in section 11, T. 18 N., R. 8 E., 5th P. M., Missouri.

It appears from the application and the accompanying affidavits that there is a tract of unsurveyed land containing about fifty-three acres in the southeast quarter of said section 11, not subject to overflow, and fit for agricultural purposes; that there are trees thereon about one or two

hundred years old; and that the configuration of either shore of the main-land has not materially changed since the original survey of the water front on the main-land in 1848. The affidavit of F. Kinsolving, surveyor, shows that he has surveyed this land; that it lies wholly on the Missouri side of the river and is separated from the main-land by a narrow slough, which, at the time of his survey, contained no water; that the channel of the river is northwest of this land and is from thirty to seventy-five yards wide and four to eight feet deep; and that the United States deputy surveyor meandered the slough, instead of the eastern shore of the river proper, thus omitting the land in question from the official survey.

The land immediately adjoining said tract on the south and east is owned by Kelly, the applicant, who alleges that until recently he thought he owned the tract in question.

This case is similar to that of *Horne v. Smith* (159 U. S., 40). In that case it appeared that Horne had received a patent for lot 7 of section 23, and lots 1 and 2 of section 26, T. 29 S., R. 38 E., Tallahassee meridian, Florida, containing 170.42 acres according to the official plat of survey. The official plat showed that sections 23 and 26 were fractional sections bordering on the Indian river. On the plat a meander line ran through the sections from north to south, the Indian river being on the west thereof. It was shown, however, that a bayou had been meandered instead of the river proper, and that between the bayou and the river was a tract of unsurveyed land containing about six hundred acres.

It was held that notwithstanding the fact that the official plat showed the Indian river to be the western boundary of the land patented to Horne, the bayou was the actual boundary and the unsurveyed land between the bayou and the river proper did not pass to him under his patent.

I am of the opinion, under the showing made by Kelly and the ruling of the supreme court in the above cited case, that the tract here involved should be surveyed and disposed of as government lands, and it is so ordered.

SURVEYOR GENERAL—MINING CLAIM—SECTION 452 R. S.

JOHN S. M. NEILL.

A surveyor-general, who orders and approves the survey of a mining claim, is disqualified as an applicant therefor under the provisions of section 452 R. S., and the departmental regulations thereunder, while holding such office.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (E. B., Jr.)

By its decision of February 25, 1896, your office affirmed the decision of the local office rejecting the application of John S. M. Neill offered

October 31, 1895, for patent to the Gold Mountain lode claim, survey No. 4653, Helena, Montana, land district, on the ground that it had not been satisfactorily shown that the land embraced in said claim was known to contain a valuable mineral bearing vein or lode at date of the application for patent to either the Cutler or the Samuel S. Richards placer mining claims, mineral entries Nos. 130 and 791, respectively, which were patented January 25, 1875, and January 31, 1883, respectively, and conflicted with said lode claim throughout nearly its entire area.

Your office further found from the record in this case "that the order of the survey No. 4653, the approval thereof, and the application for patent thereon, were made by John S. M. Neill," and that such order, approval, and application, were made by him while he was United States surveyor-general of Montana; and thereupon held that as such surveyor-general he could not "legally order or approve the survey of his own mining claim, nor be allowed to file an application for patent therefor," citing section 452 of the Revised Statutes, and case of Herbert McMicken *et al.* (11 L. D., 96) and circular instructions of September 15, 1890 (11 L. D., 348). From the decision of your office said Neill appeals, assigning error as follows:

First. It was error to hold that the lode claim did not contain a valuable mineral bearing vein at date of application for patent to placers without giving applicant an opportunity by hearing or otherwise, to demonstrate that fact.

Second. It was error to hold that a surveyor-general (the applicant in this case) could not legally order or approve the survey of this mining claim from the record presented in the abstract of title, and the additional evidence on file in the Department relative thereto.

Third. It was error to hold that the inhibition of Sec. 452 of the Revised Statutes is applicable to mineral lands.

The records of the Department show that John S. M. Neill was appointed U. S. surveyor-general of Montana May 28, 1894, and that he still holds that office. Appellant admits that he is and has been since the date last above mentioned, such surveyor-general. The record in the case shows that the order for said survey was made by him May 7, 1895, that the survey was commenced thereunder May 20, and completed May 22, 1895, by U. S. deputy mineral surveyor George K. Reeder, and was approved by said Neill as said surveyor-general on August 10, 1895.

Section 452 Revised Statutes reads—

The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office.

In construing this section in the case of Herbert McMicken *et al.* (10 L. D., 97), involving certain timber land entries made by McMicken and others while employees of the United States surveyor-general's

office of the then Territory of Washington, and therefore held for cancellation by your office, the Department held (syllabus):

The disqualification to enter public lands contained in section 452 R. S., extends to officers, clerks, and employees in any of the branches of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of the public lands.

A timber land entry made by an employe in the office of the surveyor general of the district in which the land is situated is illegal and must be canceled.

This decision the Department affirmed on review (11 L. D., 96), and directed the formulation of a circular in accordance with the construction of law therein. Such circular, dated September 15, 1890, as approved by the Department, is found at page 348 of 11 L. D. After setting out the section of the Revised Statutes (452) under consideration and referring to the decisions above cited, the circular concludes:

In accordance with said decision, all officers, clerks, and employes in the offices of the surveyors-general, the local land offices, and the General Land Office, or any persons, wherever located, employed under the supervision of the Commissioner of the General Land Office, are, during such employment, prohibited from entering, or becoming interested, directly or indirectly, in any of the public lands of the United States.

It was clearly intended that the surveyors-general themselves should come within the prohibition declared by said circular. The reasons which bring the clerks and employes of the offices of the surveyors-general under such prohibition operate with stronger force to include the surveyor-general. For demonstration see sections 2223 to 2234, inclusive, and section 2325, Revised Statutes.

It is unnecessary to consider the question sought to be raised by the first assignment of error. Section 452, as heretofore construed by the Department, which construction I approve and reaffirm, required that Neill's said application for patent should be rejected. The decision of your office is affirmed in accordance with the foregoing.

FRANCIS ADKINSON.

Motion for review of departmental decision of December 26, 1896, 23 L. D., 590, denied by Secretary Bliss, May 3, 1897.

CERTIFICATION OF LANDS—ACT OF AUGUST 3, 1854.

STOKES v. PENSACOLA AND GEORGIA R. R. CO.

Under the act of August 3, 1854, a certification of lands to a State, on account of a railroad grant is no bar to the subsequent disposition of said lands, if they in fact lie wholly outside of said grant, and hence are not of the character granted.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (J. L. McC.)

Peter Y. Stokes has appealed from the decision of your office, dated July 10, 1895, refusing to recommend that suit be instituted to set aside the certification of fractional section 29, T. 6 N., R. 22 W., Montgomery land district, Alabama, to the State of Florida for the benefit of the Pensacola and Atlantic (now Pensacola and Georgia) Railroad Company.

How it came to pass that a tract in Alabama was certified to the State of Florida is fully explained in your office decision appealed from, and a recital of the facts relative thereto is not at this time necessary.

Stokes made homestead entry of the tract (together with the W. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of Sec. 20, adjoining) on June 13, 1892. How it came about that the local officers allowed him to make entry of a tract that had long before been certified for the benefit of a railroad company does not clearly appear from the record before me.

There seems to be no doubt from the statements contained in your decision appealed from, that the land in controversy was improvidently and erroneously certified. But your office holds that, inasmuch as said certification was made more than thirty years ago, and as the grant has been adjusted by your office (in 1888), it is not proper to make demand upon the grantees for a reconveyance of the land, or to recommend that suit be instituted for its recovery.

Stokes has appealed, setting forth the fact that the local officers at Montgomery allowed him to make homestead entry of the land; that he has resided upon the same in good faith; that he has spent nearly all he possessed in money, personal property and labor, together with the labor of his family, in improving said lands; and that to dispossess him would reduce him to destitution. A copy of the appeal was duly served upon the proper officer of the railroad company, who endorsed the same as follows:

Service of this is hereby acknowledged this 30th day of November A. D. 1895; but for the information of the applicant I state that the Pensacola and Atlantic Railroad Company sold this land on the 30th day of August, 1883, to Milligan Chaffee & Co. (prior to the applicant's homestead entry), who should be notified.

Your office bases its refusal to recommend the institution of suit upon the departmental decision in the matter of the Hannibal and St. Joseph Railroad Company (10 L. D., 610). I observe, however, what appears to be a distinction between that case and the one now under consideration.

In that case the Department held (see syllabus):

Proceedings under the act of March 3, 1887, for the recovery of title to lands erroneously certified are not authorized where, long prior to the passage of said act, the grant had been declared by competent authority to be adjusted.

Such is not the fact in the case at bar, where, as stated in said decision of your office appealed from: "It appears that the grant in question was adjusted by this" (your) "office in 1888." Another difference not without weight between the Hannibal and St. Joseph case and the case at bar is that in the former (see page 111,) "No one is setting up claim to any of the lands now discovered to have been erroneously certified."

Your office decision cites also the departmental decision in the case of *Houlton v. The Chicago, St. Paul, Minneapolis and Omaha Railway Company* (17 L. D., 437). In that case, however, the adjustment had been formally declared by the Department to be closed. Moreover, Houlton was merely an applicant to enter, and his application was rejected by the local officers; while in the case at bar the local officers allowed Stokes to make entry of the land.

Under these circumstances, I am not inclined to accept the view expressed by your office, that the Hannibal and St. Joseph case and the Houlton case (*supra*) constitute precedents that should control the action of the Department in the case now under consideration. In my opinion, the grant for the benefit of the Pensacola and Georgia Railroad Company can not properly be considered as having been finally adjusted, and this Department still has jurisdiction to dispose of the question here in issue.

The case at bar would appear to be one in which the act of Congress approved August 3, 1854 (10 Stat., 346), may properly be applied. Said act provides:

That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of the several States and Territories; and where said law does not convey the fee simple title of such lands, or require patents to be issued therefor; the lists of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of said office, either as originals, or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest, shall be conveyed thereby.

In the case at bar, fractional section 29, embraced in the list certified to the State of Florida for the benefit of the Pensacola and Atlantic Railroad Company, being wholly outside the limits of the grant for the benefit of said road, and not of the character intended to be granted by Congress, said certification was perfectly null and void, and no right, title, claim, or interest was conveyed thereby, and the action of

the land department in including it within the lists certified was ineffectual. (*Weeks v. Bridgman*, 159 U. S., 541.)

In view of the said act of 1854, and of the decision of the supreme court in the case cited, there would appear to be no necessity for suit to set aside the certification in question for the reason that the same was and is a void act, wholly ineffectual to prevent the proper disposition of the land by this Department; and I am of the opinion that upon the showing made patent should issue to Stokes for the same. The recommendation for suit as requested by him is therefore unnecessary, and you will issue patent to him for the land upon proper showing as to compliance with the law.

HOMESTEAD CONTEST—ABANDONMENT—FINAL PROOF.

WILSON v. LEFREINER.

After the expiration of five years under a homestead entry a charge of abandonment and change of residence will not be entertained against the same, in the absence of an allegation that the entryman failed to comply with the law as to residence and cultivation during the statutory period.

A charge of failure to submit final proof within the statutory period of seven years from the date of the entry states no cause of action against an entryman that is entitled to the additional year conferred by the act of July 26, 1894.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (C. J. W.)

July 31, 1888, Edward Lefreiner made homestead entry No. 11372 for SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 26, W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 35, T. 163 N., R. 56 W., Grand Forks, North Dakota.

On May 19, 1894, David Wilson filed contest charging that the entryman had abandoned the tract and changed his residence therefrom for more than six months next prior to the date herein; that said tract is not settled upon and cultivated by said party as required by law; that he sold his improvements on said land some time in November, 1893, to one C. W. Andrews for a valuable consideration and Andrews has no homestead entry right to use on said land, having already exhausted the same, but is holding said improvements for the sole purpose of speculation.

Hearing was had and the local officers found that the entryman had abandoned the tract.

Your office by letter "H" of February 2, 1895, advised the local officers that said decision could not become final, for the reason that the allegations in the contest affidavit were insufficient, and their decision was reversed. On October 15, 1895, Wilson offered a second affidavit of contest, which was refused by the local officers, for the reason that the same failed to state a cause of action, there being no allegation that the abandonment occurred before the expiration of five

years from date of entry, and for the reason that the allegation that the entryman had failed to offer final proof within seven years, from date of entry was premature, the time within which final proof could be offered not having expired.

From this decision Wilson appealed, and on January 9, 1896, your office affirmed the local officers. Wilson has made further appeal to the Department. The only question presented is whether or not the last affidavit offered states a cause of action. It charges that—

The entryman has wholly abandoned said tract and changed his residence therefrom for more than the past six months. Has sold his improvements he had upon the above land to one C. W. Andrews, who has had them removed from the land, and that said Edward Lefreiner has failed to offer final proof for above land within the statutory period of seven years from date of his original homestead entry as required by law.

There is no allegation that the entryman had not complied with the law as to residence and cultivation for the period of five years as provided in section 2291 R. S. Compliance with this section authorizes final proof after removal from the land. *Lawrence v. Phillips* (6 L. D., 140). *Thomason v. Patterson* (18 L. D., 241). As to the time in which final proof must be offered, under the act of July 26, 1894 (28 Stat., 123), he had eight years instead of seven within which to offer final proof, and it is not alleged that the eight years have expired. The affidavit states no cause of action, and your office decision is affirmed.

PRACTICE—MOTION FOR REVIEW—NEW CONTEST.

CALLICOTTE v. GEER (ON REVIEW).

A cause of action arising after the hearing before the local office, and during the pendency of appeal therefrom, cannot be made the basis of a motion for the review of the departmental decision rendered on the appealed case.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (C. J. W.)

September 23, 1893, defendant M. W. Geer made homestead entry, No. 607, at Perry, Oklahoma, and on same day, J. W. Callicotte filed affidavit of contest against said entry, alleging prior settlement.

A hearing was had on September 23, 1895 and a decision rendered by the local officers, in which the cancellation of the entry was recommended.

Defendant appealed, and on September 18, 1895, your office affirmed the decision of the local officers and held said entry for cancellation. Defendant made further appeal, and on January 18, 1897 (24 L. D., 135), your office decision was affirmed. Geer files a motion to reopen the case, based on the alleged abandonment of the land by plaintiff since the trial of the case in the local office. The case was considered

by your office on appeal from the decision of the local officers, on the basis of the record of facts presented with the appeal. On appeal to the Department, it was considered here under the same record of facts.

The motion is based on facts alleged to have occurred since the hearing, and which if they constitute a cause of action, constitute a cause separate and distinct from the one tried. A cause of action arising after the hearing before the local officers and pending an appeal, cannot be made the basis of a motion for review of the decision rendered here on the appealed case. This is a necessary rule, and well settled. Under it, the motion for review must be and is denied.

In this case, however, the decision itself provides for the protection of defendant's rights in the event the plaintiff fails to exercise his right of entry. Your office decision, which was affirmed and is of force, provides that plaintiff be allowed thirty days within which to show his present qualifications and make entry of the land; and in the event he does this, the entry will be canceled, but if he fails to do so, defendant's entry will remain intact.

This affords him all the protection to which he is entitled as the next settler, in order of time, on the tract involved.

PRACTICE—MOTION FOR REVIEW—INTERLOCUTORY ORDER.

LEE *v.* KUHLMAN.

There is no authority in the rules of practice for the review of an order of the Secretary of the Interior directing a hearing. A revocation of such order should be sought through an application to the supervisory authority of the Secretary. The conviction of a person on a charge of perjury committed in a case where another party is an applicant for land, and the issue is "soonerism," and such person testifies that neither he, nor such applicant, were in the territory within the prohibited period, is not necessarily conclusive as to such person's qualification, though affecting his credibility as a witness.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (A. E.) (G. B. G.)

On February 20, 1897, H. George Kuhlman, one of the parties to the above entitled cause, filed in this Department a petition for re-review of departmental decision, dated November 12, 1896, ordering a hearing to determine whether Lee was a settler upon the land in controversy on May 25, 1893. The land involved is the SE. $\frac{1}{4}$ of Sec. 4, T. 11 N., R. 3 W., Guthrie, Oklahoma.

A motion for review of said decision of November 12, 1896, was denied by the Department on December 26, 1896, on the ground that said decision was interlocutory in character and therefore not reviewable.

It is now urged that this was error and it is further contended by

the petitioner that Robert J. Lee was convicted of perjury in the district court in and for Oklahoma county, Oklahoma Territory, for swearing to facts necessary to make him a qualified entryman for land in the Territory of Oklahoma: That therefore the Department should accept such conclusion as a final finding that Lee was a "sooner" and not qualified to make entry of the land in controversy, even should the evidence at the hearing to be held show that he was a settler upon the land when Kuhlman filed the relinquishment of Couch.

To the first proposition the Department after further and full consideration of the matter adheres. There is no authority in the rules of practice for review of an order of the Secretary of the Interior directing a hearing. It is true that by virtue of the supervisory authority with which that officer is clothed by law, such showing might be made as would induce him to revoke such an order, but no such showing is here made.

The second contention may be treated as alleged reasons why the ruling of the Department in the matter of the aforesaid interlocutory order was erroneous.

These reasons have been carefully considered and they do not afford a proper basis for the intervention of supervisory authority.

The copy of indictment filed by the petitioner, Kuhlman, shows that Lee was charged with having committed perjury at a hearing before the local office, held July 1, 1892, in the case of Aaron B. Jones *v.* Ernest L. Lawrence. The indictment substantially charged that Lee falsely swore that Lawrence and he (Lee) were not in the Territory during the prohibited period. On this indictment Lee was convicted. At the hearing at the local office, at which the perjury was alleged to have been committed, the qualifications of Lawrence, and not Lee, were in issue.

As to whether a person claiming land has entered the Territory during the period prohibited so as to disqualify him from making entry, is a question which is properly determinable by the Department, and even though Lee were convicted in that case, such conviction would not necessarily disqualify him from making entry in this case.

The judgment of the court in this matter is not conclusive, and being persuasive merely would go to Lee's credibility as a witness and can be brought to the notice of the local officers at the hearing.

It may be that Lee has not exhausted his remedy in the criminal court on the indictment against him for perjury. Or it may be that he has been confined in the penitentiary in execution of the conviction and judgment, and in this latter event a question of abandonment as a matter of law would arise which can not now be discussed in view of the uncertainty of the record.

The petition is denied and the order contained in the decision of November 12, 1896, together with the instructions contained in the decision, will be carried out.

PRACTICE—CONSOLIDATED CASES—REVIEW—APPEAL.

BULLARD *v.* PRESCOTT.

Where two or more cases, involving the same tract of land, have been consolidated and considered together, notice of appeals from, or motions for review of, the decision rendered must be served upon all parties in interest.

Secretary Bliss to the Commissioner of the General Land Office, May 3,
(W. V. D.) 1897. (R. W. H.)

I have considered the appeal of Ormsbee W. Bullard from your office decision of January 27, 1896. This decision rests upon the cases of *R. D. Prescott v. The Heirs of George S. Bidwell, deceased*, and *Ormsbee W. Bullard v. R. D. Prescott and The Heirs of George S. Bidwell, deceased*, which came up to your office separately, but were consolidated and considered together. Said decision sustained the contest of Prescott, dismissed that of Bullard, and held for cancellation George S. Bidwell's timber-culture entry, No. 1334, for the NW. $\frac{1}{4}$ of Sec. 9, Tp. 101, R. 61 W., Mitchell, South Dakota.

Bullard and the heirs of Bidwell were notified of said decision and of their right of appeal.

Notwithstanding the consolidation of the cases by your office decision, the parties whose interests were adversely affected failed to take notice of such consolidation in their subsequent proceedings.

Frank A. Bidwell, a son of George S. Bidwell, one of the heirs, assuming to act for said heirs, filed a motion for a review of your said office decision, but served no notice of said motion upon Bullard.

Bullard appealed from your said decision, but served no notice of his appeal upon the heirs of George S. Bidwell.

It further appears that, before Bullard's appeal came before the Department for consideration, your office—acting upon Bidwell's motion for review—by its decision of April 22, 1896, had reviewed, reversed and vacated its said decision of January 27, 1896.

In the case of *Gray v. Ward et al.* (5 L. D., 410), it is held:

Where there are several parties to a suit pending in your office, and a final decision has been rendered adverse to the rights of two or more of the parties to the suit, the filing of an appeal by one of the parties will not preclude the hearing of a motion for a review by another party to the record asking a reconsideration of the decision so far as the same may affect his rights.

But in the case just cited there was no failure on the part of the party appealing or the party asking a review to serve the proper notice upon all parties to the suit.

Our Rules of Practice require "due notice" to the opposite party of motions for review, as well as of appeals. (Rules 76 and 93.) Where two or more cases, involving the same tract of land, have been consolidated and considered together, notice of appeals from, or motions for review of, the decision rendered must be served upon all parties in interest.

Your office was without jurisdiction to act upon F. A. Bidwell's motion for review of its decision of January 27, 1896, in the absence of notice to Bullard, a party in interest; and your subsequent decision of April 22, 1896, is hereby declared void and of no effect.

The appeal of Bullard—notice of which was not served upon the heirs of Bidwell, the entryman—is dismissed.

The parties whose interests are adversely affected by your office decision of January 27, 1896, will be allowed to proceed by motion for review, appeal, or otherwise, as they may elect, upon due notice to all parties in interest, as if your said decision of April 22, 1896, had never been rendered.

STONE LAND—PLACER LOCATION—APPLICATION.

HAYDEN v. JAMISON.

Prior to the passage of the act of August 4, 1892, there was no authority to locate and purchase lands chiefly valuable for building stone under the placer mining laws.

Secretary Bliss to the Commissioner of the General Land Office, May 5,
(W. V. D.) 1897. (C. J. W.)

This case involves the SW. $\frac{1}{4}$ of Sec. 6, T. 3 N., R. 70 W., Denver land district, Colorado.

The record shows that on the 24th day of September, 1889, Thomas Jamison made homestead entry for the above described tract.

On the 18th of September, 1889, Benjamin Hayden, the contestant-appellant, with others, made a placer mining location for one hundred and twenty acres of the land afterwards entered by Jamison, and on the 10th of January, 1890, having purchased the interest of the other locators, he applied to file his mineral application therefor. This application was rejected on account of the prior allowance of the homestead entry of Jamison; whereupon the mineral claimant filed a protest against the entry of the defendant-respondent, alleging that the land was more valuable for mining than for agricultural purposes and that the entryman had failed to comply with the law as to settlement and improvements.

A hearing having been had on the issues thus joined, the local officers dismissed the contest; upon appeal your office decision of November 4, 1890, was rendered wherein you reversed the action of the local officers and, after going into the merits of the case, found as a fact that the land was more valuable for its minerals, and held the homestead entry for cancellation.

September 8, 1892, the Department, on appeal by Jamison, affirmed the action of your office (15 L. D., 276).

March 7, 1893, on review, the former decision was adhered to, but on June 21, 1893 (16 L. D., 537), the case then being before the Depart-

ment upon motion for re-review, reversed its former action and ordered a hearing to determine

the character of the land, its capacity for agriculture and the nature, value and extent of all deposits of a stone or mineral character found thereon, and re-adjudicate the question in the light of the evidence thus obtained.

This course was pursued because of the allegation of the presence of valuable deposits other than building stone, as gypsum and fire clay, and on account of the value of the land (\$300,000) as shown in the last mentioned decision of the Department.

A new hearing having been had in pursuance of the above order of the Department on the 21st of April, 1894, the local officers rendered their decision wherein they recommended the dismissal of the contest.

On the 8th of October, 1894, your office decision affirmed the action of the local officers and further appeal by the contestant-appellant brings the case before the Department.

An examination has been made of the voluminous record in this case. It is shown that the chief value of the land is for red sand stone suitable for building purposes, paving, and curb stones. The attempt to show gypsum, limestone, or a deposit of fire clay, is not supported by the evidence.

It appears that Jamison, the entryman, has built a frame house and stone barn on the land. He has ploughed some, but not much, owing to the character of the land, and has done some fencing and dug two wells. It is further shown by the evidence that the land has some value for grazing purposes and some timber.

The various applications for this tract were made prior to the passage of the act of August 4, 1892, providing for the disposition of lands chiefly valuable for building stone under the placer mining law, and therefore, the mineral claimant can secure no rights by reason of that act, but his rights must be adjudicated by the law as it stood at the time these claims were initiated.

In the case of Simon Randolph (23 L. D., 329), it was held that prior to the passage of the act of August 4, 1892 (27 Stat., 348), there was no authority to locate and purchase lands chiefly valuable for building stone under the placer mining laws, and that under the provisions of section one of said act, no rights are secured prior to application to enter, and if at such time the lands are not subject to entry the claim under said act must be rejected. On review (23 L. D., 516) this decision was vacated, and another decision substituted therefor, based on a changed status of the facts, but the legal principles announced in the first decision were not reversed. Randolph had discovered, located and surveyed a valuable quarry of building stone, and after location, made application to purchase, and tendered the purchase money. This application to purchase and tender of the purchase money was made June 29, 1893, and therefore after the act of August 4, 1892, was operative. His claim was rejected in the decision of October 3, 1896, for

the reason that the land was in reservation and not subject to entry at the time of his application. The application of Randolph was still pending when the reservation ceased, and the question being between Randolph and the government alone, it was held in said last decision that Randolph should be allowed to perfect his title by purchase and entry under the provisions of said act of August 4, 1892. The rule was adhered to, as announced in letter of instructions (23 L. D., 322), that under the act of August 4, 1892, no right attaches in favor of the entryman until he makes application to enter. In the present case Jamison had a homestead entry of record on the 24th of September, 1889, before Hayden filed his mineral application and his priority of right is unaffected, by the subsequent application of Hayden—he having failed to show that the land was in fact mineral in character. Hayden initiated no right under the act of August 4, 1892, by filing his mineral application January 10, 1890.

The decision appealed from is therefore affirmed.

TOWN LOTS—SALE AT THE TOWNSITE.

BASIN CITY.

In the interest of the government, and intending purchasers, a sale of town lots may properly take place at the townsite, under the personal charge of the local officers.

Secretary Bliss to the Commissioner of the General Land Office, May 5,
(W. V. D.) 1897. (P. J. C.)

I am in receipt of your letter ("G") of May 4, 1897, in relation to the public sale of lots in the town of Basin City, Wyoming.

It appears from your said letter that the residents of Basin City have complied with the requirements of the statute in regard to securing a townsite on the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 21, Tp. 51 N., R. 93 W., 6th P. M., and notice has been published of a public sale of lots in said townsite, to take place at the local office at Buffalo, Wyoming, July 24, 1897.

It appears that your office is in receipt of a petition from the residents and lot claimants in Basin City, representing that it will be of material benefit to the government and a great accommodation to the people interested to have the sale take place in Basin City, and their prayer is that this may be done. The register and receiver forwarded the petition with the recommendation that the request be granted.

In your said office letter it is said:

I believe that the interests of the government and of the people of Basin City would be best protected and subserved by holding the sale at the townsite as petitioned for; but I think the authority of law for ordering the local officers away from their office to make such a sale is doubtful, and I have concluded to submit the matter for your instructions.

It has been the practice of this office to order registers and receivers to hold public sales of lots within townsites at the townsites when in its discretion it was found best to subserve the interests of the parties concerned. In the case of Pagosa Springs townsite, in Colorado, made under sections 2380-81 of the Revised Statutes, by letter of November 19, 1884, Assistant Commissioner Harrison directed the local officers at Durango, Colorado, to proceed to the townsite to hold a sale of the lots; also, on July 27, 1893, Commissioner Lamoreux, with the approval of Acting Secretary Sims, gave like directions to the local officers at Seattle, Washington, in the case of the townsite of Port Angeles, Washington, made under said sections 2380-81 of the Revised Statutes.

I concur in the opinion that the interests of all concerned in this sale will be best subserved by having the sale on the townsite, and that it would be a matter of great expense and inconvenience to intending purchasers to be compelled to go to the local office, with no corresponding benefit to either them or the government.

You are therefore directed to instruct the local officers to have the sale of these lots take place at the townsite, and for this purpose they will be permitted to go to Basin City and personally conduct the same. For the purpose of complying with the law in regard to the published notice of the sale, you will take such action as may be deemed advisable in contemplation of this order.

RAILROAD LANDS—CONTESTANT—SECTION 3, ACT OF SEPTEMBER 29,
1890.

PATTON v. CLAUSSEN.

No right is acquired by a contest against an entry of lands reserved on account of a railroad grant, that will defeat the right of the entryman, who is in possession as a licensee, to purchase the land under the provisions of section 3, act of September 29, 1890, and the amendatory act of January 23, 1896.

Secretary Bliss to the Commissioner of the General Land Office, May 5,
(W. V. D.) 1897. (F. W. C.)

Cuna A. Claussen has appealed from your office decision of October 12, 1896, sustaining the action of the local officers in rejecting his application to purchase, under the provisions of the acts of September 29, 1890 (26 Stat., 496), and January 23, 1896 (29 Stat., 4), the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 1, T. 3 N., R. 17 E., Vancouver land district, Washington.

It appears that this tract is within the limits of the withdrawal of August 13, 1870, upon the filing of the map of general route of the main line of the Northern Pacific Railroad, opposite the unconstructed portion of the road between Wallula, Washington, and Portland, Oregon. It is also within the fifty-mile or indemnity limits as adjusted to the line of definite location of the branch line of said road across the Cascade mountains.

Although the portion of the road between Wallula and Portland was not constructed, the reservation made on account of the grant continued until the passage of the forfeiture act of September 29, 1890

(*supra*). Notwithstanding this reservation, it appears that the local officers, on November 25, 1887, permitted Claussen to make homestead entry of the land, and, on October 19, 1889, Elwood F. Patton initiated a contest against said entry, alleging that Claussen had never established a residence upon the land.

It must be apparent from what has been said that the allowance of the entry by Claussen was in violation of law, and that the contest by Patton should never have been permitted to proceed to hearing; but hearing was had upon said contest and the case prosecuted by appeal to this Department, resulting in departmental decision of June 13, 1896 (not reported), in which your office decision holding for cancellation Claussen's entry upon said contest was affirmed.

Upon the promulgation of said decision Claussen tendered his application to purchase the land under the provisions of the act of September 29, 1890 (*supra*), and of January 23, 1896 (*supra*), and in support thereof alleged that he was in possession of the land and had been since 1879, under a contract or a license from the Northern Pacific Railroad Company, and that the entire tract was under fence and otherwise improved.

Your office decision appealed from holds that this application comes too late, the right of Patton as successful contestant having intervened. The application to purchase was therefore held subject to the exercise of the preference right by Patton; from which action Claussen has appealed to this Department.

After a careful review of the matter I must reverse your office decision. As before stated, on the showing made Claussen has been in the possession of this tract since 1879 under a license or contract from the railroad company. The action of the local officers in holding the tract subject to entry, as it did in 1887, evidently induced Claussen to assert a homestead right in order to protect himself in his possession. It appears that as early as February, 1890, he inquired of your office as to the status of his entry and was informed, by your office letter ("F") of March 11, 1890, that his entry had been improperly allowed and was held suspended awaiting congressional action in the matter of the forfeiture of the company's grant for failure to build its road.

The entry having been allowed in violation of the reservation on account of the grant, was not subject to the contest of Patton instituted in 1889, and he did not succeed to any right by reason of the prosecution of that contest. He has, therefore, no such right as would bar the assertion of the right to purchase under the provisions of the acts before referred to.

The act of January 23, 1896 (*supra*), amended the act of September 29, 1890, and extended the time of purchase to January 1, 1897. It provided also

that actual residence upon the land by persons claiming the right to purchase the same shall not be required where such lands have been fenced, cultivated, or otherwise improved by such claimant, etc.

Your office seems to have considered the showing made in support of Claussen's application as sufficient, in the absence of an adverse right that might bar the purchase, because it is held in said decision that "in the event that said Patton fails to enter the land you will allow Claussen to perfect his application."

Having disposed of the alleged superior right of Patton, the record is herewith returned with direction that Claussen be allowed to complete purchase of this land as applied for.

APPLICATION TO ENTER—PREFERENCE RIGHT.

JOHN W. KORBA.

An application of a third party to enter land embraced within a judgment of cancellation, rendered by the Department, should be received and held to await action on the part of the successful contestant; and if the preferred right of the said contestant is subsequently waived, the application to enter, so held in abeyance, is entitled to precedence as against other claims arising subsequently thereto.

Secretary Bliss to the Commissioner of the General Land Office, May 5,
(W. V. D.) 1897. (C. J. G.)

The land involved in this case is the NE. $\frac{1}{4}$ of Sec. 32, T. 43 N., R. 3 E., Wausau land district, Wisconsin.

On October 11, 1895, the Department affirmed a decision of your office holding for cancellation the homestead entry of Marye Korba for the above described land. This action was taken upon a contest brought by one Lewis F. Larson, charging abandonment, that case being closed by your office on February 15, 1896.

On November 26, 1895, John W. Korba filed an application to make homestead entry of said land, which was rejected by the local office for the reason that said land was already covered by the entry of Marye Korba, and for the further reason that according to the evidence the applicant had already had the benefit of the homestead law.

Korba appealed, and under date of February 27, 1896, your office dismissed the said appeal because of failure to serve the same on the "opposite party."

On February 21, 1896, Lewis F. Larson relinquished his preference right of entry, and on February 24, 1896, John Rasmusson filed homestead application for the land in question.

John W. Korba has appealed to this Department, contending that it was not necessary to serve his appeal upon any one; that

when his homestead application was presented, to wit: on November 26, 1895, the previous entry of Marye Korba had, on April 18, 1894, been held for cancellation, which decision had been affirmed by the Secretary on October 11, 1895, so that at date of appellant's application his mother's entry had been already canceled in contemplation of law;

and that it was error not to hold that appellant was entitled to enter at least forty acres under section six of the act of March 2, 1889, his first entry having been made prior to that date and for only three legal subdivisions.

In support of the second specification above set out, the appellant cites the case of Henry Gauger (10 L. D., 221), and numerous others in line with that case.

In the case of McDonald *et al. v. Hartman et al.* (19 L. D., 547) it was held that—

A judgment of cancellation takes effect as of the date rendered, and the land released thereby from appropriation becomes subject to entry as of such date, without regard to the time when such judgment is noted of record in the local office.

Under date of January 30, 1897, in the case of Cowles *v. Huff et al.* (24 L. D., 81), the Department overruled the doctrine announced in the case of Henry Gauger (*supra*). It is now held—

If during the time accorded a successful contestant to make entry of the land involved an application or applications to enter should be made by a stranger to the record, such application or applications will be received and the time of presentation noted thereon, but held to await the action of the contestant, and should such contestant fail to exercise his preference right, or duly waive it, then such application or applications must be acted upon and disposed of in accordance with law and the rulings of the Department.

As the application of John W. Korba was filed after the judgment of cancellation was rendered by the Department in the case of Lewis F. Larson *v. Marye Korba*, his said application, under the above rulings, should have been received by the local office and held to await the action of the successful contestant in that case. When Larson relinquished his preference right of entry John W. Korba was then entitled to have his application acted upon in accordance with law.

Your office decision is accordingly reversed and John W. Korba will be allowed to make entry of the land in question, unless upon further investigation by your office he is found to be otherwise disqualified.

Among the papers transmitted with this case is an appeal by Marye Korba to your office from a decision of the local office rejecting her application to make homestead entry of the land in controversy. The said appeal and the papers accompanying the same are herewith returned to your office for appropriate action thereon.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

ANDERSON *v.* WING.

The status of an applicant to perfect title under section 5, act of March 3, 1887, as a "bona fide purchaser," is not affected by the fact that he holds under a quit-claim deed, or that said deed was executed in the consummation of an agreement for the exchange of property, nor by the further fact that prior to his purchase from the company he had been receiver of the land district within which the land is situated.

A "bona fide purchaser" from a railroad company of less than a legal sub-division is entitled to purchase such tract from the government under said section 5, and receive patent therefor; but if a survey of said tract is necessary, prior to the issuance of patent, the expense thereof should be borne by the applicant.

Secretary Bliss to the Commissioner of the General Land Office, May 5,
(W. V. D.) 1897. (C. W. P.)

This case involves lots 1 and 2, of Sec. 33, T. 49 N., R. 4. W., Ashland land district, Wisconsin.

The land lies within the fifteen miles indemnity limits of the grant to the State of Wisconsin to aid in the construction of the Bayfield branch of the Chicago, St. Paul, Minneapolis and Omaha road (acts of June 3, 1856, and May 5, 1864), and was selected by the Omaha company July 12, 1887.

The record shows that on March 24, 1856, Francis E. Geveroux filed pre-emption declaratory statement for said tracts. On May 29, 1856, your office ordered all land in Wisconsin withdrawn until further order. Said order was revoked shortly afterwards; but on December 18, 1856, under directions of the Secretary of the Interior, an order was issued, forbidding the allowance of any pre-emption claim predicated upon a settlement made after receipt of said letter. From that date the lands remained reserved until November 2, 1891.

On September 23, 1890, Isaac H. Wing applied to purchase said lots under the 5th section of the act of March 3, 1887, and gave notice of his intention to make final proof on November 6, 1890, when John J. Anderson appeared and protested against the allowance of said proof.

This proof having been prematurely made, Wing was required to give a new notice, which he did, for March 30, 1891. Meanwhile, on February 19, 1891, Anderson had applied to file pre-emption declaratory statement for said lots and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 33, T. 49 N., R. 4 W. This application was rejected by the local officers because of the existing withdrawal. Anderson appealed, and your office reversed the decision of the local officers for the reason that the land was not within the withdrawal. Subsequently, on July 13, 1891, your office withdrew said decision, and left the right of Wing and Anderson to be determined on consideration of the contest which had arisen between them.

On March 30, 1891, Wing submitted his proof, and Anderson protested. The local officers recommended that Wing be allowed to purchase lots 1 and 2. Anderson appealed. Your office held that Wing's application for lot 1 should be rejected, because his purchase from the railroad company only covered a portion of said lot, and that his application to purchase lot 2 should be allowed; and that Anderson should be permitted to complete his filing as to lot 1 and the other tracts filed for, with the exception of lot 2.

Both parties appealed to the Department.

The Department, by decision of January 18, 1896, held that the pre-emption filing of Geveroux excepted the lots in controversy both from the withdrawal and grant for said railroad, and that the land, filed on by Anderson, was open to settlement, when he applied to file, subject to a purchase in good faith under the act of March 3, 1887. But held that "the facts appear to raise a question as to Wing's good faith in this matter," and remanded the case that a hearing be had "on that point."

Pursuant to the directions of the Department, a hearing was had before the local officers, who held that "the *bona fides* of Wing, as an innocent purchaser seems to be clearly established," and recommended the dismissal of Anderson's protest. Anderson appealed. Your office held that, so far as you were able to perceive, there was nothing in the record and facts shown relating to the transaction between Wing and the company inconsistent with, or that would preclude the presumption of good faith, and affirmed the judgment of the local officers.

Anderson appeals to the Department.

The facts, as found by the Department in departmental decision of January 18, 1896, are as follows:

That Wing was receiver of the land office for the district, within which the land lies, from January 29, 1880, until January 24, 1883, when he resigned; that on October 21, 1884, he conveyed, by quit claim deed, to Edwin W. Winter and John C. Spooner, an undivided one-third interest in the land, and on October 28, following, the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, by quit claim deed, conveyed the land to Wing; that the last mentioned deed was recorded May 15, 1885, and the deed to Winter and Spooner, on October 12, 1886; that on April 24, 1890, the said Spooner, by warranty deed, in which his wife joined, conveyed the land to Wing; that all these deeds recite a consideration of \$1; that the deed from Spooner and wife to Wing was made through William H. Phipps, as attorney in fact; that at the time of the execution of the deed Phipps was land commissioner of the railroad company, and Winter, one of the grantees in the deed first mentioned, was general manager, and Spooner, the other grantee, was then, or shortly before, general solicitor of the company; that Phipps, in explanation of the consideration recited in the company's deed to Wing, testified that it did not represent all the consideration, but that Wing had conveyed to the company ninety-five acres outside of the village of Washburn for terminal uses; that this statement, however, was not substantiated by any copy of the conveyance referred to; that Phipps also swore that there was no arrangement by which the railroad company was to receive any of the land conveyed, nor that it was to be held in trust for the company; and that Spooner had been solicitor of the company, but he was not sure whether he was such at the time of the conveyance to Wing.

Upon this finding of facts, the Department, not being satisfied that Wing had shown himself to be a *bona fide* purchaser as contemplated by the statute, ordered a hearing.

By the evidence taken upon the rehearing, it is shown that on March 27, 1883, Wing conveyed to the railroad company by warranty deed (a copy of which is now in evidence in the case) a tract of land containing ninety or ninety-five acres, in the town of Washburn, Wisconsin, for railroad purposes. Wing, Phipps and Winter testify that, as part of

the consideration for said tract, conveyed by Wing to the company, the company conveyed to Wing the land in controversy. The deed from the company is a quitclaim deed, and no satisfactory reason is given why the company did not give a warranty deed. In explanation of the lapse of time between the execution of Wing's deed to the company and the company's deed to Wing, it is said by Phipps, in his testimony, that the delay on the part of the company probably arose from the company not having received from the State its title to the land. The transactions between Wing and Winter and Spooner are thoroughly cleared up and the circumstances surrounding the case when it was before the Department previous to the rehearing, appear to be sufficiently explained.

That the company conveyed the land to Wing by quitclaim deed does not of itself show that Wing was not a *bona fide* purchaser. *Stebbins v. Croke*, 14 L. D., 498; *Osborn v. Knight* (on review), 23 L. D., 216; *Moelle v. Sherwood*, 148 U. S., 21; *United States v. California, etc., Land Co., Id.*, 31. It is claimed, however, that, even if the evidence of the parol agreement, between Wing and the railroad company, was admissible, which is denied, it shows a past consideration from Wing to the company, which is not sufficient to entitle Wing to be considered a *bona fide* purchaser.

That evidence may be given of a consideration not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it, is accepted law (*Greenleaf Ev.*, Secs. 286 & 304; *Richardson v. Traver*, 112 U. S., 423); and the evidence establishing Wing's purchase does not show a past consideration, but that the deed from the company to Wing was the consummation of an agreement for the exchange of property, which is held, in *Grandin v. La Bar*, 23 L. D., 301, to be within the remedy of the statute. Then it is said that Wing at and prior to the time of his purchase from the company had actual or presumptive knowledge of the existence of the pre-emption declaratory statement of Geveroux, filed March 24, 1856, which it is claimed constituted a fatal defect in his title. There is no evidence that Wing had actual knowledge of the filing of Geveroux, and his good faith is not impugned by the fact that prior to his purchase from the company he had been receiver of the land district within which the land lies. *Osborn v. Knight* (on review), 23 L. D., 216.

One question remains. It is assumed in the decision appealed from, that it was decided by the Department, when the case was before it on Anderson's and Wing's appeals, that Wing was entitled to lot 1 as well as lot 2, thus reversing your office decision of December 2, 1892, on that point. But an examination of the decision of the Department does not show such reversal. Its decision was simply that, "as the facts appear to raise a question of Wing's good faith in the matter," a hearing should be had "on that point." If his good faith should be established, he should be allowed to purchase the land; but whether both lots or one,

is not determined. In his application to purchase, Wing applies for the entire area of lots 1 and 2. But the conveyance from the company to Wing only covers lot 2 and "so much of lot 1 as lies east of and adjoining lot 2." Lot 1 contains 49.50 acres, and the portion purchased by Wing appears to cover about ten acres. Wing has no claim to purchase under section 5 the remaining thirty-nine acres, which he did not purchase from the company. But it is held by the Department in the case of *Union Colony v. Fulmele* (16 L. D., 273), that a *bona fide* purchaser from a railroad company of less than a legal subdivision is entitled to purchase from the United States, under the fifth section of the act of March 3, 1887, the land purchased from the company and receive patent therefor upon making the proof required by said section; but that the patent in such case should contain a recital that it is issued under the provisions of said section.

In accordance with this decision Wing will be allowed to purchase lot 2 and "so much of lot 1 as lies east of and adjoining lot 2," and Anderson permitted to complete his filing as to the residue of lot 1. But before patents can issue, a survey of that part of lot 1 which is embraced in Wing's claim must be made, the necessary survey to be at the expense of Wing, and the plat thereof duly approved.

Your office decision is modified accordingly.

O'BRIEN v. NORTHERN PACIFIC R. R. Co.

Motion for review of departmental decision of February 10, 1896, 22 L. D., 135, denied by Secretary Bliss, May 6, 1897.

INDIAN LANDS—CONTEST—ALLOTMENT.

NORSTRUM v. HEAD.

Under the regulations of the Department, land included within the occupancy of an Indian is not subject to entry, and a contest against an entry of land, so excluded from disposition, will confer no right upon the contestant that will prevent the Department from subsequently holding the land in reservation, with a view to its allotment to the Indian.

Secretary Bliss to the Commissioner of the General Land Office, May 6,
(W. V. D.) 1897. (F. W. C.)

With your office letter of April 3, 1897, was forwarded a motion, filed on behalf of Alfred Norstrum, for review of departmental decision of October 3, 1896 (not reported), in which the action of your office in dismissing his contest against the homestead entry of Henry C. Head, covering lot 5, Sec. 17, and lot 1, Sec. 18, T. 42 N., R. 26 W., St. Cloud land district, Minnesota, was affirmed.

Head's entry was made September 22, 1891, and on October 15, 1894, Norstrum filed an affidavit of contest against said entry, alleging that Head had never resided upon said tract since making his entry and that he had wholly abandoned the same. In support of his claim Head offered testimony tending to show that he was prevented from taking up his residence upon this land by an Indian named Chinorton, alias Big Pete, who had been living upon a part of the land, and that he had only been able to secure the consent of said Indian to build a house upon the land a short time prior to the filing of said contest.

Upon this showing your office decision held, in view of the departmental circulars of May 31, 1884 (3 L. D., 71), and October 26, 1887 (6 L. D., 541), that it was error to allow Head to make entry of the land while the Indian was in possession thereof, living upon and claiming the same. Head's entry was therefore held for cancellation and Nostrum's contest dismissed; from which action both parties appealed to this Department.

In order that the Department might be advised of the extent of the Indian's claim, an investigation was made thereof by a special agent of the Indian Office, at the request of this Department, and as a result of the investigation the Commissioner of Indian Affairs recommended that the Commissioner of the General Land Office be instructed to withhold said lot 5 of Sec. 17 from entry.

The motion for review seems to be based upon the ground that no formal claim has been made to this land on behalf of the Indian and that the reservation of the tract occupied by him is not at his own request or desire.

There can be no question, however, but that under the circulars before referred to the allowance of Head's entry, whether inadvertent or otherwise, was clearly an error, and this Department having before it facts which it deemed sufficient to warrant a reservation of the land occupied by the Indian, affirmed the action of your office and directed that said lot 5 be held in reservation with a view to its allotment to the Indian under the provisions of the act of January 14, 1889 (25 Stat., 642).

This action of course disposed of the contest, under which Nostrum secured no such rights as would prevent the reservation of the land, and his motion is accordingly denied.

HENSLEY *v.* WANER.

Motion for review of departmental decision of January 30, 1897, 24 L. D., 92, denied by Secretary Bliss, May 6, 1897.

EXEMPLIFICATION OF RECORD—PRELIMINARY INFORMATION.

F. M. CARRYL.

A request for information as to the cost of certified copies of specified papers, or records, in the General Land Office, is entitled to a response with such information as may of necessity be required to form the basis for a request for an exemplification of the record.

Secretary Bliss to the Commissioner of the General Land Office, May 5,
(W. V. D.) 1897. (G. B. G.)

I have your favor of the 3rd instant transmitting a copy of a letter from F. M. Carryl of Newark, New Jersey, addressed to myself and referred to your office by the Department on April 27, 1897.

It appears that Mr. Carryl desires certified copies of certain papers relating to fractional section 10, T. 39 N., R. 14 E., 3 P. M., Illinois, now in the city of Chicago, among other things,—

Copy (dated) of any map or maps showing any resurvey or changes from map of original survey of this tract.

It is submitted by your office that this would appear to include a copy of the plat approved October 16, 1896, of the survey of the lake front, executed by Frank Flynt and Walter T. Paine, U. S. surveyors, in pursuance of instructions from the Commissioner of the General Land Office, dated September 24, 1896, and you ask for instructions as to whether there can be furnished at this time a copy of the plat of this last survey, the same to be certified as a true and literal exemplification of the official plat of said survey on file in your office.

Sections 460 and 461 of the Revised Statutes provide that—

Whenever any person claiming to be interested in or entitled to land, under any grant or patent from the United States, applies to the Department of the Interior for copies of papers filed and remaining therein, in anywise affecting the title to such land, it shall be the duty of the Secretary of the Interior to cause such copies to be made out and authenticated, under his hand and the seal of the General Land Office, for the person so applying.

All exemplifications of patents, or papers on file or of record in the General Land Office, which may be required by parties interested, shall be furnished by the Commissioner upon the payment by such parties at the rate of fifteen cents per hundred words, and two dollars for copies of township plats or diagrams, with an additional sum of one dollar for the Commissioner's certificate of verification with the General Land Office seal; and one of the employees of the office shall be designated by the Commissioner as the receiving clerk, and the amount so received shall, under the direction of the Commissioner, be paid into the Treasury; but fees shall not be demanded for such authenticated copies as may be required by the officers of any branch of the government, nor for such unverified copies as the Commissioner in his discretion may deem proper to furnish.

It does not appear from the letter of Mr. Carryl that he claims to be interested either for himself or as the representative of another, or that he is entitled to or claims to be entitled to the land to which the papers desired relate, under any grant or patent from the United States, nor

can his letter be treated as an application to the Department for certified copies of any papers or exemplifications of any records of your office.

It is a request for information as to the cost, by items, of certified copies of certain papers and records therein specified.

A due regard for property rights and private interests within the jurisdiction of this branch of the executive department of the government, the supervisory control of which is cast upon the Secretary of the Interior by law, would seem to require that inquiries of this sort should be answered, and such information furnished as may of necessity be required to form the basis of a request of or demand on the proper officer for the application of a statute in any case alleged to come within its provisions.

I have therefore to direct that the information desired be furnished, and that on a proper demand being made under the sections of the revised statutes above quoted, by a party or parties coming within the letter or spirit thereof, that such copies and exemplifications be furnished as is therein provided, due regard being had for the public interest.

The cost of the copies desired should be approximated and a deposit of money required to cover the cost of their preparation.

BENSON v. STATE OF IDAHO.

Motion for review of departmental decision of January 8, 1897, 24 L. D., 272, denied by Secretary Bliss, May 6, 1897.

RAILROAD SELECTIONS—NON-MINERAL AFFIDAVIT.

INSTRUCTIONS.

Secretary Bliss to the Commissioner of the General Land Office, May 10, 1897.

I am in receipt of your letter "N" of the 5th instant, relative to the departmental order of the 9th ultimo, 24 L. D., 321, amending the last paragraph of the circular of July 9, 1894 (19 L. D., 21), providing for the examination of selections by railroad companies of lands in mineral belts.

In your letter you call attention to the fact said order in addition to making the amendment referred to, also directs a modification of the form of the mineral affidavit now in use in your office; and that "a strict construction" of said order "must be held to apply to all cases of whatever character in which a non-mineral affidavit is now required, for it directs that the form of the non-mineral affidavit *now in use in this office* be amended;" and you suggest that if the purpose of said

amendment was intended to apply only to state and railroad selections, then the departmental order of the 9th ultimo be amended as follows:

That in lieu of the words "now in use in this office," the words "in state and railroad selections," be inserted.

The purpose of the amendment to the instructions of July 9, 1894, by the order of April 9, 1897, was intended to apply to state and railroad selections only, and in order to avoid the complications that may arise by the construction placed upon it by your office, said order is amended as follows:

In the second line of the last paragraph on page two of said order the words "now in use in this office" are stricken out and in lieu thereof the words "in state and railroad selections" are substituted, so that said paragraph will read as follows:

"It is also hereby ordered that the form of the non-mineral affidavit in state and railroad selections be amended as follows," etc.

RAILROAD GRANT—INDEMNITY SELECTION—SPECIFICATION OF LOSS.

NORTHERN PACIFIC R. R. CO. *v.* SHEPHERDSON.

The departmental order of May 28, 1883, waiving specification of loss, was made at a time when the indemnity withdrawals for the Northern Pacific were held valid, and that fact must be taken into consideration, and given effect, in the disposition of selections made thereunder.

Under the grant to the Northern Pacific indemnity selections may be made within the first indemnity belt irrespective of the State or Territorial lines within which the loss occurs.

Secretary Bliss to the Commissioner of the General Land Office, May 10,
(W. V. D.) 1897. (F. W. C.)

The Northern Pacific Railroad Company has appealed from your office decision of December 22, 1894, holding for cancellation its indemnity selection covering the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 33 N., R. 40 E., Spokane land district, Washington, and permitting the homestead entry made of said land by William Shepherdson May 12, 1890, to remain intact.

This tract is within the indemnity limits of the grant to said company and was included in its list of selections filed May 25, 1885. This list was presented under departmental circular of May 28, 1883 (12 L. D., 196), and was not accompanied by a designation of losses as a basis therefor.

On October 31, 1887, a supplemental list was filed, in which losses were designated in bulk in amount equal to the selected lands. These losses, it appears from your office decision, were of lands within the Yakima and Coeur d'Alene Indian reservations, in the States of Washington and Idaho, respectively.

On September 2, 1892, the company filed a rearranged list of its losses so as to specify the same tract for tract with the selected lands.

As before stated, Shepherdson made homestead entry May 12, 1890, and in his affidavit alleged settlement upon the land April 16, 1890. Your office decision holds that the company's selection of 1885 was not protected by the order of 1883, for the reason that the lands were not withdrawn, the indemnity withdrawal being in violation of law, and in support thereof referred to the case of *John O. Miller v. Northern Pacific R. R. Co.* (11 L. D., 428).

In the case of the *Northern Pacific Railroad Company v. Holtz* (22 L. D., 309) it was held (syllabus):

The order of May 28, 1883, waiving specification of loss in support of indemnity selections, was made at a time when the indemnity withdrawals for the benefit of the Northern Pacific were held valid, and that fact must be considered and given effect in determining the scope and purpose of said order, although such withdrawals are now held invalid.

It is further held that the designation made in 1887 was not sufficient, for the reason that selections can not be made in Washington for lands lost in Idaho until it is shown that such losses can not be satisfied in the latter State, and in support thereof reference is made to the case of *Northern Pacific R. R. Co.* (17 L. D., 404).

In reviewing the case cited, this Department held (20 L. D., 187), "that indemnity selections may be made within the first indemnity belt, irrespective of State or Territorial lines."

The objection stated in your office decision, to the company's selection, is therefore not sufficient, and it must be held, unless other good and sufficient reason appears upon further examination of the company's selection by your office, that its rights under its selection dated back as of the time of the presentation of the list of May 25, 1885, and as this is long prior to Shepherdson's entry, the same must therefore be canceled.

Your office decision is accordingly reversed.

DESERT LAND ENTRY—MORTGAGE—ASSIGNEE.

THOMAS E. JEREMY.

A mortgage of land covered by a desert land entry cannot be regarded as entitling the mortgagee to the status of an assignee of the entry, until after foreclosure of the mortgage, if, under the laws of the State in which the land is situated, a mortgage of real property is not a conveyance thereof.

Secretary Bliss to the Commissioner of the General Land Office, May 10,
(W. V. D.) 1897. (J. L.)

This case involves the N. $\frac{1}{2}$ of section 29, T. 1 N., R. 2 W., Salt Lake City land district, Utah.

On September 16, 1893, William C. Dyer made desert land entry No. 3843 of said tract, containing three hundred and twenty acres. On

September 16, 1895, Thomas E. Jeremy filed his affidavit in the following words:

IN THE U. S. LAND OFFICE,
Salt Lake City, Utah, September 16th, 1895.

Thomas E. Jeremy being duly sworn on oath says he is a citizen of the United States of lawful age, and the assignee of William C. Dyer, who made desert land entry No. 3843, September 16, 1893, for the north half of section 29 in township 1 north of range 2 west, S. L. M. containing 320 acres. That said land was assigned to him by mortgage on the 9th day of October 1893. That since then, said Dyer has died leaving no heir, and affiant has taken possession of said land and reclaimed the same as shown by attached proof.

THOS. E. JEREMY.

Subscribed and sworn to before me this 16th day of September A. D. 1895.

BYRON GROO, *Register.*

With said affidavit, Jeremy filed (1) a certificate, dated September 16, 1895, and signed by one Arthur Parsons, Secretary, N. P. C. I. Co., stating

that Thomas E. Jeremy is the owner of two certificates of stock one No. 196 for 74 shares, and one No. 253 for two shares of the capital stock of the North Point Consolidated Irrigation Company of this city and county, Utah Territory. Each share is of the par value of ten dollars, and each share is estimated to be sufficient to irrigate nine acres of land;

(2) the affidavits of himself and Thomas L. Irvine and Levi A. Reed, all dated September 16, 1895, and stating

that there was expended by Thomas E. Jeremy, assignee of William C. Dyer, during the second year after the date of said entry, that is after the 16th day of September 1894 and before the 16th day of September 1895, the sum of \$487, being not less than one dollar per acre of the area thereof, and that the said sum was expended in the following manner viz: In purchasing water stock for irrigating said land the sum of \$327, and in clearing a portion of said land \$160; total \$487;

and (3) a copy of a mortgage dated October 9, 1893, purporting to have been executed by William C. Dyer, and conveying the N. $\frac{1}{2}$ of section 29 aforesaid to Thomas E. Jeremy, as a mortgage to secure the payment of \$1500 of money, loaned to improve said land, and evidenced by Wm. C. Dyer's promissory note for \$1500 made payable to the order of Thomas E. Jeremy on or before three years after date, which is copied in the mortgage.

On December 6, 1895, your office, considering said affidavit of Jeremy as an application for recognition as assignee of William C. Dyer, decided (among other things)

that until after foreclosure upon the mortgage he (Jeremy) can not be recognized as the assignee of the entry; and that then he could not be so recognized, nor could any other vendee under the sale by decree of court, unless he should show the qualifications exacted of an assignee of a desert land entry.

From said decision Jeremy has appealed to this Department.

The Statutes of Utah provide that—

A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale. (Compiled Laws of Utah, Vol. 2, p. 324.)

Such being the law of the State where the property in question is situated, the Department cannot, in view thereof, recognize the appellant Jeremy as the assignee of Dyer until he has foreclosed his mortgage and become the purchaser thereunder; and the decision of your office must therefore be affirmed.

The fact however, if true as alleged, that Jeremy took possession of the property after the death of Dyer, and has since kept up the necessary expenditures and improvements thereon with a view to preserving, as far as possible, the security for his debt, no heirs of Dyer having appeared to claim the land, would seem to present strong equities in his favor, and if he shall by the foreclosure of his mortgage under the laws of Utah, as suggested, place himself in a position to be recognized as the assignee of Dyer, I see no just reason why he may not be allowed to submit proof under the former's entry, and if so submitted the same will be duly considered.

Your said office decision is accordingly affirmed.

OKLAHOMA LANDS—QUALIFICATIONS OF SETTLER.

HUYCK ET AL. *v.* HARDING.

An applicant for the right of entry in Oklahoma is not disqualified by reason of his knowledge of the country, gained through residence therein prior to the prohibited period.

Secretary Bliss to the Commissioner of the General Land Office, May 10,
(W. V. D.) 1897. (W. C. P.)

B. E. Smith and Allen R. Harding have both appealed from your office decision of November 26, 1895 in the case of Charles M. Huyck, B. E. Smith and Allen B. Donaldson *v.* Allen R. Harding involving the SE. $\frac{1}{4}$ of Sec. 21, Tp. 21 N., R. 1 W., Perry, Oklahoma land district.

This tract is a part of the body of lands known as the "Cherokee Outlet" opened to settlement at noon on Saturday September 16, 1893. Harding made homestead entry for said tract on September 18, 1893. On September 20, Huyck filed affidavit of contest against said entry; on September 22, Smith filed his affidavit of contest, and on October 28, Donaldson filed his affidavit, each one claiming to be the first settler upon said tract. After a hearing at which all parties appeared and submitted testimony, the local officers found that Huyck was the first settler and awarded the land to him. Notice of this decision was acknowledged by the attorneys of the respective parties on March 12, 1895, and appeals therefrom were filed, by Harding on April 5, by Smith on April 11, and by Donaldson on April 13, following. Your office found that Donaldson's appeal was filed too late, declared the local officers' decision final as to him, and affirmed said decision, awarding the land to Huyck as the first settler. Appeals by Harding and Smith bring the case here.

These appeals agree in urging that Huyck was disqualified as a claimant for this land because of the advantage he had over other claimants owing to his knowledge of the country obtained by a residence there prior to the opening of said lands to settlement. The act of Congress approved March 3, 1893 (27 Stat. 612-640) authorizes the opening of these lands to settlement by proclamation of the President and contains the following provision:

No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquiring any of said lands.

The proclamation of the President dated August 19, 1893 (17 L. D., 230) declared that said lands would be opened to settlement at 12 o'clock noon on Saturday September 16, 1893, prescribed rules and regulations for the occupation and settlement of said lands, and as to premature occupation thereof repeated the words of the statute quoted above.

The facts as to Huyck's knowledge of these lands and the manner in which it was acquired are to be found in his own testimony. When asked to state how he became acquainted with that country he replied:

I have lived in this country ten years, have worked for cattle men right on this range all around where Wharton, Perry stand. I know every divide, every creek, and all crooks and turns there is in this locality.

He further says that he knew very near where all the lines of this tract ran, that he did not enter the Cherokee Strip between August 19, and September 16, 1893, that he was last in the Strip prior to September 16, 1893 on July 7, when he went to Wharton to get money due him from the railroad company for which he had been working, that during the winter of 1892-3 he worked for a hack line company up to about the last of March and then for the railroad company until about the first of June, living during that time in a dug out built by the hack line company near Wharton and in the vicinity of this tract. He further states that he knew the country as well three years before as he did the day he made the run, that he knew other tracts better than the one he selected and admits that his knowledge of the country possibly gave him some advantage in selecting a route to travel over, to reach any particular tract. He says he expected to take land in section 27, but finding some one there he passed on and located on the first tract he found unoccupied. No other witness testified upon this point in the case and the above statement gives the substance of all the testimony as to Huyck's presence in that country prior to the opening.

It is contended that the facts in this case bring it within the rule laid down in *Faull v. Lexington Townsite* (15 L. D. 389). The facts testified to in that case are not set forth in the decision but it is said:

I think it is clear from the evidence, that not only, the townsite company, but that Faull, made an examination and selection of the tract in dispute, subsequent to the passage of the act of March 2, 1889, and prior to the time fixed by the President's

proclamation for the opening of said lands to settlement, hence Faull is disqualified from appropriating the same as a homestead.

It has been held in regard to the lands in the Cherokee Outlet, that the inhibition against entering upon and occupying them runs from the date of the President's proclamation, August 19, 1893, opening said lands to settlement. *Townsite v. Morgan et al.*, 21 L. D., 496.

In the case at bar the evidence shows that Huyck did not make any examination of this tract during the prohibited period, and that he was not, in fact, within the boundaries of these lands during that period. The rule in the Faull case does not therefore apply here. Neither can the fact that Huyck had a knowledge of the country gained prior to the prohibited period be held to disqualify him from taking land therein. In *Golden v. Cole's Heirs* (16 L. D., 375) it was said:

It was impossible to deprive people who had been over the Territory of the knowledge they had thus acquired, but it was the intention of Congress that persons should stay out of the Territory after it had been secured as a part of the public domain until a certain hour.

In *Curnutt v. Jones* (21 L. D. 40) it was shown that Jones was well acquainted with the particular tract claimed by him at the date of the act authorizing the opening of the lands to settlement, that he had in fact selected it prior to that time and that he frequently passed through that section of country after the President's proclamation fixing the date at which the land would be opened for settlement. It was held that Jones was not disqualified to take the tract in dispute, it being said:

Jones, the defendant in this case, had lived for some time on the border of the territory, within less than a mile from the line, and almost from the necessity of his situation was familiar with the lands in the immediate vicinity. His information respecting them, and particularly respecting the tract subsequently entered by him, is shown to have been acquired long prior to March 2, 1889, and as was well said in the case of *Golden v. Cole's heirs*, *supra*, "It was impossible to deprive people who had been over the Territory of the knowledge they had thus acquired." His periodical visits to Oklahoma city, which was at once his post office, his most convenient and accessible railway station, and his market town, do not appear to have brought him any advantage over other persons seeking lands in the Territory, and his entrance therein upon the missions and for the purposes indicated by the evidence, it having been made affirmatively to appear that he reaped no advantage therefrom, should not, in my opinion, be held to disqualify him.

In *Monroe et al. v. Taylor* (21 L. D. 284) it was shown that one of the claimants, Jordan, went into the Territory in 1888, prior to the act of March 2, 1889, and selected a tract adjacent to the one there in controversy, that he went out on the order given to vacate the Territory, and that after the passage of said act he was three times within the prohibited territory, to visit in his professional capacity a sick patient, and that during those visits he did not seek to obtain any information in reference to land. In view of these facts it was said:

No knowledge of this particular tract of land, or of adjacent lands, obtained prior to the passage of the act of March 2, 1889, however advantageous such information

might be, could have the effect of disqualifying him for subsequent entry, and the presence of Jordan inside the Territory during the prohibited period, under the circumstances detailed, would not disqualify him unless it should appear that he acquired some advantage over others by reason of such visits. The conclusion that he did or could obtain such advantage seems to be clearly negated by the evidence.

In the case of *Hensley v. Waner* (24 L. D., 92) the doctrine laid down in *Monroe et al. v. Taylor* is reaffirmed.

In the case under consideration Huyck like the various claimants in the cases cited, acquired a knowledge of the country by a long acquaintance therewith prior to the prohibition against entry thereon and added nothing to his information in respect thereto after the beginning of the prohibited period. The conclusion of your office upon this point in the case, that Huyck was not disqualified as an entryman by reason of his knowledge of the country gained by a residence therein prior to the prohibition against entry upon said lands is in accord with the rulings of this Department as laid down in the cases herein cited and is concurred in.

The only other question presented by the record for consideration is as to the priority of settlement upon the tract in dispute. The testimony is voluminous, and, as is to be expected in view of the conditions under which the claims are asserted and the fact that there were four different claimants, it is contradictory. The substance of the testimony submitted in support of the respective claims is set forth in the decision appealed from and it is not necessary to repeat it here. An examination of that testimony leads to a concurrence with the conclusion reached by the local officers and in your office that Huyck was the prior settler upon this tract. He followed up that settlement by residence which has been continuously maintained and by such improvements as indicate his intention to make the place his home. He also showed himself duly qualified to make homestead entry.

The decision appealed from is therefore hereby affirmed.

SCHOOL LANDS—INDEMNITY SELECTION.

WILLIAM WILEY.

A school indemnity selection not made within the land district in which the loss occurred, as required by section 2276, R. S., may be held valid, in the absence of any intervening adverse right, under the amendatory act of February 28, 1891, which removed said restriction.

Secretary Bliss to the Commissioner of the General Land Office, May 10,
(W. V. D.) 1897. (C. W. P.)

From the record in the case of William Wiley, it appears that on September 26, 1895, Wiley made desert land entry of lot 1 and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 31, T. 22 S., R. 59 W., Pueblo land district, Colorado.

Said entry was held for cancellation, as invalid, by your office decision of December 19, 1895, upon the ground that the land entered had been selected by the State of Colorado as school indemnity, in list No. 3, filed in the local office January 6, 1890.

From this decision Wiley has appealed to the Department, contending that the indemnity school selection made by the State of Colorado is controlled by section 2276 of the Revised Statutes, which provides that such indemnity "shall be selected within the same land district" in which the losses occur, and not by the act of February 28, 1891, which provides:

That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur. (26 Stat., 796.)

It is true that, when the State made the selection in question, its right of selection was restricted to lands within the same district in which the loss occurred. But the act of February 28, 1891, *supra*, removed that restriction long before Wiley made his desert land entry, and I can see no reason why, the restriction being removed before Wiley applied to enter the land, the selection should not be held to be valid. (See State of Dakota, 13 L. D., 708.)

Your office decision is therefore affirmed. The motion to dismiss Wiley's appeal, filed by the attorney for the Bent-Otero Improvement Company, as intervenor, is dismissed.

INDIAN ALLOTMENT—CONTEST.

ADAMS v. GEORGE.

The action of the Office of Indian Affairs on allotments is conclusive, so far as the General Land Office is concerned, as to whether the Indian was a settler on the land, and whether he was entitled as an Indian to receive an allotment.

Secretary Bliss to the Commissioner of the General Land Office, May 10,
(W. V. D.) 1897. (J. L.)

This case involves lot 7 of section 19, T. 17 N., R. 2 E., Humboldt meridian, in Humboldt land district, California, containing 39.59 acres.

On September 8, 1892, John B. George, a half-blood Indian of the Klamath tribe, filed in the district land office, his application No. 29 to have allotted to him under the act of February 8, 1887 (24 Stat., 388) as amended by the act of February 28, 1891 (26 Stat., 794), lot 7 of section 19 and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 30, T. 17 N., R. 2 E., Humboldt meridian, containing 159.59 acres of surveyed lands, valuable only for grazing purposes. And the allotment was duly made.

On October 15, 1892, Mary A. Adams filed her affidavit of contest, corroborated by Horace Gasquet, against said allotment so far as it embraced the lot 7 of section 19 aforesaid, in which affidavit she

alleged: (1) That on September 25, 1892, she made actual settlement on lots 6 and 7 in section "19" and lots 7, 8 and 9 of section 20, in the township aforesaid, containing 139.40 acres; (2) that George had never made any settlement on any portion of the lands embraced in the allotment to him; and (3) that George's application was not sworn to before an authorized officer, and is therefore void.

The local officers rejected said affidavit of contest, "because the land had been allotted to the claimant before the alleged settlement of the contestant" was made.

Adams appealed. And on September 14, 1895, your office (by letter "G") affirmed the action of the local officers, refused to order a hearing, and dismissed the affidavit of contest.

On December 24, 1895, Adams filed an appeal, which was transmitted to this Department by your office on March 3, 1896.

By letter "G" of June 12, 1896, your office transmitted to this Department (1) a paper purporting to be John B. George's relinquishment of lot 7 of section 19 as aforesaid, (2) a homestead application of Mary A. Adams embracing said lot, and (3) certain correspondence in regard to a survey affecting said lot. All of said papers were filed in the local land office on May 23, 1895, while the appeal was pending here. Upon the recommendation of the Commissioner of Indian Affairs the Secretary declines to accept and will not recognize the said relinquishment.

Your office decision of September 14, 1895, rejecting Adams' affidavit of contest and refusing to order a hearing was clearly right.

The papers show that George's application was sworn to before M. Piggott, a special allotting agent, who was duly authorized to administer oaths in that case. (See section 3 of the act of February 8, 1887, and paragraph 628 of the Regulations of the Indian Office.)

The affidavit of contest shows that Adams made her settlement on September 25, 1892, seventeen days after the allotment to George had been placed on record. So that she was not a prior settler, and had no rights that were violated by the allotment.

The other allegation in the affidavit of contest, to wit: "That George had never made any settlement on any portion of the lands embraced in the allotment to him," presented a question of which your office had not, and even now has not jurisdiction.

The regulations prescribed by the Secretary on June 15, 1896 (22 L. D., 709) provide that

the action of the Office of Indian Affairs on said allotments shall be conclusive, so far as the General Land Office is concerned, as to whether the Indian was a settler upon said land, and whether he was entitled as an Indian to make an allotment.

Your office decision is hereby affirmed.

RESIDENCE—ABANDONMENT—VOTING.

PRATSCH ET AL. v. DOBBINS ET AL.

Registering and voting for several successive years in a precinct in which the land is not situated, on an oath as to actual residence in such precinct, raises a conclusive presumption against a claim of residence for the same period on the land.

Secretary Bliss to the Commissioner of the General Land Office, May 10,
(W. V. D.) 1897. (R. W. H.)

The plat of township 21, range 9 W., Olympia district. Washington, was filed in the local land office, March 8, 1895.

On the same day, Thomas Thorpe filed a pre-emption declaratory statement for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 26, of said township and range, alleging settlement in October, 1890, and improvements of the value of \$685; Charles R. Pratsch filed pre-emption declaratory statement for the SW. $\frac{1}{4}$ of said section 26, alleging improvements of the value of \$450; and Hiram E. Hulet made homestead entry for the SE. $\frac{1}{4}$ of said section, alleging settlement prior to January, 1895, and valuable improvements.

On May 7, 1895, Levi Dobbins filed application to enter the SW. $\frac{1}{4}$ of said section, under the timber and stone act of June 3, 1878 (20 Stat., 89), alleging that said land was valuable chiefly for timber and stone, was unfit for cultivation, and was uninhabited, and that it contained no mining or other improvements.

On May 22, 1895, Thorpe gave notice to Hulet, Dobbins and Pratsch that on July 20, 1895, he would make final proof for the land claimed by him before H. M. Sutton, United States Commissioner, at Montesano, Washington. On said day, Thorpe and his witnesses appeared before said commissioner, and submitted their testimony, which was received at the local office on July 22, 1895. On this last named day, Hulet, Pratsch and Dobbins filed protests against the allowance of said proof, and the local office rejected the same because one of Thorpe's two witnesses admitted on cross-examination that he had not seen the land claimed by Thorpe, and had never seen Thorpe on the land, until February, 1895. From this rejection Thorpe appealed to your office.

On May 8, 1895, Dobbins advertised his intention to make proof on his timber land claim, and July 23, 1895, was fixed as the time, due notice being given to Pratsch and Thorpe to show cause why Dobbins's entry should not be allowed.

On the day named Dobbins made his final proof, Pratsch and Thorpe each filing protests and alleging *bona fide* settlement and valuable improvements at the date Dobbins applied to enter the land.

Thorpe's final proof having been rejected, as heretofore stated, the proof of Dobbins was suspended to await the hearing on Pratsch's protest, set for September 10, 1895, and of which Dobbins and Pratsch were notified.

As a result of the hearing, the local office allowed the proof of Dobbins, dismissed Pratsch's protest, and held his pre-emption declaratory statement for cancellation.

The cases came to your office on the appeals of Thorpe and Pratsch, and as the interests of all the claimants of the land were involved therein, they were consolidated and considered together.

The testimony established to your satisfaction the following, among other facts: that Pratsch was not a *bona fide* resident of said land; that, even if he had made actual settlement thereon, he had since abandoned it; that the registration and poll books of Aberdeen precinct in Chiehalis county, Washington, for 1891, 1892, 1893, and 1894, showed that the said Charles R. Pratsch was a legal voter and actual resident of the second ward of said city during each of said years, and that his claim was based upon a mere pretence of settlement. Your office accordingly dismissed his protest, and held his declaratory statement for cancellation.

I find that Pratsch's attempted explanation of his registering and voting in Aberdeen amounts substantially to an admission of the charge.

In the case of *State of California v. Sevoy* (9 L. D., 139), it was held that Sevoy's voting in Crescent City—a different precinct from that in which his claim was located—"indicated an illegal act rather than a change of domicile," and did not raise a conclusive presumption against his claim of residence. But where registering and voting have been done for several successive years, and an oath has been taken each year, by a party, that he was an actual resident of the place at which the registering and voting occurred, the case is entirely different, and, in my opinion, the presumption, either of non-residence on the land or abandonment of such residence, is conclusive.

This last supposed case, I find from the testimony, is exactly Pratsch's case, and there is nothing in his appeal to the Department which raises any doubt, in my mind, as to the correctness of your action in dismissing his protest and holding his declaratory statement for cancellation.

At this stage of the controversy it would be premature, on the part of the Department, to take any action, or express an opinion, with respect to the conflicting claims of Thorpe and Dobbins, in view of your office decision, reversing the action of the local office and suspending their final proofs, until a further hearing can be held to determine the conflict between all the parties in interest. Your order for this hearing, on the ground indicated in your office opinion, is approved.

RELINQUISHMENT—CONTEST—FINAL DECISION.

CURNUTT *v.* LAWRENCE.

A relinquishment can not be held to be the result of a contest which had, prior to the relinquishment, been finally decided in favor of the entryman.

Secretary Bliss to the Commissioner of the General Land Office, May 11,
(W. V. D.) 1897. (U. W. P.)

The record shows that on April 27, 1889, James B. Jones made homestead entry of the NW. $\frac{1}{4}$ of Sec. 35, Tp. 13 N., R. 1 W., Oklahoma land district, Oklahoma; that on January 12, 1891, Adah Curnutt initiated contest against said entry, charging Jones with soonerism; that the local officers sustained the contest; that the entryman having died during the pendency of the case before the local officers, Joab Jones, his father and heir at law, appealed from said decision to your office, and from your office to the Department; that the decision of your office, which was in favor of Jones, was reversed by the Department on July 6, 1895. (Curnutt *v.* Jones, 21 L. D., 40.)

It further appears that on March 13, 1896, the said Joab Jones relinquished said entry, and Edward L. Lawrence made homestead entry of said land; that on the same day the local officers transmitted their report, showing that notice of said departmental decision had been served on Adah Curnutt on November 18, 1895, and that no motion for review had been filed.

On March 24, 1896, Adah Curnutt presented her homestead application for said land, which was rejected by the local officers for conflict with the entry of Lawrence, and on March 30, 1896, Adah Curnutt filed a motion for rehearing in her contest against Jones on the ground of newly discovered evidence, which motion was served on Jones's attorney on May 27, 1896. On April 7, 1896, Adah Curnutt filed an appeal from the decision of the local officers, rejecting her homestead application.

On August 4, 1896, the Department denied Adah Curnutt's motion for rehearing, on the ground that said motion was not served, until subsequently to entry of Lawrence, and said:

In the appeal before your office in the case of Curnutt *v.* Lawrence it is urged that the relinquishment filed by Joab Jones, heir at law as aforesaid, was the result of the contest of Curnutt *v.* Jones, which, if true, would lead to the cancellation of the entry of Lawrence and the awarding of a preference right of entry to Curnutt. The case is therefore remanded to your office for such action upon the allegations of Curnutt in the premises as may be deemed just and proper by you.

And the case was remanded to your office "for such action upon the allegations of Curnutt in the premises as may be deemed just and proper."

On August 22, 1896, your office promulgated the decision of the

Department on the motion for rehearing, and formally closed the case of Curnutt *v.* Jones.

In her appeal from the decision of the local officers rejecting her application to enter said land, Adah Curnutt insists that the local officers erred in rejecting her application for the reason that she

was the successful contestant for the tract applied for, the contest of Adah Curnutt *v.* the heirs of James B. Jones, deceased, for said tract of land being still pending and not finally closed by the Commissioner of the General Land Office, and the relinquishment filed by Joab Jones, heir, was directly caused by the pending contest of this applicant and said relinquishment was the result thereof,

and prays that Lawrence may be required to show cause why his entry should not be canceled for conflict with the prior and superior right of the appellant.

Your office affirmed the decision of the local officers, rejecting Adah Curnutt's application to enter said land, and she appeals to the Department.

Notice of the decision of the Department, dismissing Adah Curnutt's contest was mailed by the local officers to Adah Curnutt on November 18, 1895, and her motion for rehearing was not filed until March 30, 1896. The time allowed for filing a motion for review or for rehearing expired on the 29th of December, 1895, and the decision of the Department then became final. Hence the filing of the relinquishment can not be held to inure to the benefit of the contestant. The fact that your office had not then formally announced that the case of Curnutt *v.* Jones was closed, reserved to the contestant no rights, and the relinquishment can not be held to be the result of a contest which had previously been finally decided by the Department in favor of the entryman. Warn *v.* Field, 6 L. D., 236; Pomeroy *v.* Wright, 2 L. D., 164.

Your office decision is therefore affirmed.

APPLICATION TO AMEND ENTRY—ADVERSE CLAIM.

HUDSON *v.* ORR.

An application to amend a homestead entry, by including therein an additional tract, operates to reserve the land covered thereby, so far as the rights of the applicant are concerned, until final action thereon.

Secretary Bliss to the Commissioner of the General Land Office, May 11,
(W. V. D.) 1897. (J. L.)

This case involves lot 1 of section 13, T. 11 N. R. 4 E., Indian meridian, Oklahoma City land district, Oklahoma, containing 13.55 acres of land.

On March 15, 1892, Joseph C. Orr made homestead entry No. 3267 of lots 1 and 2 of section 18, T. 11 N., R. 5 E., containing 50.85 acres of land. On December 2, 1893, he filed an application to amend said entry so as to include the aforesaid lot 1 of section 13, T. 11 N., R. 4 E., situ-

ated in an adjoining township, but contiguous to the lots entered by him. In support of said application he filed his affidavit, corroborated by two witnesses, in which he alleged:

That at the time he made said entry he applied for lots 1 and 2 of Sec. 18, T. 11 N., R. 5 E., and also for lot 1 of Sec. 13, T. 11 N., R. 4 E., all of said tracts being contiguous; that at the time he presented said application he was informed by the clerk in charge at the U. S. Land Office that lot 1 in Sec. 13, T. 11 N., R. 4 E., was not open to entry but was allotted land, and your affiant was shown a schedule which appeared to indicate that said land was not open to entry. That your affiant was only allowed to make entry of said lots 1 and 2 in Sec. 18; that your affiant established his residence on said lots 1 and 2 of said Sec. 18, T. 11 N., R. 5 E.; has built a house thereon, reduced a portion of said tract to cultivation and has in all respects complied with the homestead law as to residence and improvement; that he has cleared and reduced to cultivation some two or three acres upon said lot 1 in Sec. 13; that a short time ago your affiant was informed by his former attorney, L. P. Hudson, that a mistake had been made in telling him that lot 1 in Sec. 13 was allotted land, and that the same was in truth and in fact, government land and open to entry; that no person other than your affiant has occupied or improved said lot 1 in Sec. 13, and that the same is also clear of any adverse claims of record.

The local officers recommended that the application be allowed. But on December 21, 1893, your office reversed the decision of the local officers, saying:

There appears to be no law or regulation of this department, under which Orr's application to amend may be properly allowed; and the application is therefore rejected subject to the usual right of appeal.

From said decision Orr appealed; and on July 6, 1895, this Department reversed your office decision, saying:

In view of the facts set forth, and especially of the improper restriction through the erroneous action of the local land office, it is my opinion that Orr should be allowed to amend his homestead entry in accordance with his original application. (See *Northern Pacific Railroad Company v. Yantis*, 8 L. D. 58).

And your office proceeded by letter "C" of August 17, 1895, to carry said departmental decision into effect.

In the meantime, while Orr's appeal was pending, to wit: On May 3, 1894, Lewis Hudson had been permitted by the local officers to make homestead entry of the aforesaid lot 1 of section 13, T. 11 N., R. 4 E., containing 13.55 acres of land, which were awarded to Orr by the departmental decision aforesaid. Whereupon your office by letter "C" of October 3, 1895, directed the local officers to advise Lewis Hudson

that he will be allowed thirty days from notice within which to show cause why his said entry should not be cancelled, having been improperly allowed when the tract was reserved by the pending application for amendment of Joseph C. Orr, party to homestead entry 3267, made March 15, 1892, for lots 1 and 2, sec. 18, T. 11 N., R. 5 E.

Within the thirty days prescribed, Hudson filed under his oath, but uncorroborated, an answer to the rule, and a protest against the allowance of Orr's application to amend, in which he alleged:

That at the time he made said homestead entry he was informed by a Mr. Watts a clerk in the said Land Office, that said tract was vacant government land subject to

homestead entry, and that he has since date of said entry settled and resided upon said tract in good faith and made valuable improvements thereon.

That the records of the said Land Office show that said Joseph C. Orr made his homestead entry upon lots 1 and 2 of section 18, in township 11 N. of range 5, east of the I. M. and that on August 17, 1895 he was allowed to have his said homestead entry amended, by direction of the Honorable Secretary of the Interior. That your affiant is informed that said Orr, has represented in his application for said amendment that he went to the U. S. Land Office aforesaid, at the time he made his original entry (No. 3267) and "applied to enter also lot 1 of Sec. 13 in township 11 N. of range 4 east I. M." That this affiant is informed and verily believes that said Joseph C. Orr never applied nor offered to enter said lot 1 of section 13 T. P. 11 N. of range 4 east, until after he made his original entry as aforesaid. That this affiant made settlement upon said tract during the month of August 1894, and about the same time established his residence thereon. That said Orr, has resided upon and improved the tract he originally entered and confined his improvements to the same, except that he has built his fence across the line in one place, so as to enclose about a half or three fourths of an acre of the tract in controversy.

That he has only occupied said tract by cutting and disposing of all the valuable timber thereon, and has at no time disputed the right of this affiant to said tract until after the amendment of his said entry was allowed as aforesaid, and that said Orr has resided within about a quarter of a mile of this affiant during all of the time he (affiant) resided upon and claimed said tract and was fully advised of the fact that your affiant had entered and claimed said tract as his homestead. Wherefore. He protests against the cancellation of his said homestead entry No. 8680, and asks that a hearing be ordered and that this affiant may be allowed to prove the allegations herein set forth, and to show that said Joseph C. Orr did not apply to enter the tract in controversy until after date of his original entry.

On January 13, 1896, your office denied Hudson's application for a hearing and held his entry for cancellation saying:

The application for amendment by Orr, reserved the land until the final disposition thereof, and Hudson could acquire no rights thereto as against Orr. It is therefore unnecessary to order a hearing, and the entry having been improperly allowed, is this day held for cancellation.

Hudson appealed to this Department:

It is a well settled principle that a legal application to enter land, is while pending, equivalent to actual entry, so far as the applicant's rights are concerned, and its effect is to withdraw the land embraced therein from any other disposition, until such time as it may be finally acted upon. The fact that the application of appellant was not an original, but only for amendment of a former entry to embrace the land in dispute, does not alter the case (*Mack Long*, 15 L. D., 579).

Land covered by one entry, or by an application to enter by amendment or otherwise, is not subject to another entry at the same time; and an application to enter land not subject to entry at the time the application is made, confers no rights upon an applicant. (*Rumbley v. Causey*, 16 L. D., 266). A legal application to enter land subject to entry, while pending, is equal to actual entry, so far as the applicant's rights are concerned, and withdraws the land embraced therein from any other disposition, until final action thereon. (*Hamilton v. Harris*, 18 L. D., 45 and *Pfaff v. Williams*, 4 L. D., 455).

Orr's application to enter by amendment the lot of land in controversy, was filed and put on record on December 2, 1893. The lot was

thereby withdrawn from any other disposition. The act of the local officers in permitting Hudson to make entry of the lot on May 3, 1894, was beyond their authority, and Hudson acquired no rights thereby. The fact that Mr. Watts, the clerk, was mistaken and misled Mr. Hudson as to the status of the tract, cannot impair the rights of Mr. Orr. The purpose of this proceeding against Mr. Hudson is to remove from the records his entry which was unlawfully made *pendente lite*, and which is inconsistent with the entry which the Department authorized Orr to make of the same tract. Mr. Hudson, who acquired no interest by his unlawful entry, cannot be permitted in this collateral proceeding to impeach the decision of the Department in Orr's case, to which he, Hudson, was not a party. The facts alleged in his answer and protest are not sufficient to entitle him to a hearing in this case.

Your office decision is hereby affirmed.

SETTLEMENT CLAIM—SUCCESSFUL CONTESTANT.

HINE v. CLIFF.

A settlement on land covered by the entry of another, confers no right as against a successful contestant who secures the cancellation of such entry.

Secretary Bliss to the Commissioner of the General Land Office, May 11,
(W. V. D.) 1897. (J. L. McC.)

On September 19, 1893, David A. Kittleman made homestead entry for the NW. $\frac{1}{4}$ of Sec. 26, T. 28 N., R. 1 W., Perry land district, O. T.

Twenty-seven days afterward—to wit, on October 16, 1893—Meredith A. Tarleton filed affidavit of contest against said entry, alleging prior settlement. No action appears to have been taken on said affidavit.

On June 4, 1894, Frank D. Cliff filed affidavit of contest against said entry on the ground of abandonment; and afterward an additional affidavit of contest, charging that Tarleton had never established residence on the land.

This case was set for a hearing, at which time Cliff appeared, but both Kittleman and Tarleton defaulted.

From the testimony taken it appeared that the entryman, Kittleman, had failed to establish residence on the tract, or to cultivate or improve the same, and had abandoned it for more than six months prior to the filing of the contest affidavit; and that Tarleton had never established residence upon the land, although more than six months had passed since he had filed an affidavit alleging prior settlement. The local officers therefore recommended the cancellation of Kittleman's entry and the dismissal of Tarleton's contest. From their decision no appeal was taken, and on May 20, 1895, your office canceled Kittleman's entry.

On June 13, 1895, Cliff exercised the preference right earned by his successful contest, and made homestead entry of the land.

On July 10, 1895, Lewis P. Hine applied to make homestead entry of the land; but the local officers rejected his application because of conflict with Cliff's homestead entry, made June 13, 1895 (*supra*). Hine appealed to your office, alleging that he was a settler upon the land prior to the settlement of Cliff; and that the local officers should have ordered a hearing to determine the fact as to priority. Your office, by decision of March 13, 1896, held:

Although Hine alleges settlement on the tract on May 30, 1894, he made no attempt to establish a claim to the land until July 10, 1896—fourteen months after the date of settlement; and by failing to assert his claim within three months from such settlement he lost all right he might have acquired thereunder:

Therefore your office refused his application for a hearing.

Hine has appealed to the Department. He contends, in substance, that Cliff filed his contest against Kittleman within a few days after Hine's settlement on the land, and within three months allowed him (Hine) in which to place his application of record; that after the contest had been filed by Cliff, he (Hine) had no way of placing himself on record prior to Cliff; that an application by Hine for said land would have been rejected on account of Kittleman's then existing entry, and a contest for abandonment would have been held in abeyance until the disposition of Cliff's contest for abandonment; that it was not until Cliff made entry under his preference right that he (Hine) had an opportunity under the rules to assert his claim, which he did by applying to make entry of the land, within a month after Cliff's entry; and he asks that a hearing be ordered to determine, as between him and Cliff, which was the prior settler.

It is clear that Hine, for the same reason that he could not have been permitted to make entry of the land at the date when he went upon it (because it was segregated by Kittleman's homestead entry), could not make a legal settlement or establish a legal residence thereon while said entry remained of record. (*Turner v. Robinson*, 3 L. D., 562, and many cases since).

After Cliff had initiated contest against Kittleman, Hine's settlement (whether made before or after the initiation of Cliff's contest) was subject to Cliff's preference right in case such contest should result in the cancellation of the entry. When the entry was canceled as the result of said contest, and Cliff made entry of the land, Hine's settlement (even conceding it to have been made earlier than that of Cliff) conferred upon him no rights in the premises.

The decision of your office denying Hine's application for a hearing is therefore affirmed.

HARDING v. MOSS.

Motion for review of departmental decision of February 13, 1897, 24 L. D., 160, denied by Secretary Bliss, May 13, 1897.

TIMBER CULTURE APPLICATION—INDEMNITY WITHDRAWAL.

GORDER v. ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

An application to make timber culture entry of land withdrawn for the benefit of a railroad grant confers no right as against the grant or the government, and if the land, so applied for, is subsequently restored to the public domain, after the repeal of the timber culture law, there is no right in the applicant that brings him within the protective terms of said repeal.

Secretary Bliss to the Commissioner of the General Land Office, May 13,
(W. V. D.) 1897. (W. A. E.)

The plaintiff in the case of Christian C. Gorder v. St. Paul, Minneapolis and Manitoba Railroad Company has appealed from your office decision of January 5, 1895, holding for cancellation his timber culture entry, allowed January 7, 1893, for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 35, T. 125 N., R. 39 W., St. Cloud, Minnesota, land district.

Said tract is within the indemnity limits of the grant for the benefit of the main line of said road, the withdrawal on account of which was made August 14, 1868. This withdrawal remained in force until May 22, 1891, when it was revoked (12 L. D., 541), under the authority of section 4 of the act of Congress approved September 29, 1890 (26 Stat., 496).

It is also within the indemnity limits of the grant for the benefit of the St. Vincent Extension of said road, the withdrawal for which was made February 6, 1872.

November 25, 1873, it was selected by the company on account of the St. Vincent Extension grant. No losses were specified as a basis for said selection, it not being required at that date, but on June 6, 1894, a rearranged list was filed, in which losses were specified, tract for tract.

November 21, 1876, said tract was claimed as swamp by the State of Minnesota,

January 3, 1887, Christian C. Gorder tendered his timber culture application for the land and said application was rejected for conflict with the claim of the State.

Gorder appealed, and a hearing was ordered to determine the character of the land. As a result of the hearing the claim of the State was finally rejected by your office on September 9, 1892, and on January 7, 1893, Gorder was permitted to perfect his timber culture application.

It does not appear that in these proceedings between Gorder and the State the railroad company was made a party or notified of the action of the local office and your office. The railroad was therefore not bound or affected by those proceedings. While it is to be regretted that the railroad claim was entirely overlooked, still it must be noted that Gorder could not have hoped to establish any right to the land as against the railroad without making it a party to the proceeding.

On January 5, 1895, however, your office held Gorder's entry for cancellation, and from this action he has appealed.

In the case of *Sachs v. Hastings and Dakota Railway Company* (21 L. D., 298), it was held that an application to make timber culture entry of land embraced within a railroad indemnity withdrawal confers no right as against the grant or the government, and that where land covered by such an application is restored to the public domain, after the repeal of the timber culture law, there is no right in the applicant that can be recognized as within the protective terms of said repeal.

If then, as argued by attorney for Gorder, the withdrawal of this land for the benefit of the main line of said road was a bar to its selection on behalf of the St. Vincent Extension and rendered that selection illegal, said withdrawal was also a bar to the allowance of Gorder's timber culture application. Whether or not, therefore, the selection on behalf of the St. Vincent Extension is valid, Gorder's timber culture entry is clearly illegal and must be canceled.

Your office decision is affirmed.

DESERT LAND CONTEST—STATUTORY LIFE OF ENTRY.

ROSCOE ET AL. v. FOSTER ET AL.

The period covered by a departmental order suspending a desert land entry must be excluded in computing the time within which reclamation must be effected and final proof made.

The act of March 3, 1891, amending the desert land act of March 3, 1877, operates to confer upon entrymen under the original act, at their option, the additional time for effecting reclamation provided for in said amendatory act, and an entry occupying such status, on which final proof has not been submitted, is within the provisions of the act of July 26, 1894, extending the time for making final proof and payment.

Secretary Bliss to the Commissioner of the General Land Office, May 13,
(W. V. D.) 1897. (W. M. W.)

Your office, by letter of January 27, 1897, rejected the application of A. C. Roscoe and Joseph P. Carroll to contest the desert-land entry of James A. Foster for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, of Sec. 28, T. 26 S., R. 25 E., Visalia land district, California.

Your office has forwarded the record pursuant to departmental order of January 29, 1896.

The entry was made by said James A. Foster on April 19, 1877. He died on April 21, 1886, having devised all his interest in said entry to his widow, Janie A. Foster—naming her in his will as executrix.

This entry (with many others made at the Visalia, California, land office) was suspended by departmental order of September 12, 1877; which suspension was revoked January 12, 1891. *United States v. Haggin*, 12 L. D., 34.

On February 3, 1896, A. C. Roscoe and J. P. Carroll applied to contest Foster's entry, alleging failure to reclaim the land and submit final proof in the time allowed by law.

On March 14, 1896, Roscoe and Carroll filed a second complaint, in which they alleged that on August 21, 1893, due notice of the revocation of the suspension of said entry was given the entryman by registered mail; they also alleged that three years, exclusive of the suspended period, had elapsed and that the land had not been reclaimed. The local officers held these two affidavits of contest pending the disposition of prior contests.

On April 18, 1896, Janie A. Foster assigned her interest in the land to Omar Phillips. On May 9, 1896, Phillips submitted final proof in support of said entry. On May 18, 1896, the local officers passed upon the final proof, and found:

That the land has been reclaimed, and that the water right is sufficient, but we refuse to accept final payment and issue final receipt thereon, for the reason that there are contests pending against said entry.

On May 22, 1896, Carroll filed a supplemental affidavit, in which he alleged, on behalf of himself and Roscoe, that Phillips's final proof fails to show that the land has been sufficiently irrigated, and that sufficient water right has been secured. This affidavit was rejected by the local officers on June 4, 1896,

because the allegations attack the final proof, which said proof has been passed upon and accepted by this office, and the same is held pending disposition of contests against original entry.

No action by the local officers appears to have been taken on said affidavits, filed February 3, and March 14, 1896, by Carroll and Roscoe.

Carroll and Roscoe appealed to your office.

On November 30, 1896, your office directed the local officers to report what contests they referred to as pending at the time the first two contest affidavits of Carroll and Roscoe were filed, and at the time officers passed on said final proof.

On December 9, 1896, the register and receiver reported that said prior contests (not naming the parties who had initiated them)

have all been disposed of, and there is now nothing in this office having precedence over the original contest of Roscoe *et al.*

On January 27, 1897, your office held that the charges made in plain-

tiffs' first and second affidavits of contest, of failure to reclaim the land in the time allowed by law, are premature; and respecting the sufficiency of the charges made in their third affidavit, it was found:

That the Calloway canal passes within two miles of the land and furnishes water for irrigation. The water is conveyed to the land by three ditches, sixteen feet wide, and distributed by lateral ditches. Water was conveyed upon the land in 1880. The land has been sufficiently irrigated since 1885. By reason of the irrigation the land is capable of producing in paying quantities such crops as are grown in that vicinity. There are no high points to which water can not be conveyed. Accompanying the proof is an abstract of water right, showing that said Calloway canal was constructed by a corporation organized for the purpose in 1877, and that said three ditches conveying water from the canal to the land were constructed by said corporation, and sufficient water conveyed to the land by virtue of an agreement entered into with said Foster by which he was to have perpetual water right on payment to said corporation of his proportionate share of the whole cost of construction of the canal. All the water rights acquired by Foster were conveyed to Phillips by said devisee.

It seems to me that the proof is satisfactory in its showing of reclamation of the land and of water right.

The charges found in the three affidavits by Roscoe and Carroll do not constitute a cause of action, therefore, hearing on their petitions is denied.

Your office also disposed of the application of John C. Collins to contest Foster's entry adverse to Collins, and, inasmuch as he has not appealed from your office decision, there is no question here relating to his rights.

Roscoe and Carroll appeal.

The first specification of error alleges that your office erred in holding that the first two affidavits of contest filed by plaintiffs were premature.

The theory upon which this specification and others seem to be based is that the time for reclaiming the land, and making final proof and payment therefor, under the desert act of 1877 (19 Stat., 377), had expired at the date said affidavits of contest were filed, and also that the acts of July 29, 1894 (28 Stat., 123), and August 4, 1894 (28 Stat., 226), have no application to desert entries under the act of 1877. It is further claimed that your office erred in deciding that the period of suspension should be excluded from the three years in which the entryman should submit his proof under the act of 1877.

In *United States v. Haggin*, 12 L. D., 34, the suspension of this entry, made September 12, 1877, was revoked, and it was said:

The time between the date when said order became effective, and the date of notice of its revocation, will be excluded from the time within which the entryman is required to make proof of his compliance with the requirements of the law.

In *Farnell et al. v. Brown* (on review), 21 L. D., 394, and *White v. Dodge*, Id., 494, it was held that on the revocation of an order suspending a desert entry time will not run against the entryman until due service of notice upon him of such revocation.

There is nothing in the record before the Department in this case to show that the entryman or his assignee was ever served with notice of

the revocation of the suspension of said entry; but plaintiffs allege in their amended affidavit of contest, filed March 14, 1896, that the entryman was duly notified of the revocation of the suspension on August 21, 1893, and for the purposes of this opinion said date will be considered as the time when the entryman was duly notified of the revocation of the suspension of his entry. Under the act of 1877 the entryman might make his proof of reclamation at any time within three years after filing his declaration. This entry was made on April 19, 1877; it was suspended September 12th of that year, so that four months and twenty-three days of the three years had run at date of suspension. After the date of suspension the time did not begin to run against said entry until the entryman was duly notified of the revocation, which, as before indicated, will be assumed to have occurred on the 21st day of August, 1893; from that date to February 3, 1896, when plaintiffs first affidavit of contest was filed, two years, five months and twelve days elapsed after notice of suspension was served on the entryman; this time, added to the four months and twenty-three days that had run before the suspension, makes in all two years, ten months and five days that had expired at the date plaintiffs' first affidavit of contest was filed. The plaintiffs' second or amended affidavit of contest was filed one month and eleven days after the first, and, of course, related back to the date of the filing of the original, to which it was amendatory.

For the sake of argument, it may be conceded that the date of the filing of the amendatory affidavit should govern in computing the life of the entry, and still the contention of appellants would be without force, for at the time said affidavit was filed only two years, eleven months and sixteen days, of the three years allowed, had expired, and the contest was prematurely brought under the act of 1877, independent of the acts of 1894. But, if the time allowed by the act of 1877 had expired, the act of July 26, 1894, *supra*, extended the time for making final proof and payment, for

all lands located under the homestead and desert land laws of the United States, proof and payment of which has not yet been made . . . for the period of one year from the time proof and payment would become due under existing laws.

The second section of the act of March 3, 1891 (26 Stat., 1095), added four sections to the desert land act of 1877. The 6th section so added to the desert act provides that any valid rights theretofore accrued under the act of 1877 should not be affected,

but all bona fide claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, . . . ; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said act.

Under this act Foster's entry was an entry under "existing laws."

It is clear that plaintiffs' first two contest affidavits, charging a failure to reclaim the land within the time allowed by law, fail to state

facts sufficient to constitute a cause of action, and there was no error in your office decision so holding.

In view of this conclusion, it becomes unnecessary to determine whether the act of August 4, 1894, *supra*, applies to an entry made under the act of 1877, when the entryman does not elect to proceed under the act of 1891, *supra*.

The final proof was made and filed within the time allowed by law. I concur with your office in its conclusion that the final proof shows compliance with the requirement of the desert law in every material respect, including the reclamation of the land embraced in said entry.

On June 30, 1896, one John C. Collins applied to contest the entry in question, on the identical grounds as set forth in Roscoe and Carroll's affidavit of contest. Your office correctly dismissed Collins's complaint.

Since the decision of your office was rendered, Chesley M. Carter (on January 18, 1897,) and George M. Phillips (on February 10, 1897,) have filed protests against the final proof submitted by Omar Phillips. In order to avoid circuitry of action and consequent delay, it will be proper for the Department to consider their protests, although they have not been acted upon by your office. (*Kiser v. Keech et al.*, 7 L. D., 25) and many cases since.)

The protests of Carter and Phillips involve substantially the same charges as have hereinbefore been considered. They are not sufficient to justify the Department in ordering a hearing, and are therefore dismissed.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT RIGHT.

MULLER v. NORTHERN PACIFIC R. R. Co.

Indemnity selections accompanied by designation of loss in bulk, made prior to the specific departmental requirement that lost lands should be arranged tract for tract with the lands selected, operate to protect the company as against subsequent applications to enter, made prior to said requirement, and the rearrangement of losses in accordance therewith.

The right of a qualified settler who is in the possession of land to perfect title thereto, is not defeated by an intervening indemnity selection.

Secretary Bliss to the Commissioner of the General Land Office, May 18,
(W. V. D.) 1897. (F. W. C.)

The Northern Pacific Railroad Company has appealed from your office decision of April 26, 1895, holding for cancellation its indemnity selection covering the W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 15, T. 146 N., R. 86 W., Bismarck land district, North Dakota, with a view to the allowance of the homestead application of Frederick Muller.

This tract is within the indemnity limits of the grant for said company and was included in list of selections filed July 14, 1890 (List

No. 50). This list contained a specification of losses as bases for the selections but the same was not arranged tract for tract with the selections.

The losses were of unsurveyed lands within the diminished Crow Indian reservation.

Under the orders issued in accordance with the directions contained in the decision in the case of *La Bar v. Northern Pacific Railroad Company* (17 L. D., 406), the company filed its rearranged list on May 14, 1894.

On July 23, 1891, Muller tendered a homestead application for this land, accompanied by affidavits in which he alleged settlement upon the land in the spring of 1889, and that he, together with his family, have continuously resided thereon since that time.

Said application was, by the local officers, rejected for conflict with the selection by the company from which action Muller appealed.

From the record transmitted, it further appears that during the pendency of said appeal, to wit, on May 24, 1894, Muller filed a contest against the company's selection alleging substantially the same as contained in his affidavits filed in support of his homestead application. Upon said contest hearing was set for December 10, 1894, and service duly made.

At the appointed time both parties appeared and after the witnesses offered by Muller had been examined and cross-examined by the company, the case was closed, the company offering no testimony.

An examination of this testimony clearly sustains the finding of the local officers, which is as follows:

That said contestant settled upon said W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 15, T. 146 N., of R. 86 W., in the fall of 1887, that himself and family have continuously resided thereon ever since, that he has yearly subsequently to 1889 raised crops thereon, that his improvements amount to the value of \$585, that the said contestant was a qualified homestead entryman when he settled upon said tract, that he settled upon said tract with the view of acquiring the same as a homestead and that he has maintained his residence thereon since with the like intention.

The record of this hearing had not been received at your office at the time of the rendition of your decision appealed from (April 26, 1895), in which it was held, in effect, that the company's selection list of July 14, 1890, was not a valid selection because the losses were not arranged tract for tract with the selected lands, and, therefore, that said selection was no bar to the allowance of Muller's homestead application tendered, as before stated, on July 23, 1891.

This is clearly in conflict with the ruling made in the case of the *St. Paul, Minneapolis and Manitoba Ry. Co. v. Lambeck* (22 L. D., 202), in which it was held that—

Indemnity selections accompanied by designation of loss in bulk, made prior to the specific departmental requirement that lost lands should be arranged tract for tract with the lands selected, operate to protect the right of the company as against subsequent applications to enter, made prior to said requirement, and the rearrangement of losses in accordance therewith. (Syllabus.)

Upon the record before me it must therefore be held that the company's rights under its selection date as of the presentation of its list July 14, 1890.

The question then arises, had Muller such a claim to the land at that date as would bar the selection?

While it is true the hearing, hereinbefore referred to, was held during the pendency of Muller's appeal from the rejection of his application, yet, as the company appeared, without objection, I can see no good reason for further hearing, and the allegations of settlement and residence made by Muller in support of his claim are considered as sustained.

The land was, therefore, in the occupation and possession of Muller, a qualified settler, at the date of selection, and such selection can not bar the consummation of his claim which he has sought to perfect by the tender of his application under consideration.

For this reason your office decision is affirmed, and upon completion of entry by Muller the company's selection will be canceled.

RAILROAD GRANT—RES JUDICATA—ACT OF MARCH 3, 1887.

HARRIS *v.* NORTHERN PACIFIC R. R. CO.

A decision of the Department, in accordance with the rulings then in force, that a certain tract of land passed under a railroad grant, does not, in view of the provisions of the act of March 3, 1887, requiring the adjustment of railroad grants "in accordance with the decisions of the supreme court," preclude subsequent departmental action, on the application of a third party, under the later decisions of said court.

Secretary Bliss to the Commissioner of the General Land Office, May 18,
(W. V. D.) 1897. (J. L. McC.)

The Northern Pacific Railroad Company has appealed from the decision of your office, dated August 3, 1895, rejecting its claim to the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 23, T. 4 N., R. 10 W., Helena land district, Montana.

Said land is within the primary limits of the grant to the railroad company named. On April 16, 1872, one Isaac Harris filed pre-emption declaratory statement for the same, including also the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 14, adjacent. The latter eighty acres he afterward entered under the homestead law, and applied to make additional homestead entry of the eighty acres in the odd section—which was allowed. Thereupon a contest arose between him and the company, the details of which are fully set forth in the departmental decision of April 10, 1891, in said case (12 L. D., 351); and need not be herein repeated. The Department held therein that the tract in the odd section inured to the company.

Said decision was in strict accordance with departmental rulings at that time prevailing. Since then, however, the United States supreme court has rendered a decision in the case of *Whitney v. Taylor* (158 U. S., 85), to the effect that an uncanceled pre-emption filing of record at the date when a railroad grant becomes effective excepts the land covered thereby from the operation of the grant, even though at such time the statutory life of the filing has expired. Said supreme court decision vitally affects the case now under consideration.

At the date when the withdrawal upon general route became effective (February 21, 1872), and when the map of definite location was filed (July 6, 1882), the tract was embraced in the pre-emption declaratory statement of one Bernhard H. Dudden, filed January 24, 1872, and still uncanceled and of record on the books of your office. Under the ruling in said *Whitney-Taylor* case, therefore, the land was excepted from the operation of the grant.

Isaac Harris, the homestead claimant in the case decided by the Department on April 10, 1891 (*supra*), is dead; and his wife, Mary Harris, now applies to enter the land under the homestead law.

The company contends that, inasmuch as the Department, on April 10, 1891, awarded the lot to it, the matter is *res judicata*, and can not be reopened; that

Isaac Harris's homestead entry for this land having been canceled in 1891, pursuant to the decision of the Secretary, it is not competent for the Commissioner to allow his widow, Mary Harris, to offer proof upon said canceled entry, and to secure the issuance of patent thereon.

The above is not quite an accurate statement of the facts. Isaac Harris's additional homestead claim is not in question here. Mrs. Harris is not seeking to secure the issuance of patent upon her husband's canceled entry. She is applying to enter in her own right certain lands, which under the decisions of the supreme court cannot be held to have passed to the company under its grant, and must therefore be treated as public lands subject to entry by any qualified applicant. Congress by act of March 3, 1887 (24 Stat., 556) has provided that certain railroad grants shall be adjusted by the Secretary of the Interior, "in accordance with the decisions of the supreme court." The fact that the Department has at some time heretofore held that the land here in controversy had passed to the railroad company, does not prevent its now adjudicating the new question that has arisen upon Mrs. Harris's application to enter, in accordance with the decision of the supreme court in the case of *Whitney v. Taylor* (*supra*).

Your office letter of August 3, 1895, (*supra*) holding that the land did not inure to the railroad company, was in direct contravention of the departmental decision of April 10, 1891 (*supra*). While the Department possesses authority by virtue of the act of March 3, 1887 (above cited), to take action in the case irrespective of its former decision awarding the land to the railroad company, your office had no such authority and

jurisdiction. Hence your office letter has been considered simply in the light of a recommendation. In such recommendation, however, I concur, and hereby direct that the claim of the company be rejected, and that Mrs. Harris's application to make homestead entry of the land be allowed, unless some other reason to the contrary shall appear.

TIMBER CULTURE FINAL PROOF—ACT OF MARCH 4, 1896.

JOHN W. BURNS.

The act of March 4, 1896, relieves a timber culture entryman from the requirement of appearing before the local office, or an officer designated by statute within the county in which the land is situated, on the submission of final proof, but does not modify prior legislation or regulations thereunder with respect to the testimony of his witnesses.

Secretary Bliss to the Commissioner of the General Land Office, May 18,
(W. V. D.) 1897. (G. C. R.)

John W. Burns has appealed from your office decision of February 15, 1896, which affirms the action of the register and receiver in rejecting the final proof, offered November 5, 1895, in support of his timber culture entry (Garden City series), made June 4, 1885, for the SW. $\frac{1}{4}$ of Sec. 22, T. 31 S., R. 36 W., Dodge City, Kansas.

The final proof was rejected because the same was not taken before the register and receiver, or before an officer within the county in which the land is situated.

The proof appears to have been taken before J. W. Johnson, judge of the probate court in Harvey county, Kansas, about two hundred miles distant from the county in which the land lies.

Mr. Burns in his appeal alleges no specific error, but contends that the law "does not contemplate legal or moral impossibilities;" that the peculiar state of affairs

in the present desolate and almost deserted counties of western Kansas should not deprive the bona fide claimant and cultivator of the timber culture claims of his moral right to enter the tract, even though the wise provisions of the General Land Office be disregarded.

The act approved May 26, 1890 (26 Stat., 121), provides as follows:

That the proof of settlement, residence, occupation, cultivation, irrigation, or reclamation, the affidavit of non-alienation, the oath of allegiance, and all other affidavits required to be made under the homestead, pre-emption, timber culture, and desert land laws, may be made before any commissioner of the United States circuit court, or before the judge or clerk of any court of record of the county or parish in which the lands are situated; and the proof, affidavit, and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them, with the fee and commissions allowed and required by law.

The proof, as shown above, was taken before a judge of a probate court in Kansas, which court, by section 1, chapter 29 (p. 325), of the

compiled laws of Kansas (1881), is declared to be a court of record, and in this respect met the requirements of the statute above quoted.

But at the time it was taken (1895) it did not meet the requirements of the statute or the regulations thereunder, in that it was not taken before the register and receiver or before a commissioner of the United States circuit court having jurisdiction over the county in which the land is situated, or before a judge or clerk of any court of record in such county. Edward Bowker, 11 L. D., 361.

The act approved March 4, 1896 (29 Stat., 43), provides:

That timber-culture claimants shall not be required, in making final proof, to appear at the land office to which proof is to be presented or before an officer designated by the act of May twenty-sixth, eighteen hundred and ninety, within the county in which the land is situated; but such claimant may have his or her personal evidence taken by a United States court commissioner or a clerk of any court of record under such rules and regulations as the Secretary of the Interior may prescribe.

This act was passed after Burns made his final proof, but, under the rule laid down in the case of *S. Lizzie Guernsey* (22 L. D., 526), he is entitled to its benefits, and his personal evidence, taken before any officer named in the act of 1890 (*supra*), in any part of the United States, might be accepted; but this does not relieve him from the necessity of conforming to the statute and regulations thereunder in respect to his proof witnesses. Apart from the claimant's personal testimony, the regulations in regard to the manner of taking final proof in timber culture cases have not been changed.

The decision appealed from is accordingly affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—DESIGNATION OF LOSS.

PAGE v. NORTHERN PACIFIC R. R. Co.

Indemnity selections, unaccompanied by designation of loss, made prior to the departmental order waiving such designation, are protected by said order in the absence of any intervening adverse claim.

On the rearrangement of an indemnity list, based on losses alleged in bulk, so that the lands selected, and the losses specified, shall correspond tract for tract, the rights of the company date as of the presentation of the first list, so far as the selections and losses are the same.

Indemnity selections of the Northern Pacific resting on alleged losses east of Superior City, regular and legal under the construction of the grant at the time when made, should be protected under the changed construction of the grant, with due opportunity to assign new bases, as against intervening adverse claims.

Indemnity selections, made under the departmental order waiving specifications of loss, are valid, and while of record a bar to the allowance of adverse claims.

Secretary Bliss to the Commissioner of the General Land Office, May 18,
(W. V. D.) 1897. (F. W. C.)

With your office letter of April 23, 1897, was forwarded a petition, filed on behalf of Thomas M. Page, in which it is moved that the approval given by my predecessor (Mr. Secretary Francis), on March

2, 1897, to indemnity lists No. 50 and No. 56, covering lands within the Fargo and Bismarck land districts, North Dakota, be revoked and hearing ordered, with a view to the establishment of the claim of Thomas M. Page to the SW. $\frac{1}{4}$ of Sec. 5, T. 146 N., R. 67 W.

Similar petitions are filed on behalf of Joshua Lemert as to the SW. $\frac{1}{4}$ Sec. 31, T. 147 N., R. 67 W.; Frank R. Lemert, SW. $\frac{1}{4}$ Sec. 31, T. 147 N., R. 67 W.; R. D. Lemert, NE. $\frac{1}{4}$ Sec. 31, T. 147 N., R. 67 W.; Harry A. Page, NW. $\frac{1}{4}$ Sec. 5, T. 146 N., R. 67 W.; Jennie F. Rogers, NE. $\frac{1}{4}$ Sec. 5, T. 146 N., R. 67 W.; Burton L. Russell, SE. $\frac{1}{4}$ Sec. 5, T. 146 N., R. 67 W.; Edw. I. Walton, SW. $\frac{1}{4}$ Sec. 25, T. 147 N., R. 68 W.

The grounds upon which these petitions are based are in all important particulars the same, so it is necessary only that one be considered, the action upon all to be governed thereby.

The case of Thomas M. Page is selected by the attorneys for the petitioners, and the following facts are gathered from the arguments filed in support of the petitions.

The land involved is within the indemnity limits of the grant for said company and was included in list of selections filed May 14, 1883.

This list was not accompanied by a designation of losses as bases for the selections, but as no adverse claim is alleged to have attached to the land prior to the promulgation of departmental order of May 28, 1883, exempting this company from the requirement of specifying losses when making its indemnity selections, the same was protected by said order. *Sawyer v. Northern Pacific R. R. Co.*, 12 L. D., 448.

On October 14, 1887, the company filed a supplemental list, containing losses in amount equal to the lands selected in list of May 14, 1883, but not arranged tract for tract with the selected lands. A re-arranged list was filed on March 3, 1892, in which the losses were arranged tract for tract with the selected lands. It is urged that this latter list did not contain all the lands assigned as bases in the list of October 14, 1887, and should therefore be treated as a new selection on account of the variance.

This contention seems to be based upon the decision in the case of *La Bar v. Northern Pacific R. R. Co.* (17 L. D., 406), but said decision will not support it. In that case the second list was not only reduced, but different losses were substituted, and like the first list the losses were not arranged tract for tract with the selected lands. On account of this variance in the losses designated, and because the extent of the new selection could not be ascertained, the same not being arranged tract for tract, it was held that the second list was a new selection.

Suppose the original list in which the losses were not arranged contained an amount of lost lands in excess of the selections, or that some of the selections had been canceled after the filing of the first list and before re-arrangement tract for tract, necessarily some of the losses contained in the first list would not be used in the re-arranged list, but the variance should not avoid the entire list, as it was a mere reduction.

If the latter list contains new losses, to that extent it is a new selection, but, so far as the selections and losses are the same, the rights of the company must date as of the presentation of the first list.

The losses assigned in the lists of October 14, 1887, and March 3, 1892, were of lands in the State of Wisconsin, which were not sufficient to support the selection after departmental decision of November 13, 1895 (21 L. D., 412), in which it was held that the grant for this company did not extend east of Superior, Wisconsin.

It is presumed that, acting under directions given in said decision, the company thereafter specified a new basis for its selections in question, for the clear lists submitted and approved on March 2, 1897, show losses within the Crow Indian reservation, Montana.

The petition does not question the regularity or sufficiency of this later designation.

Page makes affidavit to the following facts relative to his claim to this land and the steps taken to secure the allowance of the same:

Thomas M. Page, being first duly sworn, says that he made settlement and established residence upon the SW. $\frac{1}{4}$ Sec. 5, Twp. 146 N., range 67 west, in the month of June, 1885, and ever since has resided upon said tract, and has continued to improve and cultivate the said tract; that he has a good house, barn, and granary upon said land; that he has 80 acres of said tract under cultivation, and that his said improvements are of the value of about \$2,000; that he has resided continuously upon said tract since the month of June, 1885; that on the 18th of May, 1895, he made homestead application for said tract and paid the fees and commissions required by law; that he was at that time and is now qualified to make homestead entry; that the local office at Bismarek rejected his said application, because of conflict with selection of the Northern Pacific Railroad Company; that on June 16, 1895, he appealed from the said rejection to the Hon. Commissioner; that on August 17, 1896, his attorney received by regular mail the rejection of said application by the Hon. Commissioner; that on August 21, 1896, he appealed to the Hon. Secretary of the Interior. That he had done all things necessary to perfect his entry for said tract, and now asks to be allowed to intervene in the matter of the selection of said tract by the Northern Pacific Railroad Company, and he respectfully asks that the Hon. Secretary of the Interior may exercise his supervisory powers and protect his rights as a settler and grant to him such relief as in law or in equity he may be entitled to. This affidavit is made in good faith and is made for the purposes above set forth.

The petition alleges that your office refused to receive the appeal from the decision referred to in said affidavit, because not served upon the proper representative of the company, so that said appeal has never been transmitted to this Department.

As thus presented the case is in all important particulars similar to that of *Gamble v. Northern Pacific R. R. Co.* (23 L. D., 351), except that the lands considered in that case had not been approved by the Secretary of the Interior, and that Gamble did not allege settlement prior to his application, tendered on March 20, 1895. In said case it was held:

Indemnity selections of the Northern Pacific resting on alleged losses east of Superior City, regular and legal under the existing construction of the grant at the time when made, should be protected under the changed construction of the grant,

with due opportunity to assign new bases, as against intervening adverse claims. (Syllabus.)

Relative to the approval, it might be said that on March 3, 1897, the day following the approval of the selection, Mr. Secretary Francis directed your office to suspend the issue of patents upon said approval as to the tracts here in question.

Some question might be raised as to the authority to proceed with hearing in this case after the approval, but for the reasons hereinafter given I deem it unnecessary to consider that question at this time.

Page urges that the selection list of October 14, 1887, was not a compliance with the circular of August 4, 1885 (4 L. D., 90), because the losses were not arranged tract for tract, and that the purpose of said circular was to revoke the order of May 28, 1883, so that his rights as a settler on October 14, 1887, take precedence over the selection of October 14, 1887, and all later selections.

The circular of August 4, 1885 (*supra*), so far as it referred to selections already made, provides as follows:

Where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed.

This identical question was presented in the case of *O'Brien v. Northern Pacific R. R. Co.* (22 L. D., 135), in which it was held (syllabus):

Indemity selections made under the departmental order waiving specification of loss are valid, and while of record a bar to the allowance of adverse claims. A list in bulk of lost lands filed thereafter in support of such selections does not invalidate the same, nor can a subsequent rearrangement of said list, tract for tract, to correspond with the selections, be regarded as an abandonment of the company's right under its original action.

To the same effect is the decision in the case of *St. Paul, Minneapolis and Manitoba Ry. Co. v. Lambeck* (*id.*, 202).

After a most careful consideration of the petition and argument filed in support of the alleged superior claim of Page over that of the company under its selections of this land as indemnity on account of its grant, I must hold that no such showing has been made as would warrant the recognition of his right as against the selection, if the facts as alleged were proven at a hearing, and have therefore to deny his petition and direct that patent issue upon the approval heretofore given of the company's selection.

GLOVER ET AL. *v.* SWARTS.

Motion for review of departmental decision of December 15, 1896, 23 L. D., 480, and for rehearing, denied by Secretary Bliss May 18, 1897.

TIMBER CULTURE CONTEST—ACT OF MARCH 3, 1893.

KIRK v. BROOKS.

Under the amendatory provisions of the act of March 3, 1893, the failure of a timber culture entryman, who has complied with the law for the period of eight years from date of entry, to continue such compliance with law, will not defeat his right to a patent, though he may not have succeeded in securing a growth of trees.

Secretary Bliss to the Commissioner of the General Land Office, May 18,
(W. V. D.) 1897. (C. J. G.)

This controversy has reference to the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 26, T. 10 S., R. 27 W., Wa Keeney land district, Kansas.

On May 8, 1884, George M. Brooks made timber culture entry for said tract, and on May 2, 1895, Andrew Kirk filed an affidavit of contest against said entry.

A hearing was duly had and the local office rendered decision in favor of the contestant, recommending that the entry be canceled.

An appeal was taken to your office, where, under date of February 7, 1896, the said decision of the local office was reversed and the contest dismissed.

A further appeal brings the case before this Department.

The evidence satisfactorily shows that the contestee in good faith planted and cultivated trees or tree seeds on the land in question for eight years from date of entry, and it was stipulated by the parties to this controversy that the contestee was engaged in the planting of trees or tree seeds for the eighth year; but that no trees, tree seeds or cuttings were planted on said land after the expiration of the eighth year of said entry. The question therefore arises whether he is entitled, under the act of March 3, 1893 (27 Stat., 593), amending the act of March 3, 1891 (26 Stat., 1095), to have his final proof accepted and patent issued, notwithstanding his admitted failure to plant and cultivate his claim since the expiration of said eight years and up to date of submitting said final proof.

The local office held that

claimant having failed to procure a growth of timber it became his duty to faithfully continue in his efforts until rewarded with success or until such time as he could offer proof for his land. . . . It was held in the case of *Cassady v. Eiteljorg's heirs*, 18 L. D., 235, that compliance with the law must continue up to date of proof.

As previously stated, your office overruled this opinion, holding that—under the act of March 3, 1893 (*supra*),

where a claimant has complied with the law for eight years to get a growth of trees upon the land, notwithstanding he may have failed in so doing, he has nevertheless earned his patent. This being so, an entry is not liable to contest where the entryman has complied with the law for eight years for any subsequent failure to plant or replant although he may not have succeeded in obtaining a growth of trees.

It is readily seen that it becomes of importance, in construing the act of March 3, 1893 (*supra*), to ascertain from what time the requisite eight years of cultivation are to be computed, whether from date of entry, from date the trees, seeds, or cuttings are planted, or immediately preceding the time final proof may be submitted. All acts having reference to timber culture, except the original act which required ten years, provide for the issue of final certificate or patent at the expiration of eight years from date of entry.

Paragraph 22, Circular June 27, 1887 (6 L. D., 284), stated that, in computing the period of cultivation the time runs from the date when the total number of trees, seeds, or cuttings required by the act are planted.

Prior to that date the time allowed for preparation of the land and planting the trees was treated as forming part of the requisite eight years of cultivation. John M. Lindback (9 L. D., 284); Christian Isaak (Id., 624); Jacob E. English (10 L. D., 409); William Thompson (Id., 501). In the departmental instructions of July 16, 1889 (9 L. D., 86), it was held that the period of cultivation should be computed under the rule in force at the time the entry was made. As the contestee in the case at bar made his entry on May 8, 1884, he would therefore be entitled, under the said instructions, to the benefit of the rules in force prior to June 27, 1887. In the case of Mary R. Leonard (9 L. D., 189) it was held that

a departmental construction of a statute, until revoked or overruled, has all the force and effect of law, and acts performed thereunder are entitled to protection.

The first section of the act of March 3, 1891, repealed the timber culture laws with certain provisos. The third and fourth provisos thereof are as follows:

That in computing the period of cultivation the time shall run from the date of entry, if the necessary acts of cultivation were performed within the proper time.

That the preparation of the land and the planting of trees shall be construed as acts of cultivation, and the time authorized to be so employed shall be computed as part of the eight years of cultivation required by statute.

This act, it will be observed, treated the time employed in preparation of the land and the planting of trees as forming part of the requisite eight years of cultivation. But at the same time the said act left unrepealed one of the conditions of the act of June 14, 1878 (20 Stat., 113), which is as follows: "At the time of making such proof there shall be then growing at least six hundred and seventy-five living trees to each acre." The defendant herein would not be entitled to the benefit of the act of March 3, 1891, because of his inability to make such showing.

The act of March 3, 1893 (*supra*), is as follows:

That section one of an act entitled, "An act to repeal timber culture laws and for other purposes," approved March third, eighteen hundred and ninety-one, be, and hereby is amended by adding the following words to the fourth proviso thereof: *And*

provided further, That if trees, seeds, or cuttings were in good faith planted as provided by law and the same and the land upon which so planted were thereafter in good faith cultivated as provided by law for at least eight years by a person qualified to make entry under the timber culture laws, final proof may be made without regard to the number of trees that may have been then growing on the land.

From the language of the above quoted act and from previous departmental decisions, notably those of Jerome Hewett (16 L. D., 293) and Nancy D. Smyth (Id. 385), it is very clear that where the timber culture entryman can show a satisfactory or reasonable compliance with law for at least eight years he may make final proof without regard to the number or character of trees growing on the land. The act in that respect repeals the condition above mentioned, in the act of June 14, 1878, left unrepealed by the act of March 3, 1891. A further examination of the said amendatory act will show, however, that if construed strictly, instead of counting the requisite eight years from date of entry, as is done in the case at bar, the period of cultivation must be computed from the time the trees, seeds, or cuttings were actually planted. The literal words of the act, taken independently, would admit of this construction, for after providing "that if trees, seeds, or cuttings, were in good faith planted as provided by law," the said act proceeds to state, "and the same and the land upon which so planted were *thereafter* in good faith cultivated as provided by law for at least eight years." In this view the contestee herein would not come within the purview of the said act, and his proof would be insufficient, he not being able to show cultivation for eight years after date of planting.

But in the opinion of this Department the said amendatory act should be construed as in *pari materia* with former timber culture acts and especially in connection with the provisions of the act of March 3, 1891, the fourth proviso of which it is intended to amend. The act of March 3, 1893, did not repeal section one of the act of March 3, 1891, nor any part thereof, it merely amended, according to the language of the act, the fourth proviso thereof by adding the words of the later act. This left all the provisions of the former act in force, and while apparently there is an inconsistency or repugnancy, yet the Department is disposed to hold that it was not the intention of Congress to enact new legislation, nor destroy the effect of the main features of the former act; but merely to add such words thereto as that it would not be necessary for the entryman, under otherwise satisfactory proof covering the period of at least eight years to show the number of trees then growing on the land. And according to the fourth proviso of the act of March 3, 1891, the entryman is to be given credit for the time employed in the preparation of the land and the planting of trees, in computing the eight years of cultivation required by the statute.

It may be urged, considering the literal words of the act, that until trees are planted and in existence, they can not be cultivated. The act makes provision for the planting of tree seeds as well as trees and cuttings. It takes time for these seeds to germinate and grow, and it

might as well be urged that if the seeds fail to germinate and grow, then the entryman is to receive no credit for his labor because he is unable to show any time expended in the cultivation of trees. As is well known there are many failures in timber culture. If the entryman should be required to show cultivation for eight years after trees have been actually planted and are in existence, he might never be in a position to make proof, as planting and replanting are nearly always necessary. The act was evidently intended to relieve just such cases. If the entryman is able to prove an honest attempt for the requisite period after entry to secure a growth of timber, that would seem to be all that can be required of him under the statute.

In view of the fact that at the time of proof there need not be a showing, under the amendatory act, as to the character or number of trees, there can be no authoritative requirement of cultivation beyond the requisite eight years. The closing words of said amendatory act, "that may have been then growing on the land," would seem to refer to the time of the expiration of the eight years, and not to the time final proof may be submitted. No requirement is imposed beyond the requisite eight years, which are herein determined to run from date of entry.

With regard to the case of *Cassady v. Eiteljorg's Heirs* (18 L. D., 235), cited by the local office and relied upon by the contestant in his appeal, it was stated in said case that "commutation of a timber culture entry was undoubtedly intended by Congress to be substantially similar in principle and procedure to that of a homestead entry; and a homestead entryman is not allowed to commute unless he can prove compliance with the homestead law until the time of commutation." It may be stated that a timber culture entry under the amendatory act of March 3, 1893, is more nearly analogous to that of the regular homestead entry, where, after cultivation and residence in good faith for the period of five years, the said entry is not thereafter subject to contest or forfeiture on account of abandonment.

Your office decision is hereby affirmed.

HUMISTON *v.* NORTHERN PACIFIC R. R. Co.

Motion for review of departmental decision of December 23, 1896, 23 L. D., 543, denied by Secretary Bliss, May 18, 1897.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* GRIMES.

A claim of occupancy will not be held sufficient to defeat the right of indemnity selection in the absence of actual residence on the land.

Secretary Bliss to the Commissioner of the General Land Office, May 18,
(W. V. D.) 1897. (A. E.)

This is an appeal from your office decision of June 18, 1895, rejecting the selection of the Northern Pacific Railroad Company, made June 16, 1892, for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 13, Tp. 127 N., R. 33 W., St. Cloud, Minnesota, and allowing the additional homestead entry of John Grimes for the same tract.

It appears that the railroad company first filed a list of selections on November 7, 1883, which was rejected because the land was within the grant to the St. Vincent Extension. From this the Northern Pacific Company appealed. This list did not specify losses.

On June 16, 1892, the company filed a list in proper form. On June 28, 1893, John Grimes made application to make additional homestead entry for the land in controversy. This application was rejected because of the railroad selection, dated November 7, 1883. Grimes appealed. Under direction of your office a hearing was had. The local office recommended that the application of Grimes be allowed.

Your office found that on June 16, 1892, when the railroad company filed its rearranged list, Grimes "was occupying and cultivating the land as an additional homestead claim, which defeated the company's right of selection."

Examination of the testimony introduced by Grimes fails to show that he had ever lived upon the land or had a place of abode thereon.

Grubbing, ditching and fencing without residence can not be deemed sufficient to except the land from the selection of the railroad company, even were the first selection, filed by the railroad company prior to the claim of Grimes, held to be invalid because not specifying losses.

Your office decision is reversed, and you will reject the application of Grimes and allow the selection made by the railroad company to stand subject to approval.

BELLAMY *v.* COX.

Motion for review of departmental decision of February 23, 1897, 24 L. D., 181, denied by Secretary Bliss, May 18, 1897.

RAILROAD GRANT—INDEMNITY SELECTION—DESIGNATION OF LOSS.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. *v.* STEEGE ET AL.

An indemnity selection, in the absence of a specified basis therefor, is no bar to the acquisition of a settlement right; and after such right has intervened the company will not be permitted to designate a loss, and thus perfect the selection.

Secretary Bliss to the Commissioner of the General Land Office, May 21,
(W. V. D.) 1897. (F. W. C.)

The St. Paul, Minneapolis and Manitoba Railway Company has appealed from your office decision of October 24, 1894, holding for cancellation its indemnity selection made on account of the St. Vincent extension of its grant, covering lot 11, Sec. 31, T. 150 N., R. 46 W., Crookston land district, Minnesota.

This tract is within the indemnity limits of the grant for said company and was formerly included in the pre-emption claim of Mary Carlton, she having filed pre-emption declaratory statement No. 742, covering this and adjoining lands, April 5, 1873, in which settlement was alleged July 25, 1872.

Carlton made due proof upon her pre-emption, against the acceptance of which the railroad company protested, and a hearing was held. From the record made at said hearing it was held that her claim was sufficient to defeat the indemnity withdrawal made on account of this grant, and the company's selection made March 13, 1880, was ordered canceled. See departmental decision of August 2, 1882 (91 L. and R., 14).

It appears that upon further consideration of the pre-emptor's claim it was found that the amount of lands claimed was in excess of one hundred and sixty acres, and she was required to release one of the tracts covered by her filing. This she did in 1883, and by your office letter of October 11, 1883, the company's selection was reinstated as to lot 11, the tract now under consideration, which was eliminated from Miss Carlton's claim.

The company's selection of March 13, 1880, was not accompanied by a designation of losses, as required by the circular of November 7, 1879, and the same was not supplied until June 6, 1894. In the mean time applications had been tendered to enter this land as follows: Frederick Anderson, June 22, 1893, and Henry Steege, August 14, 1893.

Your office decision of October 24, 1894, holds that the company's selection of March 13, 1880, was invalid and no bar to the applications since presented which were prior to the specification of a loss in support of the indemnity selection.

This holding is in accordance with departmental decision in the case of Hoeft *et al.* *v.* St. Paul and Duluth R. R. Co. (15 L. D., 101), in which it was held that an indemnity selection, in the absence of a specified basis therefor, is no bar to the acquisition of a settlement

right; and, after such right has intervened the company will not be permitted to designate a loss and thus perfect the selection.

Your office decision states, that while Anderson was the prior applicant, Steege alleges settlement prior to the presentation of Anderson's application, and that hearing will therefore be necessary in order to determine the respective rights in the premises.

For the reasons given, I affirm your office decision holding that the company's selection of 1880 was no bar to the acquisition of other rights prior to the filing of its supplemental list on June 6, 1894, and you are therefore directed to take proper proceedings to determine the respective rights of Anderson and Steege, and upon completion of entry by the successful party the company's selection of this tract will be canceled.

HOMESTEAD ENTRY—TIMBER CUTTING.

UNITED STATES *v.* BROUSSEAU.

The action of a homesteader in cutting and selling timber growing on the land covered by his entry, should not be held sufficient to justify cancellation of the entry, on the ground of fraudulent intent in making the same, if the entryman is actually residing on the land, and apparently expending the proceeds of the timber in the permanent improvement of his claim.

Secretary Bliss to the Commissioner of the General Land Office, May 21,
(W. V. D.) 1897. (C. J. W.)

Alphonze Brousseau made homestead entry, No. 5745, on November 10, 1891, at Duluth, Minnesota, for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 18, T. 51 N., R. 17 W. Your office on report of special agent H. F. Young, charging failure to reside upon the land, held said entry for cancellation. On the application of the claimant a hearing was had before the local officers at Duluth, Minnesota, and on August 16, 1895, they found that the charges made were substantially true when made, but on account of the showing of good faith in the subsequent conduct of the entryman, they recommended the relief of the entry from suspension. On December 13, 1895, your office reversed this decision, and again held the entry for cancellation.

Brousseau has appealed to the Department.

Your office, in substance, held that the default of the entryman in establishing residence had been cured, but that the cutting and sale of the timber was such evidence of fraudulent intent in making the entry as to require its cancellation. The motive in making the entry was, therefore, made the final test of the entryman's rights, and it was, in effect, held, that the cutting and sale of timber from the land was conclusive evidence of fraudulent motive in making the entry. The case of John T. Wooten (5 L. D., 389), wherein is announced the rule that timber should not be removed from lands covered by homestead

entry faster than is necessary to clear it and prepare it for cultivation, is quoted in support of this construction. That case concedes the right of an entryman, where the land is to be cleared and cultivated, to remove the timber, and does not make such removal conclusive evidence of fraud, but puts upon him the burden of showing that such removal was not fraudulent and with speculative intent.

On page 6 of instructions to special agents, of 1883, in reference to timber depredations by entrymen, this rule is laid down:

8. The claimant to any such land, provided he is living upon, cultivating and improving the same in accordance with law, and the rules and regulations prescribed by this Department, is permitted to cut and remove, or cause to be cut and removed from the portion thereof to be cleared for cultivation, so much timber as is actually necessary for that purpose, or for buildings, fences and other improvements on the land entered.

9. In clearing for cultivation should there be a surplus of timber over what is needed for the purposes above specified he may sell or dispose of such surplus; but it is not allowable for him to denude the land of its timber for the purpose of sale or speculation until he has made final proof and acquired title.

10. Where the facts justify the conclusion that the person has made his entry in good faith and is cultivating and improving the land with the purpose of making it his home, the agent need not consider it his duty to report every deviation from the preceding rule. But where the person does not make the land his actual residence and cultivate and improve the same, or where the value of the timber cut and removed is greatly in excess of the improvements, or where other facts afford a strong presumption that the entry was not made in good faith but solely for the purpose of denuding the land of its timber, the case should be at once reported to this office.

It is to be borne in mind that the good faith of the entryman in what he does, is the final test to which his entry is subjected. In the light of these instructions, if the agent who made the report, had found the state of facts existing then, which were shown to exist at date of hearing, he would have been justified in withholding the report, for at the latter date, the entryman and his family were residing upon and cultivating the land, and had improvements on it in excess of the value of the timber removed. I think the status at that date should control.

In my opinion, the facts as stated in your office decision fail to do justice to the defendant, in this, that it quotes from his testimony all admissions, as to the cutting and sale of timber, and omits to mention what was said by way of explanation and justification. This doubtless resulted from the fact, that it was believed that the status at the time the report was submitted should control. But the very question at issue being the good faith of the entryman, the evidence on that subject should be both presented and considered. There are two guides to the entryman's motive in making the entry. One is, his acts, and the other, his admissions and statements in reference thereto. They should be considered together. The evidence discloses the fact that he understands the English language but imperfectly, but his answers to questions seem to be candid, and show no disposition to suppress facts. In reference to motive in making the entry, on page

46 of the record, he is asked, why he made it. His answer is,—“for to make my home”. He is asked if that was his intention when he made the entry, and the answer is,—“Yes sir.” “Has it always been your intention?” A. “Yes sir.” Q. “What are your circumstances, are you a poor man?” A. “Yes sir, I am a poor man.” On page 48 of the record, the question is asked,—“Why did you cut that timber off?” A. “It was to improve the property.” Q. “How much have you received from the sale of the timber you cut?” A. “Well, I can’t tell for certain, because I would do it a little at a time, and I didn’t keep track of it.”

Q. Did you spend on your claim as much as you received from the sale of timber?

A. Yes sir.

Q. Is it your intention to clear that entire place?

A. Yes sir.

Q. Have you any income except what you make with your hands, your labor?

A. I don’t understand exactly, what does it mean, explain it.

Q. Have you any money coming to you from any source, except for work?

A. No sir.

Q. So that to improve your place it was necessary, wasn’t it, to cut the timber?

A. Yes sir, I couldn’t do it otherways. I was too poor a man.

Q. Have you ever thought of abandoning that claim?

A. No sir.

Q. Is it your intention to make that your home and your family’s home?

A. Yes sir.

No saying or admission of the entryman as to why he made the entry, contrary to what he swears, is shown. He is very deeply perjured, else he made the entry in good faith.

Now as to what he has done. Take the largest estimate of the timber—about two hundred and sixty thousand feet, and suppose it all to have come off the claim, and to be worth three and a half dollars per thousand, it would be worth \$910. Special Agent Gray, who examined the improvements in 1894, and testified at the hearing, estimated the value of the improvements by items at \$955.50, with twelve and three-eighths acres cleared. It is not conjecture then, that the value of the improvements is equal to or in excess of the value of the timber removed, but this is shown by the testimony for the government. If the entryman had intended to get the value of this timber, and abandon the place, it seems he could have done so. The value of his improvements must be considered in determining his motive in making the entry. I am not prepared to agree with your office in holding that this entry must be cancelled for fraud, since there is no adverse claim, and the entryman is shown to be residing with his large family upon the land, and making valuable improvements. The excess of the value of the improvements over the timber removed cannot be exactly estimated, as a part of the timber, in the estimate made, was taken from the railroad right of way, which passes through the land. The special agent (Young) testifies that most of it was taken from the railroad track (evidently he meant the railroad right-of-way), as shown

by the stumps. Jolin, a witness for the government, also swears, that a good part of the timber used came off the railroad right of way, where it was all taken off.

Owing to the strength of the defendant's showing, I think he has overcome the strong presumption of bad faith, which arose against him, on account of the removal of the timber. In direct reference to its removal faster than the land was cleared, he swears that "he thought he had a right to cut the timber in the manner it was done, and that he intends to clear all the land." The evidence shows this entryman to have a wife and ten children, the youngest only a few months old; that he is poor, owns no house or land elsewhere, and has to labor with his hands for a living. He and his family are living upon the land embraced within the entry and all and more than all he obtained from the sale of timber is on the land in the shape of permanent improvements. These are facts against the presumption that he made the entry with a view to get the timber, and then abandon the land. He can not obtain title until he has fully complied with the homestead laws as to five years of residence and cultivation, which must be made to appear from his final proof, when submitted. There appears to be no present necessity for the cancellation of the entry.

Your decision is accordingly reversed, and the entry held intact, subject to his future compliance with the homestead laws.

TOWN LOT—ADVERSE OCCUPANCY—TOWNSITE COMPANY.

SMITH *v.* HAVARD ET AL.

The occupancy of a town lot by the agents of a townsite company confers no right that will defeat an adverse occupant of the remainder of said lot, who is claiming the whole of it.

Secretary Bliss to the Commissioner of the General Land Office, May 21,
(W. V. D.) 1897. (C. J. W.)

The record in this case shows that it was first heard before townsite board No. 3, for Hennessey, and that decision was made by them in favor of Havard and Batton from which Smith appealed. Before the record and appeal were forwarded to your office, board No. 3 was succeeded by board No. 6. The last named board on May 8, 1895, transmitted to your office Smith's appeal and all papers to be found connected with the case.

On June 22, 1895, upon examination of the record, your office found that there was no proper proof of service of notice of the hearing, upon the parties, and further that the typewritten pages purporting to be the testimony of witnesses examined at the hearing were not certified by the board to be such testimony. Your office further found that no decision of the board accompanied the record, further than appeared

from a letter from H. S. St. Clair, late chairman of board No. 3, in which he says that his record shows that the decision was rendered January 6, 1893, and was delivered to the attorneys for Smith. He then gives what he states under oath to be a correct and complete copy of the decision of said board No. 3 as follows:

Case tried on the — day of January, 1893, the board find as follows for the defendants W. T. Havard and F. T. Batton:

Your office upon their showing recognized Smith's right of appeal, but returned the testimony to board No. 6, with instructions to allow the parties thirty days within which to file an agreement signed by themselves showing that the record contains the testimony as given by the witnesses at the trial, or to file an agreed statement of facts. If they failed in said time to cure the defects in the record of the evidence, the board was directed to order a new hearing in the case, and give all parties due notice thereof.

It appears that the parties failed to take action and cure the defects in the record, and the board on August 21, 1895, ordered a hearing *de novo*, and due notice of the same was served upon Smith, Havard and Batton. Smith and Havard appeared on November 27, 1895, and entered into an agreement that the testimony heretofore taken, may be considered in the case, and each filed an affidavit that he was a native born citizen of the United States. It was discovered on examination of the papers, that J. W. McEver had filed an application for the lot, which had not been disposed of by board No. 3. The board thereupon continued the case of its own motion to April 28, 1896, and duly notified McEver. On said day McEver failed to appear and was adjudged to be in default, and his application dismissed. On July 8, 1896, townsite board No. 6 rendered a decision in which they awarded said lot to Smith.

From this decision Havard and Batton appealed, and your office on October 20, 1896, affirmed said decision.

The case comes before the Department on the further appeal of Havard and Batton.

In reference to the facts, your office reports as follows:

It appears that on April 23, 1889, one John A. Blair made homestead entry of the SE. $\frac{1}{4}$ of Sec. 24, Tp. 19 N., R. 7 W. and June 26, 1889, commenced to build a house, twelve by fourteen, on said land which house is now located in whole or in part on the lot in controversy. It does not appear that Blair ever resided on said land, or occupied said house in person. He claims that he had tenants in said house but failed to state when and how long his tenants occupied it. He states that he once rented the building to Lee Gray; thinks it was in the winter of 1889, or 1890. Blair in answer to the following question, says:

"Q. Did anybody ever occupy it as your tenant before Gray occupied it? A. Yes sir.

Q. Who was it? A. I think Judge Bross was one, Guy Gillett and anybody else that saw fit to occupy it."

It appears that this lot No. 2 is a part of land entered by Blair as a homestead and that he relinquished his right to said land October 23, 1889. He further claims that said land was platted for a town, and on June 26, 1889, he claimed the lot his

house was to be built on as his. On the day Blair relinquished his claim to said land, John T. Baldwin made homestead entry for the same tract, and on March 23, 1891, Baldwin relinquished the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said quarter section. This last described forty acre tract is now, and has been since June 23, 1892, a part of the townsite of Hennessey, and the lot in contest is located in this tract.

It appears that Smith settled in Hennessey in the fall of 1889, and in connection with O'Conner, opened a hardware store on lot one in said block, and adjoining the lot in dispute. On January 14, 1890, Smith took possession of, and fenced said lot; and on that evening the fence was cut down by parties claiming to represent a townsite company. It appears that Smith's possession of said lot did not include the house erected thereon in 1889. Smith claims that notwithstanding his fence was torn down, he still held possession of the lot and used it for storing lumber and machinery on. In November, 1891, he again set some posts around said lot with the intention of fencing it, when he was prevented from fencing it by one "Tom" Smith. Smith and Gillett claimed that they were representing the Hennessey townsite. It appears that Blair was in Hennessey several times from the fall of 1889 to the spring of 1892, but paid no attention to said lot, nor did he notify Smith that he laid any claim to it. Blair offers in evidence a receipt from the sheriff of Kingfisher county, O. T. which states that in 1892, he paid \$8.80 taxes and costs. This receipt does not state for what said taxes and costs were paid, it describes no real estate as tax receipts for real estate usually do, and does not state on what day or month in 1892 it was paid, but Blair testifies that it was for taxes levied on said lot by the provisional authorities of said town. Blair testifies that he sold his interest in said lot in April 1892, to Havard and Batton. The townsite of Hennessey was entered by townsite board No. 3, June 23, 1892.

The townsite board found substantially the same facts, and the record supports the finding.

Your office found that Blair had practically abandoned the lot prior to his sale of it, and that he could convey no better title to Havard and Batton than he had at that time. If he had been in possession of the house by himself or tenant, the case would be different. The evidence indicates that the parties occupying the building were tenants, or agents, of the townsite of Hennessey, and not of Blair, and that it was so occupied at the date of the townsite entry, in June, after the sale to Havard and Batton. No one seems to have exercised any dominion over the lot for a considerable period before and after Blair's sale, except the townsite company and Smith.

This corporation was not qualified to settle and occupy a town lot in its own right. Its agents could have lawfully occupied a lot as tenants of a qualified owner, and if they had been Blair's tenants, their occupancy would have been his; but while Blair seems to have permitted their occupancy, he also permitted them to assert a right in themselves as representatives of the corporation without protest. It was charged that he was himself a member of this corporation, but the evidence does not show who composed it. That he had notice that both Smith and the corporation laid claim to the lot seems pretty clear, and he gave notice of his own claim. He appears to have been willing for the corporation to hold the lot, and to claim it as its own. He does not claim that the agents of the corporation were his tenants. They could only lawfully occupy as tenants, and under the facts their occupancy

of the building must inure to the benefit of Smith, who occupied the remainder of the lot, and was claiming the whole of it.

Your office decision is accordingly affirmed.

RAILROAD RIGHT OF WAY—STATION GROUNDS—HOMESTEAD ENTRY.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. *v.* MALONEY ET AL.

The actual use of land as station grounds, prior to survey, by a company that has filed its articles of incorporation, proofs of organization, and constructed a railroad over unsurveyed land, entitles said company to an approval of a plat of said grounds, as against an intervening homestead entry, if such use antedates the settlement of the homesteader.

Secretary Bliss to the Commissioner of the General Land Office, May 21,
(W. V. D.) 1897. (F. W. C.)

The St. Paul, Minneapolis and Manitoba Railway Company has appealed from the action taken in your office decision of October 2, 1896, in refusing to recommend for approval its plat showing station grounds situated upon lots 5, 6, 7 and 8, Sec. 26, T. 26 N., R. 11 E., Seattle land district, Washington.

Your refusal to recommend the approval of this plat is upon the ground that the tract covered by the plat is embraced in homestead entry of John Maloney, which entry was made prior to the filing of the plat by the railway company.

On behalf of the company it is represented that the line of its road through the lots described was located during the year 1891 and the road actually constructed during the following year; that at the time of the location of said road the company selected for station purposes the tracts shown upon its plat and has been enjoying and using them for that purpose from that time to the present. The land was at that time unsurveyed, the plat of survey not being filed until May, 1896. Upon the filing of said plat it appears that Maloney made the homestead entry in question, and in his affidavit alleged settlement upon the land during the year 1891.

In the argument filed on behalf of John J. Sturgus it appears that he lays claim to lot 6 by reason of an attempted location of the same with Gerard scrip, which is alleged to have been offered before the allowance of Maloney's entry, and that a contest was at the time of the filing of said argument (January 15, 1897) pending, undetermined, in the local office, between said parties, involving the right to enter said lot.

The company's application for the approval of its plat appears to be based upon the act of March 3, 1875 (18 Stat., 482), which granted the right of way through the public lands of the United States to any railroad company

duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the

Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; . . . also ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

In the case of *Dakota Central R. R. Co. v. Downey* (8 L. D., 115) it was held—

If it were to be held that a railroad company has a right to build its road on unsurveyed land, and yet, perhaps years subsequently to the date of the completion and operation of the road, and the actual appropriation of the land (under the first section) for station-buildings, depots, machine shops, side tracks, turn-outs, and water-stations, within the limited quantity, that its right to the continued benefit of the ground for right of way, station-grounds, etc., must depend upon its filing a profile of its road, after the township plats of survey are deposited in the land office, but before any other claimant can make a timber-culture entry, or a homestead entry, or file a pre-emption declaratory statement, or other step under the laws for the acquisition of public lands, it would be simply to deny to the company the benefit of the first section of the act. It would be impossible for the company to comply with the condition of filing a profile as quickly as individual settlers could file entries upon the land. A timber-culture entry might be filed on a quarter-section which would embrace the depot-grounds of a company, including its buildings, side tracks, etc., and it would be unreasonable, in my judgment, to suppose that Congress intended in said act that a railroad company, which had constructed its road prior to the initiation of any claim or right under the laws for the disposal of the public lands, should be compelled to purchase its improvements and right of way from the subsequent claimant.

It seems to be clear, as held in said decision, that it is not necessary for a company, which has filed its articles of incorporation and proofs of organization, and constructed a road over unsurveyed public lands, to file a map of definite location in order to entitle it to the benefits of said act.

If the land covered by the plat for station grounds now under consideration was actually used for the purposes indicated, prior to the settlement of Maloney, upon proof of this fact it would seem that its application for the approval of its plat should be granted, notwithstanding the fact that entry had been made of the land by Maloney before the presentation of said plat.

I have therefore to direct that a hearing be ordered, after due notice to all parties concerned, in order to determine the question as to the exact time the land covered by the plat under consideration was actually selected and used for station purposes; also as to whether any settlement right to this tract existed in Maloney at the time the tract was so selected and used. If Sturgis claims, as does not appear from the papers now before me, a right prior to his attempted location in 1896, opportunity should be afforded him to show the nature of such claim at the time of the selection and use of the land for station purposes.

I do not see that this application can in any wise interfere with or

influence action in the controversy now pending between Maloney and Sturgus under their respective claims as before described.

The papers are therefore herewith returned for your further action in accordance with the directions herein given.

EXECUTIVE WITHDRAWAL—APPLICATION TO ENTER.

MICHAEL L. TOOLE ET AL.

During the existence of an executive withdrawal of lands for a public purpose no right thereto can be acquired by an application to enter the same; but it is within the exercise of departmental discretion, on the removal of the reservation, to recognize applications so filed, subject to prior adverse claims.

Secretary Bliss to the Commissioner of the General Land Office, May 21,
(W. V. D.) 1897. (R. W. H.)

The lands covered by the applications of the parties above named are the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 8; the SW. $\frac{1}{4}$ Sec. 9; the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 17, Tp. 144 N., R. 25 W., St. Cloud land district, Minnesota.

The antecedent history in relation to them is briefly as follows:

By letter of July 24, 1883, the Secretary of War asked authority of this Department to cut timber for reservoir purposes from public lands, not withdrawn, in the vicinity of the dams at and above Poquima Falls, Minnesota.

It was determined by this Department that the best method of acceding to the request of the Secretary of War would be to withdraw such lands as were indicated by him, and withhold them from the public offering that had been proclaimed for the 20th of August, 1883.

The General Land Office was accordingly authorized by letter of August 1, 1883, "to withhold from public sale and disposal of any kind" the tracts as specified.

Your official letter of formal withdrawal, containing the statement that they were "reserved for reservoir purposes," bears date August 16, 1883.

On September 25, 1890, Dennis Hanlon made application to enter the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section 9, and other land not embraced in the reservation; and on the same day Michael L. Toole applied to enter the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said Sec. 9, and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ said Sec. 8, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ said Sec. 17—both parties tendering their fees and commissions.

On June 28, 1892, William A. Berry filed his application to enter the SW. $\frac{1}{4}$ of Sec. 9. On the same day Jesse L. Hull applied to enter the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 17; and on July 1, 1892, Samuel A. Hull filed application to enter the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 8.

None of these applications was formally rejected according to Rule of Practice 66.

It appears from the record that Michael L. Toole and Dennis Hanlon, upon the presentation of their applications, were notified by the register and receiver that the lands applied for were not subject to entry; and upon this information they left their applications in the custody of the local office, taking no steps in reference to them, except to employ an attorney to look after their interests, until the lands were restored to the public domain.

The applications of Samuel A. Hull, Jesse L. Hull and William A. Berry were denied, not only for the reason that said lands were reserved from the public domain for reservoir purposes, but for the additional reason that the prior applications of said Toole and Hanlon were on file in the local office, and should have precedence.

Berry and the Hulls appealed from this denial of their applications, first to your office, which sustained the action of the local office, and then to this Department, which in separate letters, of even date, to the parties, to wit, June 18, 1894, used this language:

An examination of the matter shows that the land was reserved at the request of the Secretary of War, but since the rendering of your office decision it has been determined by the Secretary of War that "no present or contemplated operations of the Engineer Department would require the lands in question to remain excepted from the public domain;" therefore you will restore the same, giving the preference right to enter to the applicant herein subject to any superior right by virtue of prior settlement or application.

Pursuant to instructions contained in your office letter of July 3, 1894, enclosing the departmental decisions of June 18, 1894, in the cases of Samuel A. Hull, Jesse L. Hull and William A. Berry, the local office ordered a hearing for October 8, 1894, of which due notice was given to all parties, in order to determine what rights, if any, were superior to those of the said applicants.

On July 6, 1894, Dennis Hanlon made application for the SW. $\frac{1}{4}$ of Sec. 9, and on the same day Aaron L. Swanson applied to enter the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, said Sec. 8, and Charles A. Burton applied to enter the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said Sec. 17.

These applications were suspended to await the result of the hearing, which had been ordered, as above stated.

On July 12, 1894, Michael L. Toole, having learned of the restoration of the lands, covered by the applications of Berry and the two Hulls, renewed his former application of September 25, 1890, tendering therewith the proper fees and commissions, and subsequently filed a new homestead affidavit. This application was likewise suspended to await the result of the hearing.

On February 7, 1895, the local office rendered its decision, finding that:

The application of Dennis Hanlon, filed July 6, 1894, should be rejected; that the application of Aaron E. Swanson, filed July 6, 1894, should be rejected; that the

application of Charles Burton, filed July 6, 1894, should be rejected; that the application of Dennis Hanlon, filed September 25, 1890, should be allowed in so far as the same does not conflict with homestead entry No. 15015, by B. Finnegan; that the claim of William A. Berry should be rejected so far as the same conflicts with the application of Dennis Hanlon, but as to the tracts of land not conflicting with the application of Dennis Hanlon, be allowed; that the application of Michael L. Toole, filed September 25, 1890, should be allowed; that the applications of Samuel A. Hull and Jesse L. Hull should be rejected, so far as the same conflict with the application of Michael L. Toole; that as to all other tracts not conflicting with the application of Michael L. Toole, the applications of Samuel A. Hull and Jesse L. Hull should be allowed.

All the parties, except Toole, appealed from the decision of the local office.

In your office decision upon these appeals it was held that the preference right given by departmental decisions of June 18, 1894, was merely intended to allow them to enter the land under their applications, in the event there were no other applications then pending and on file; and as the applications of Hanlon and Toole had not been formally rejected by the local office, and were pending prior to and at the date of the applications of the two Hulls and Berry, they are "superior to the applications subsequently filed;" that the subsequent application of Hanlon, and the applications of Swanson and Burton, filed July 6, 1894, conflicting with the applications filed prior to that date, were properly rejected; that the departmental decisions of June 18, 1894, had been correctly applied, and that the only error was in awarding to both Toole and Berry the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 9. With the correction of this error, and the restriction of Berry's application to the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said Sec. 9, the finding of the local office was affirmed.

The contentions of the parties to this case, all of whom have appealed to the Department from your office decision, except Toole, are:

First: In behalf of Berry and the two Hulls—that the burden and expense incident to the prosecution of their appeals, which resulted in the restoration of the land to the public domain, entitle their applications to precedence; that the applications of Hanlon and Toole, which were not followed up by appeal or request for any action whatever in the premises, gave them no rights; that the case is one where the maxim in favor of the vigilant as against the dormant specially applies, and that it would be inequitable to allow Hanlon and Toole to reap a reward which had not been secured by their labors. In support of these contentions cases are cited holding that an application to enter, which though rejected, is followed promptly by proceedings to make it effectual, and to secure favorable rulings of the Department, when the impediment in the way of the entry is removed, gives a preference right.

Second: In behalf of Swanson, Burton and Hanlon (the last named party having presented a new application in conflict with that of Toole as to the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 9, and that of Berry as to the entire

SW. $\frac{1}{4}$ of said section)—that no rights attach under the applications of Toole, Berry and the Hulls, because the lands applied for were, at the time, in a state of reservation, and having failed to renew said applications in proper form prior to the intervention of adverse rights attaching when the land was subject to entry, they have no claims that can be recognized; and that the departmental orders of restoration, of date June 18, 1894, are not to be construed as contravening the established rules of the Department governing applications for public land.

The counsel for Toole claim that, as the record showed his application was on file when the applications of the other parties were made, they were charged with notice of the same, and that, in restoring the land to the public domain, the Department did, as it had a right to do, expressly recognize his priority.

It must be observed that the particular lands here in question, although "reserved for reservoir purposes," were not embraced in any of the lists which were withdrawn, and afterwards restored, by proclamations of the President under the provisions of the act of June 20, 1890 (26 Stat., 169).

This act prescribed restrictions and conditions relative to the entry of the lands specified therein, after their restoration to the public domain, which were not imposed by the Department in restoring the lands now under consideration.

The withdrawal in this case was in virtue of the recognized executive authority to withdraw public lands, and to restore the same to the public domain, as the public good may demand. While said withdrawal was in force no rights were acquired under any of the applications to enter the lands covered thereby. In this respect the applications of Toole, Berry, the Hulls, and the original application of Hanlon are upon the same footing—the land not being subject to entry when they were made. The action of the local office in not accepting them was, therefore, proper; and their presentation entitled the applicants to no other consideration than the Land Department, in the exercise of its discretionary power, saw proper to concede, the questions being entirely between the several applicants and the government.

The cases cited by counsel for Burton, Swanson, and Hanlon are based, for the most part, on withdrawals under railroad grants, which are different, both in purpose and effect, from temporary withdrawals like the one here under discussion—the former being in the nature of government quitclaims to property granted to a corporation; the latter being reservations of its own land from disposal, and setting it apart for public purposes, the reservation remaining as long as the public purpose exists, of which the Department is the judge.

It is also to be observed that the reservation here in question is not of that class of reservations which require congressional action for their restoration to the public domain when the purpose of their creation has ceased to exist.

Inasmuch as the Department by its decisions of June 18, 1894, awarded the preference right of entry to the parties named therein, subject to the conditions stated, and the parties appear to have made expenditures in view thereof, such action will not be disturbed, though the same was not in strict accord with the usual rulings of the Department upon similar questions.

I am also of the opinion—as the applications of William A. Berry, Jesse L. Hull and Samuel A. Hull were refused by the local office, for the reason that the lands applied for were reserved for reservoir purposes, and, also, because “the prior applications of said Toole and Haulon were on file and should have preference,”—that it was the purpose of said departmental letters of June 18, 1894, to give the preference right in the cases named, subject to the pending applications, as hereinbefore set forth.

The decision of your office is affirmed.

DESERT LAND ENTRY—CITIZENSHIP—RESIDENCE.

PALMER v. MILES.

The provisions of the amendatory desert land act of March 3, 1891, requiring the entryman to be a resident citizen of the State in which the land is situated, are not applicable to an entry made prior to the passage of said act.

Secretary Bliss to the Commissioner of the General Land Office, May 22,
(W. V. D.) 1897. (E. M. R.)

This case involves the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of section 10, T. 3 N., R. 38 E., Blackfoot land district, Idaho.

The record shows that Edwin H. Miles made desert land entry for the above described tract July 17, 1890.

July 25, 1893, he made application for extension of time within which to make final proof.

September 21, 1893, the extension was granted until August 17, 1894.

July 12, 1894, the entryman gave notice that he would offer final proof on the date to which the extension was granted.

August 3, 1894, George F. Palmer filed corroborated affidavit of contest against the entry of Miles, alleging that the land had not been irrigated or reclaimed; that final proof and payment had not been made within the time required by the statute, and that the entryman was not, and had not been, for four years a resident of Idaho according to statutory requirements.

A hearing having been ordered and had, the local officers on March 29, 1895, rendered their decision in which they found that the only charge contained in the affidavit of contest, which was sustained at the hearing, was that the defendant was not a resident in the State in

which the land lay. It having been decided that such residence was requisite, they sustained the contest and recommended the cancellation of the entry of the defendant-respondent.

Upon appeal being taken, your office decision of December 5, 1895, was rendered reversing the action of the local officers, the proof being deemed satisfactory and your office not concurring in the view of the local officers that residence in the State where the land lay was required of the entryman, if the entry was made prior to the act of March 3, 1891.

Appeal by the plaintiff brings the cause to the Department.

It is apparent from the record that the defendant has complied with the law as to reclamation, and the extension of time granted him within which to make proof served to protect him from the charge that his proof was not made within the statutory period; so the only question for consideration is, whether his residence in Utah, the land in controversy being in Idaho, necessitates the cancellation of his entry.

The original desert land act of March 3, 1877 (19 Stat., 377), had no provision requiring that the entryman should be a resident of the State in which the land covered by his entry lay.

In the amendatory act of March 3, 1891 (26 Stat., 1095), in section 8, it is provided—

That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located.

Section 6, of the same act, provides—

That this act shall not affect any valid rights heretofore accrued under said act of March third, eighteen hundred and seventy-seven, but all *bona fide* claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures and contests, as if this act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

In the case of *ex parte* Kimble (20 L. D., 67), it was held that the provision requiring the entryman to be a citizen and resident of the State in which the land lay, referred to the original entry. When the entry now under consideration was made, the law was silent as to such requirement and, therefore, the entry was properly allowed. Under the provisions of the latter act, the entryman could have proceeded under either act. If he chose the act of 1891, then the terms of such act, to use the language thereof, became binding "so far as applicable." This could not be construed to mean, that as this act demanded the entryman to be a resident of the State in which the land lay, the entryman under the act of 1877 would have to show this qualification. Having a "*bona fide* claim" under the act of 1877, he came within the express permission of the act of 1891, to perfect his claim thereunder.

No other question having been raised by the appeal, than is herein set out, no good reason appears for disturbing the judgment of your office, and it is affirmed.

TOWNSITE ENTRY—CONTEST—NOTICE TO TRUSTEES.

BRUMMETT *v.* McCORDIA TOWNSITE.

On the application of townsite trustees to make a townsite entry a charge of abandonment, as against the townsite settlers, may be properly entertained, and notice to said trustees of the hearing ordered thereon is notice to lot claimants.

Secretary Bliss to the Commissioner of the General Land Office, May 22,
(W. V. D.) 1897. (C. J. W.)

The present contest was preceded by various proceedings had with reference to the establishment of a town upon the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of Sec. 32, T. 26 N., R. 3 W., I. M., located in what was known as the Cherokee Outlet. It appears from your office decision, that in November, 1893, soon after the opening, D. B. Madden, as probate judge of "L" county, Oklahoma, at the instance of alleged settlers and occupants, filed an application to enter it for townsite purposes for their use and benefit. He submitted final proof, which was rejected by your office (letter "G" of March 24, 1894) for want of authority to make the same, but stated that the conditions surrounding the town were in conformity with the requirements of the act of May 14, 1890 (26 Stat., 109), so as to justify its entry under that act, and townsite board No. 12 was instructed to make said entry. It had been previously decided that townsite entries in the Cherokee Outlet could only be made through townsite trustees under said law. Said board filed application to make the entry, but on offering final proof, C. W. Humphrey filed protest, which was subsequently amended. The protest charged that the entry was sought for speculative purposes. The record was forwarded to your office for consideration. Your office by letter "G" of October 20, 1894, dismissed the protest. Humphrey appealed, and his appeal was disallowed by your office, because filed too late. He applied for a writ of certiorari, which was denied here, April 13, 1895, and your office decision dismissing his protest became final. Meantime board No. 9 had become the successors to board No. 12. February 10, 1895, Alonzo Brummett filed affidavit of protest in the nature of a contest, in which the abandonment of the town by its settlers was alleged, and asking for a hearing to determine the status of the land, and for preference right to enter it as a homestead. On June 11, 1895, your office ordered a hearing, and directed the local officers to notify Brummett and the townsite board of the date fixed for hearing. By letter "G" of same date your office notified townsite board No. 9 that the hearing had been ordered, and enclosed a

copy of the petition on which probate judge Madden had based the application to enter, for information in conducting the defense at said hearing, and informed said board of the names and addresses of witnesses who were advertised, and all who had testified both on Madden's proof and the proof of board No. 12, and further instructed them to endeavor to have such testimony produced at the hearing as would enable the local officers to render a correct decision.

On September 11, 1895, a hearing was had, Brummett appearing in person and by attorney, and the townsite of McCordia by said townsite board No. 9, and the case closed.

January 27, 1896, M. Winfield, A. C. Rosewell and A. T. and J. K. Cross filed motion to reopen the case, for further hearing.

On March 15, 1896, the local officers rendered a decision, in which the motion to reopen was denied, and the rejection of the townsite application recommended, and also that Alonzo Brummett be allowed a preference right of entry, subject to M. Winfield's right to make entry for the technical subdivision upon which he resides. The parties who moved to reopen the case filed authority from townsite board No. 6, which board had become successors to board No. 9, to be made nominal defendant and to appeal.

The decision of the local officers was accordingly appealed from. The questions presented in that appeal were passed upon by your office letter "G" of May 29, 1896, in which the decision of the local officers was affirmed as modified. The same questions are now before the Department on appeal from your office decision.

The first assignment of error denies the validity of the hearing on June 11, 1895, based on Brummett's affidavit, and assigns error in that part of your office decision holding that the legality of the order directing a hearing is *res judicata*.

The order directing a hearing was interlocutory, was not subject to appeal, and in that sense was *res judicata*. There is no error found in this ruling.

The second ground of complaint is that your office erred in directing townsite board No. 9 to notify the inhabitants, and have them produce evidence at said hearing. It is not stated wherein this was erroneous, and it is not found to be so.

The third and fourth grounds allege error in not reopening the case, for further hearing, and the fifth ground alleges error in holding that a townsite settled under the law of May 14, 1890, can be lost by abandonment.

The seventh and eighth grounds are embraced in the preceding ones.

The ninth ground charges error in holding that notice to and appearance by the townsite board is notice to and appearance by the lot claimants. The 10th, 11th and 12th grounds are formal.

If it be true as stated by counsel, and as stated in the fifth ground

of appeal, that a settlement for townsite purposes under the act of May 14, 1890 (26 Stat., 109), is not subject to the charge of abandonment, this would be conclusive against your office decision, and no other ground would require consideration. No brief is filed in support of this contention and no authority cited except the act itself, and no reference is made to any particular clause or section of the act. The act in all its provisions has been examined, and it is not found that it admits of the construction contended for. The general scheme of the act is to have townsite entries in Oklahoma made by trustees for the benefit and use of the occupants, and the sixth section provides, when final entry is made, that the title of the United States to the land covered by it shall be conveyed to said trustees for the uses and purposes contained in the act. In 14 L. D., 295, it was held that the issuance of patent to townsite trustees was not a disposition of the government title, so as to take the same without the supervision of the Secretary of the Interior, and if this be true, certainly a mere settlement, nominally for townsite purposes, before entry, will not have that effect. It must be held that the contention is not supported by the law, and that settlement rights under this act may be lost by abandonment, before final entry by the trustees. Neither the probate judge nor any one of the boards of trustees has ever got further in this case than to file application to enter and offer final proof. Such proof has not been accepted and followed by final entry. That offered by the probate judge was rejected in accordance with instructions of February 14, 1894 (18 L. D., 122), in which it was held that probate judges are not invested with authority to make townsite entries within the Cherokee Outlet.

The status of this land is that an application by trustees to enter it was pending at the time the charge of abandonment was made, and is still pending. In my opinion such charge can be properly entertained, and if it is made to appear that not more than one head of a family remains on the land as an occupant, the application can be properly rejected.

The question as to whether or not Brummett is estopped from setting up claim to this land under the homestead laws, by reason of having been one of the former townsite claimants and occupants will be next considered. It is shown that his father was a member of the townsite company or committee which managed and directed the affairs of the settlers in the original effort to found a town, and that in his official capacity he sold lots and issued certificates to the purchasers, and he is charged with having used his influence finally to prevent its growth and success. The charge of bad faith on his part is by implication also made against the protestant, Alonzo Brummett. He concedes that he occupied and improved a town lot, and intended to acquire title under the townsite laws, but when the town commenced to go down he abandoned it; he sold his building to his father and formed the purpose of

claiming the land under the homestead laws. The record has been examined with a view to determine whether or not he has done anything which would in law estop him from objecting to the perfection of the townsite entry, and I have not been able to find that he is so estopped.

The remaining question is, whether the motion of Winfield, Rosewell and others to reopen the case for further hearing should have been granted. The affidavits filed in support of that motion were not addressed to the proposition of showing actual occupancy of town lots, but ownership of such lots, and that they would have been occupied if the owners had been encouraged in the scheme of building a town. They did not propose to show that the town was not abandoned, but asked to be allowed to show why it was not occupied. The effort to establish this town had lasted about three years, and it then had one family residing in its limits, according to the proof, and nearly all buildings and improvements had been removed. The local officers, at the close of the hearing, found as a fact that the land was used by one occupant only, and that he had four buildings on it used chiefly by this one occupant; that it was situated one and a half miles from the small town of Lamont, which contains from twelve to fifteen buildings. It appears from the affidavits filed in support of the motion to reopen that the hope of building this town rested largely on a plan to have the Lamont people abandon their town and remove to it. This plan did not succeed and the place at the date of the hearing was not occupied as required by law. It is not decided what number of occupants would authorize an entry in trust under the law, but certainly such entry must be for occupants, and it would seem that the showing in this case was not sufficient to authorize the entry. The facts in relation to the attempt to found this town are fairly presented in the decision appealed from, on pages 4 to 7 inclusive, and need not be restated here. It is sufficient that the attempt was a failure. It is insisted that the former occupants and lot owners should have had notice of the hearing. Your office properly held that notice to the trustees was notice to them. It is further insisted that Alonzo Brummett's affidavit of protest should have been dismissed, because of its corroboration by his father, who was interested in the townsite. Your office, in the exercise of a sound discretion had the right to order a hearing, to ascertain the present status of the land, where it was represented and charged to be abandoned. It is reported by the local officers that Alonzo Brummett paid the costs and expenses of the hearing. There was no error in ordering the hearing. Your office as a result of the hearing or the facts presented thereat rejected the proof and the application to enter by the townsite board, and reserved for determination hereafter any rights which Alonzo Brummett and M. Winfield may have in the land, when they present applications for it, and said decision is affirmed.

HODGES ET AL. v. COLCORD.

Motion for review of departmental decision of February 27, 1897, 24 L. D., 221, denied by Secretary Bliss May 25, 1897.

PRACTICE—ATTORNEY—CONTEST—GUARDIAN—PREFERENCE RIGHT.

PHILLIPS v. SMITH.

An attorney in good standing, admitted to practice before the Department, is not required to file written authority to appear on behalf of his client.

A duly appointed guardian of the minor children of a deceased soldier may institute a contest, on behalf of his wards, against an entry, and, in the event of success, exercise the preference right by filing a soldier's declaratory statement for the benefit of said minor children; and this right will not be defeated by the failure of the guardian to set forth in the affidavit of contest the capacity in which he was then acting.

Secretary Bliss to the Commissioner of the General Land Office, May 25,
(W. V. D.) 1897. (W. M. W.)

The case entitled Tilton S. Phillips, administrator and guardian, v. Albert A. Smith, has been considered on the appeal of the latter from your office decision of December 18, 1895, rejecting the desert land declaration of said Smith for the NE. $\frac{1}{4}$ of Sec. 24, T. 9 N., R. 22 E., W. M., North Yakima, Washington, land district.

Counsel for Phillips asks to have the appeal dismissed:

1. The time for appealing from the decision of the Honorable Commissioner had expired before this appeal was taken. Rule 83 U. S. L. O. Practice. 2. The attorneys, Whitson and Parker, have no authority to institute the appeal herein under rule 101 G. L. O. Practice, not having filed any written authority from the appellant, Albert A. Smith.

The register of the local office reported to your office, under date of February 24, 1896:

That the parties were duly notified of your decision therein by registered mail on December 24, 1895 (the receipts for which are herewith enclosed), and Phillips appeared and filed soldier's declaratory statement No. 42, covering the tracts involved. And that on this 24th day of February, 1896, A. A. Smith filed his appeal from your decision.

The post office registered receipt, dated on February 24, 1896, with affidavit of mailing of the appeal, is attached to the papers showing the appeal was mailed on said date, addressed to the attorney for Phillips.

It is clear that the motion to dismiss the appeal is without merit, for the reason that the notice of the appeal is shown to have been served in time under Rule 87 of the Rules of Practice, and for the further reason that an attorney in good standing, admitted to practice before the Department, is not required to file written authority to appear on behalf of his client. *Dober v. Campbell et al.* (on review), 18 L. D., 88.

It appears that on February 1, 1892, Wallis B. Williams made homestead entry for the land in question.

On March 13, 1893, Tilton S. Phillips filed an affidavit of contest against Williams's entry, alleging abandonment. Said contest was finally decided in favor of Phillips by the Department on April 18, 1895 (306 L. and R., 478). Said entry was canceled by your office letter of June 26, 1895.

On July 2, 1895, Albert A. Smith offered to file his desert land declaration for the land in question, and tendered the requisite purchase money. The register suspended this declaration to await the action of Phillips under his preference right as a successful contestant.

On July 22, 1895, Tilton S. Phillips offered by virtue of his preference right to file a soldier's declaratory statement in his capacity as the duly appointed administrator of Clayton S. Phillips, a deceased soldier, and guardian of his minor children, Ina May, Oliver Morton, Joseph Clinton, and Myrtle Grace Phillips.

Tilton L. Phillips filed with his application an affidavit, stating that he is the identical person who contested Williams's entry for the land in question, and that he

did the same as administrator and guardian of the estate of Clayton S. Phillips, deceased, not having any right of my own to use. That at the time I instituted this action I asked that my filing for this land be accepted by the land office, and was informed that it was not necessary, that I would be allowed thirty days after cancellation to make my said filing of record.

He presented with his application a copy of the discharge of Clayton S. Phillips from the United States army, which shows that said soldier was enrolled as a private in Company H, 6th Mo. Cavalry, on the 10th day of January, 1862, to serve three years or during the war, and was honorably discharged on the 30th day of January, 1865. Also certified copies of his appointment as administrator of the estate of Clayton S. Phillips, deceased, dated June 10, 1888, and of his appointment as guardian for Ina May Phillips *et al.*, on January 20, 1893.

The register and receiver rejected Phillips' application to file soldier's declaratory statement on the ground:

That in the contest of T. S. Phillips v. W. B. Williams, by which the tract described were made subject to entry, the parties in whose interest and name this entry is sought to be made are strangers to the record and have no preference right to file therefor, and that Albert A. Smith filed D. L. application for the same land on July 2, 1895.

Phillips appealed.

On December 18, 1895, your office reversed the judgment of the local officers, on the grounds that:

Under Sec. 2307 R. S. of U. S., the guardian had a clear right to make a homestead filing and entry for the benefit of his wards, and he was not deprived of such right by the fact that the land upon which he desired to exercise it was covered by the abandoned entry of Williams, which he, the guardian, proceeded to remove from the

records, going to considerable expense with the laudable object in view of providing a home and sustenance for his orphaned charges.

After the guardian had removed the obstacle which barred the way to the accomplishment of this worthy purpose, it would be extremely inequitable to allow a stranger, like Smith, to reap the benefits of Tilton S. Phillips' charitable work conscientiously performed in the discharge of his duty to his wards.

Smith appealed.

The assignment of errors is as follows:

1. Error committed in holding that a preference right to enter a tract of land can be acquired by contest in the name of another.
2. Error committed in considering the ex parte affidavit accompanying the application of said Phillips without service upon or notice thereof to Smith.
3. Error committed in holding that the preference right to enter, acquired by contest, can be transferred.
4. Error committed in rejecting the application of Smith to enter said land.
5. Error committed in allowing the application of said Tilton S. Phillips as guardian.

In support of these errors the cases of *Welch v. Duncan et al.*, 7 L. D., 186; *Kellem v. Ludlow*, 10 L. D., 560; *Tillinghast v. Van Houten*, 15 L. D., 394, and *Matthews v. Barbarovie*, 18 L. D., 446, are cited and relied upon. These cases hold that the preference right of a successful contestant can not be transferred to another person; and that a transferee in such case acquires no right that can be asserted as against the intervening entry of another. If the filing of a soldier's declaratory statement by Tilton S. Phillips for the land in question, on behalf of his wards, who are minor children of a deceased soldier, amounts to an assignment or transfer of the preference right of entry from said Phillips to his wards, the appellants' contentions are well founded and should be sustained. If, on the other hand, Phillips as the duly appointed and qualified guardian of the minor children of a deceased soldier had the right under the law to prosecute a contest against Williams's entry, and, upon the successful termination of said contest resulting in the cancellation of said entry, to exercise such preference right by filing a soldier's declaratory statement in the names and for the benefit of his wards, then plaintiff's contention must fall, and your office decision be affirmed.

Before considering these questions, it seems to be proper to observe that during the time allowed Phillips as a successful contestant to exercise his preference right of entry under the law every question in connection with the exercise of that right was solely between Phillips and the government. If he exercised his right in accordance with law, Smith would have no right to complain, for he could acquire no right under his desert application until after the thirty days allowed Phillips by law to assert his claim had expired. *Allen v. Price*, 15 L. D., 424; *Cowles v. Huff et. al.*, 24 L. D., 81, and authorities cited.

Phillips's application to file soldier's declaratory statement was made within the thirty days allowed by law to assert his preference right of entry, and during that time all he was required to do was to satisfy the

government that he was asserting the right in the same capacity that he instituted and carried on the contest.

The capacity in which Phillips contested Williams's entry and the capacity in which Phillips might desire to exercise his preference right were of no concern to Smith, for, if Phillips could show the government that he commenced and carried on the contest in the same capacity that he was asserting his preference right, and that he could lawfully make an entry in such capacity, and did make such entry, or its equivalent, in accordance with law, then Smith's desert application would give him absolutely no right to the land as against Phillips.

The record shows that at the time Phillips commenced the contest he was the duly appointed guardian for the minor children in whose behalf he sought to file soldier's declaratory statement; his affidavit shows that he had no right of his own to use as an individual contestant in making an entry in his own name; that at the time he instituted the contest he asked that his filing for the land be accepted. From these facts it is reasonable to presume that he was acting for the benefit of his wards from the commencement of the contest; and in case he should be successful in his contest that he intended to make an entry in the names and for the benefit of his wards.

From these statements it is clear that there was no such a thing as the transfer or assignment of the preference right in the whole transaction. "Assignment" in the law of contracts means a transfer or making over to another of any property, real or personal, in possession or chose in action, or of any estate or right therein. Phillips's affidavit shows that there was no change in the rights of the parties from the beginning of the contest to the time he offered to file in behalf of his wards. The mere fact that he did not attach the word "guardian" after his signature to his affidavit of contest, or allege in the body of his charge that he was acting in the capacity as guardian in his contest against Williams, can not be held sufficient to defeat his right as such guardian under the law to make the entry of the land under the preference right accorded by statute.

Section 2304 of the Revised Statutes permits every private soldier or officer who has served in the United States army during the recent rebellion for ninety days, and who was honorably discharged, and has remained loyal to the government, to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres.

Section 2307 provides that:

In case of the death of any person who would be entitled to a homestead under the provisions of section two thousand three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children by a guardian, duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter.

Under this section it is clear that Phillips, as the duly appointed

guardian of the minor orphan children of his deceased brother, would have the right to make an entry for and in the names of his wards.

There was no error in your office decision appealed from. It is therefore affirmed.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

HENLINE v. GINDER.

The rule recognizing slight acts of settlement, as between parties making the run for Oklahoma lands on the day of opening, is not applicable to the ordinary case of a party who claims priority of settlement.

Secretary Bliss to the Commissioner of the General Land Office, May 25,
(W. V. D.) 1897. (C. W. P.)

The land involved in this controversy is the SE. $\frac{1}{4}$ of Sec. 19, T. 23 N., R. 10 W., Alva land district, Oklahoma.

On September 26, 1893, Kate Ginder made homestead entry, No. 629, of said land.

On October 26, 1893, H. P. Henline filed affidavit of contest, charging that he made settlement on said land about ten o'clock A. M., September 22, 1893, and prior to the settlement and entry made by said Kate Ginder.

A hearing was had; the local officers decided in favor of Kate Ginder, and recommended that the contest be dismissed. On appeal, your office, by decision dated December 19, 1895, affirmed the judgment of the local officers. The contestant appeals to the Department.

The acts of settlement, as testified to by the contestant, are: That he went upon the land about seven o'clock A. M., September 21, 1893, and stuck a stake in the ground about forty rods west of the southeast corner and about fifty yards north of the south line of the quarter section. Later in the day he threw up a mound two feet high, about two hundred yards northwest of said corner, and wrote his name on a blazed tree about fifty yards southwest of the mound. He then left the land, went to Alva, and thence to his home in Kansas.

The contestant also testified that he established his residence on the land, with his family, in the month of March following his settlement, and since then has continued to reside upon the land, and he has a comfortable house and has broken and cultivated about twenty-five acres, and has other improvements. His testimony is corroborated by two witnesses.

On the other hand, the defendant, her father, David Ginder, and J. S. Warnstaff testified that they went upon the land on the morning of the 22d of September, and that they saw no one on the land claiming it, nor any signs of settlement.

The acts of settlement on which the contestant relies are such as have been recognized by the Department as valid acts of settlement,

in the case of Oklahoma lands, as between adverse claimants who made the race for lands on the day of the opening of the Territory to settlement. But these rulings are based upon the peculiar circumstances under which the run was made for homes on the lands opened to settlement. They are not applicable to the ordinary case of a party who claims priority of settlement on the public lands. In the latter case it is well established that to constitute settlement the settler must go upon the land and do some act, by which the public may have notice of his claim, and that such act must consist of some substantial and visible improvement, having the character of permanence, with an intent to appropriate the land under the settlement laws.

It is manifest that the acts of settlement in this instance were wholly insufficient to give notice to the public that the land was settled upon by a bona fide settler.

The defendant and her witnesses did not see the stake or the mound when they went upon the land in the morning of the 22d of September, and when she made her entry on the 26th of September following, it was without knowledge of the contestant's claim to the land.

For these reasons, I am of opinion, that the contestant has no right to the land and your office decision is affirmed.

CONTESTANT—PREFERENCE RIGHT—INTERVENING ENTRY.

LAWRENCE v. SEEGER ET AL.

In the case of a departmental decision rendered prior to the change of practice, following the decision in *Allen v. Price*, as to closing cases on review, but wherein notice of such decision is not given by the local office until after such change of practice, the contestant is entitled to the protection provided for under the new practice.

Secretary Bliss to the Commissioner of the General Land Office, May 25,
(W. V. D.) 1897. (W. A. E.)

On April 23, 1889, John R. Furlong made homestead entry for the NW. $\frac{1}{4}$ of Sec. 15, T. 11 N., R. 3 W., Oklahoma, Oklahoma land district.

On April 25, 1889, Thomas J. Lawrence filed affidavit of contest against said entry, alleging

that the said John R. Furlong entered upon and occupied said mentioned land prior to twelve o'clock, noon, on the 22d day of April, 1889, in violation of law and contrary to the President's proclamation opening said lands for homestead settlement; and further, that this contestant entered upon and occupied said lands after twelve o'clock, noon, on the 22d of April, and commenced bona fide improvements, and is so occupying said land.

A hearing was had on this contest, and resulted in a decision by the local officers in favor of the contestant.

Furlong appealed to your office, which, on December 19, 1891, affirmed the decision of the register and receiver and held the entry for cancellation.

On January 10, 1892, during the time allowed Furlong in which to appeal to the Department, Henry W. Seeger filed his homestead application for the tract. This application was rejected by the local officers and Seeger appealed.

Subsequently, Furlong appealed to the Department, which, on October 10, 1892, affirmed your office decision.

On October 24, 1892, your office promulgated said departmental decision, canceled Furlong's entry on the records, and threw the land open to entry by the first qualified applicant, subject only to the contestant's preference right. This action was in accordance with the practice then existing.

On November 15, 1892, however, the Department, in the case of *Allen v. Price* (15 L. D., 424), changed the practice in regard to closing cases after final decision by the Department. Since the date of that decision, when the Department renders a judgment of cancellation, your office promulgates the decision, without canceling the entry on the records, and holds the case open until after the expiration of the time allowed for filing motion for review or rehearing. If no motion for review or rehearing is filed within the time allowed, the case is closed, the entry is canceled on the records, and the land is reserved for the benefit of the contestant during the statutory period provided for the exercise of his preferred right of entry.

On November 26, 1892, the local officers served notice upon Lawrence of the cancellation of Furlong's entry, but advised him that under the decision in the case of *Allen v. Price*, he should wait until after the expiration of the time allowed for filing motion for review before exercising his preference right.

There is nothing in the record to show when notice of said departmental decision was served upon Furlong. The local officers report that there is no proof in their office of service upon him. On January 6, 1893, however, he filed a motion for review of said decision.

On April 8, 1893, Seeger appeared at the local office, presented a withdrawal by Furlong of the motion for review, and renewed his own application to enter the tract. Said application was accepted by the register and receiver and placed of record.

On April 19, 1893, Lawrence filed his homestead application for the land, which was rejected for conflict with Seeger's entry.

Lawrence appealed, and on December 27, 1893, your office held that his right was superior to that of Seeger, and called upon Seeger to show cause why his entry should not be canceled.

Notice of this decision was served upon counsel for Seeger on January 4, 1894, but no showing was made in support of said entry.

On August 17, 1895, said attorneys were served with a second copy of your office decision of December 27, 1893, and on September 27, 1895, Seeger filed appeal to the Department.

Your office, however, by letter of November 20, 1895, declined to

forward said appeal, for the reason "that the decision of December 27, 1893, ordering him to show cause, is not appealable." It was further held by your office

That Seeger has failed, after due notice, to make any showing in support of his entry, and the same is hereby held subject to the right of Lawrence to exercise his preference right.

Seeger thereupon filed a second appeal to the Department, and the case is now here upon that appeal.

Lawrence contested Furlong's entry, not on the ground of prior settlement, but on the ground that Furlong was disqualified. It is true that he alleged settlement on April 22, 1889, but he did not claim that he had settled prior to Furlong. On the contrary, he testified at the trial that Furlong was on the land when he reached it. The time when he actually settled, then, was immaterial, as he had no rights as against Furlong by virtue of that settlement. On the cancellation of Furlong's entry, Lawrence had a contestant's preference right for a period of thirty days, and the principal question for consideration here is as to the date when that preference right began to run.

Before notice was served upon him of departmental decision of October 10, 1892, the practice in regard to closing cases after final judgment by the Department had been changed. When the local officers advised him, then, that he should not attempt to exercise his preference right until after the expiration of the time allowed Furlong for filing motion for review, they were following the new practice—the practice authorized by the decision in the case of *Allen v. Price*. Under that decision it was their duty to reserve the land from entry until after the expiration of the time allowed for filing motion for review, and had Lawrence tendered his homestead application during that time they would have had to reject it.

Furlong filed motion for review on January 6, 1893. The effect of that motion was to suspend all further action in regard to this land until it had been disposed of. It was withdrawn on April 8, 1893, and at no time prior to that date could Lawrence's preference right as a successful contestant have attached.

He filed his homestead application on April 19, 1893, and consequently was in time. It was error on the part of the local officers to allow Seeger to make entry on April 8, 1893.

Your office decision holding Seeger's entry subject to the superior right of Lawrence is affirmed.

SURVEY OF PUBLIC LANDS—OFFICIAL PLAT.

GEORGE W. FISHER.

The approved plat of an official survey is conclusive as to the designation of tracts embraced therein, and must govern in the disposal of the lands covered thereby.

Secretary Bliss to the Commissioner of the General Land Office, May 25,
(W. V. D.) 1897. (W. M. B.)

George W. Fisher appeals from your office decision, of May 2, 1896, rejecting his amended application of April 7, 1896, to purchase the SE. fractional quarter, Sec. 28, T. 37 N., R. 7 W., 2nd P. M., Indiana, under the act of June 3, 1878 (20 Stat., 89) as amended by the act of August 4, 1892 (27 Stat., 348).

The ground upon which said application was denied is stated in words following:

As shown by the official plat in this office the area of the fractional part of section 28 applied for was surveyed as a part of section 33, and the area of said tract is included in the area of the E. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ said section 33, north of the Indian boundary line. The entire NE. fract. $\frac{1}{4}$, said section 33 north of the Indian boundary line being embraced in the location of military bounty land warrant No. 63932.

Your application still stands rejected subject to your right of appeal, for the reason that the land applied for was surveyed as a part of section 33 and has been disposed of as above set forth.

In his appeal from said decision applicant assigns allegations of error as follows:

1. That the Commissioner erred in holding that the SE. fractional $\frac{1}{4}$, Sec. 28, T. 37 N., R. 7 W., 2nd P. M., Indiana, was surveyed as a part of Sec. 33, T. 37 N., R. 7 W., 2nd P. M., Indiana.
2. That the Commissioner erred in holding that the SE. fractional $\frac{1}{4}$, Sec. 28, T. 37 N., R. 7 W., 2nd P. M., Indiana, is embraced in the location of military bounty land warrant No. 63,932 and was patented on Feb'y 15th, 1858; to Joseph E. Lange.

Thus it is seen that the said SE. fractional quarter of said Sec. 28 is the tract in controversy.

On February 5, 1857, Joseph E. Lange made application under provision of the act of March 3, 1855 (10 Stat., 701) to locate, and did locate on said day, a certain tract of land, for which patent issued to him on February 15, 1858, the description whereof, as contained in said patent is as follows:

* * * the northeast quarter (north of the Indian boundary line) of section 33 in township 37 north, of range 7 west, in the district of lauds subject to sale at Indianapolis, Indiana, containing one hundred and thirty-one acres, and fifty hundredths of an acre.

The General Land Office held as hereinbefore stated, that the small tract involved was surveyed as a part of Sec. 33, and was attached thereto, while appellant, *per contra*, contends that it was not so surveyed

and attached, and contends, further, that the area of the tract in question could not have been merged into that of Sec. 33 since, as alleged, there is no authority for "transposing land from one section to another," wherefore it is insisted that the tract in dispute could not pass to Lange under his patent.

Under the rule laid down by the supreme court in the case of *Cragin v. Powell* (128 U. S., 691) the question raised by appellant that land cannot be "transposed from one section to another"—though that particular question is not discussed in that case—is pretermitted or eliminated from the controversy. In the case cited the court held (*syllabus*):

"When lands are granted according to the official plat of the survey, the plat, with its notes, lines, descriptions and land marks, becomes as much a part of the grant or deed by which they are conveyed, and, so far as limits are concerned, controls as much as if such descriptive features were written out on the face of the deed or grant.

The question at issue in the present case is, therefore, determinable by the evidence furnished by the official plat of the survey in which the land in question is embraced.

A lithographic copy of the official plat—of the said survey, executed in April, 1830, of the lands hereinbefore described, together with that of adjacent lands—as made, approved and returned by the surveyor-general, and accepted by the General Land Office is filed with the record in the case, and the fact that the small fractional part of Sec. 28 was not platted as a separate subdivision, but as a part of the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ (north of the Indian boundary line) of Sec. 33, will appear from the disclosures made by the official plat, and the method pursued in platting surveys of the public lands.

Where fractional sections are too small to be designated as quarter-quarter sections they are, as a general rule, either numbered as lots or are merged in some other legal subdivision. An examination of the above referred to plat will show that no specific designation is given to SE. fractional quarter, Sec. 28, such as a fractional subdivision or lot.

It appears from the official plat that the eastern boundary line of the E. $\frac{1}{2}$ of the fractional Sec. 33 extends from the Indian boundary line—a distance of 36.16 chains—all the way to Lake Michigan, thus showing that no east boundary line was recognized as established for the SE. fractional quarter, section 28, as an independent subdivision, in platting the survey. The use of a *dotted*, instead of a full or *solid* line—indicating the course run by the deputy surveyor, 20.50 chains in length, on the south of said SE. fractional quarter, Sec. 28—in platting the survey, shows that said course was not recognized and adopted as an established line.

Furthermore, the surveyor-general—as will be observed from the plat—platted and returned the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of fractional section 33 as having an area of 69 acres. Said subdivision could not contain so large an area without having merged therewith the area of the tract in

controversy; the area of that portion of the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 33 lying between the Indian boundary line on the south and the dotted line extending across the northern portion thereof—and 0.50 chs. beyond and west of the west boundary line of this said subdivision—is 65.32 acres, while the area of that part of this same subdivision which lies between said dotted line and Lake Michigan is computed at 3.68 acres, making the said total of 69 acres as the correct area of the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ said Sec. 33. The table of contents of the various subdivisions show that no separate area was computed and returned for the fractional part of said Sec. 28 as such. The W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of fractional Sec. 33 was platted and returned as comprising an area of 62.50 acres, which is approximately correct.

Thus it appears that the total actual area of the land embraced in the NE. $\frac{1}{4}$ (north of the Indian boundary line) of Sec. 33, T. 37 N., R. 7. W., is 131.50 acres, there being included in said area, as already stated, that of the fractional part of section 28, applied for, which was surveyed as a part of the NE. $\frac{1}{4}$ of Sec. 33, as shown by the official plat, all of which said NE. $\frac{1}{4}$ of Sec. 33 was patented to Joseph E. Lange according to the plat thereof as hereinbefore appears.

For the foregoing reasons the decision of your office of May 2, 1896, rejecting Fisher's application to purchase the land in question is hereby affirmed.

RAILROAD LANDS—ACT OF MARCH 3, 1887.

GILMORE *v.* BROADWELL.

The right of purchase under section 5, act of March 3, 1887, cannot be recognized, if the bona fide character of the conveyance, under which the applicant claims, is not established.

Secretary Bliss to the Commissioner of the General Land Office, May 26,
(W. V. D.) 1897. (F. W. C.)

Samuel J. Gilmore has appealed from your office decision of July 23, 1896, holding that he has failed to establish his claimed right to purchase, under the fifth section of the act of March 3, 1887 (24 Stat., 556), as a *bona fide* purchaser, the NE. $\frac{1}{4}$ of Sec. 9, T. 3 S., R. 67 W., Denver land district, Colorado.

This tract is within the limits of the grant to the Kansas Pacific Railroad Company (afterwards the Union Pacific Railroad Company), the rights under which attached upon the definite location of the road March 3, 1869. At that date the land was embraced in the pre-emption declaratory statement of Philip Zehner, filed December 3, 1866, but upon a contest instituted by the company, said filing was ordered canceled by your office letter of July 2, 1874. Thereafter, to wit, May 16, 1882, the railroad company listed the tract.

On June 13, 1885, John M. Broadwell tendered his homestead application for the land, which was rejected by the local officers for conflict with the railroad claim under its list above referred to; from which action Broadwell appealed.

The case was prosecuted to this Department, and by decision of September 11, 1890, the previous adjudication of 1874 was set aside, the tract in question being held to have been excepted from the company's grant by reason of the filing by Zehner, of record at the date of definite location, and a hearing was ordered to determine the respective rights of Broadwell and Zehner, the pre-emptor, who, in the meantime, had filed an application for reinstatement of his pre-emption filing.

On February 16, 1891, Samuel J. Gilmore filed a protest against proceeding with the hearing between Broadwell and Zehner, in which he alleged that the tract in question was sold and conveyed by the Union Pacific Railroad Company to the Platte Land Company on April 18, 1882; that in the year 1886 said tract was sold and conveyed by the Platte Land Company to him (S. J. Gilmore); that the tract was enclosed by a lawful fence, has two dwellings on it, and is occupied and in possession of tenants who farm it under lease from said Gilmore.

Although no formal application was made under the provisions of section 5 of the act of March 3, 1887 (*supra*), as explained by the answer filed on behalf of Broadwell to dismiss Gilmore's protest, the purpose of the protest was to apprise the Department of Gilmore's claimed rights through the purchase made of the railroad company, with a view to granting him an opportunity to offer proof in support of his claimed rights under the act of March 3, 1887 (*supra*).

On March 2, following, Zehner dismissed his application for reinstatement and Broadwell was permitted to complete homestead entry for the land. No action appears to have been taken upon Gilmore's protest until December 5, 1891, when the same was dismissed by the local officers; from which action he appealed.

The action of the local officers was sustained by your office, and Gilmore appealed to this Department, the matter being considered in departmental decision of October 9, 1894 (not reported), in which your office was directed to order a hearing

to afford the plaintiff (Gilmore) an opportunity to show his rights and claim to said land as a *bona fide* purchaser from the railroad company and offer evidence in support of his protest.

Section 5 of the act of March 3, 1887 (*supra*), under which Gilmore is attempting to establish a right, provides as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said

lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns.

Under this section it must be shown that the applicant to purchase is (1) a citizen of the United States, or has declared his intention to become such citizen; (2) that he is a *bona fide* purchaser; and it has been uniformly held that these two essentials must be shown by the applicant. Thus in the circular of August 30, 1890 (11 L. D., 229), it was said:

It can make no difference, in my judgment, whether the applicant is the immediate purchaser from the company, or a purchaser one or more degrees removed. If he is a *bona fide* purchaser of the land, and has the required qualifications as to citizenship, he is within the intendment of the statute, and if he be not the original purchaser from the company it is immaterial what the qualifications of his immediate grantor, or the intervening purchasers may have been. If his immediate grantor was a foreigner, and his purchase was simply for the purpose of acquiring title from the government for the benefit of the foreigner, he would not be a *bona fide* purchaser, and would not therefore come within the terms of the act.

See also *Sethman v. Clise* (17 L. D., 307) and *Union Pacific R. R. Co. v. McKinley* (14 L. D., 237).

After numerous continuances, and in accordance with the departmental order of October 9, 1894, hearing was duly had on December 5, 1895. The register and receiver recommended that Gilmore's protest be dismissed and that Broadwell's homestead entry remain intact; from which action Gilmore appealed to your office, resulting in your office decision of July 23, 1896, now appealed from.

The testimony offered on behalf of Gilmore was that of several witnesses tending to show that Zehner, the original pre-emptor, did not make settlement upon this land preceding the filing of his declaratory statement in the local office; that he never actually resided upon the land; that the notice of the hearing had in 1874, upon the contest instituted by the company against Zehner's filing, was duly published; and that certain improvements, consisting of fencing, the building of two houses, and the construction of flumes and irrigating ditches, were made upon this land, supposedly by Gilmore. Copy of a warranty deed executed April 18, 1882, on behalf of the Union Pacific Railroad Company, transferring this tract, together with other lands, to the Platte Land Company, a foreign corporation, was offered in evidence; also copy of a quit claim deed executed August 1, 1886, by the Platte Land Company, to Samuel J. Gilmore, the same being acknowledged February 2, 1887. The consideration named in this deed is \$5,000, and the land quit-claimed amounted in the aggregate to about 3,000 acres.

Gilmore, although duly advised of the hearing ordered for the purpose of permitting him an opportunity to establish his claimed right as a *bona fide* purchaser, did not appear personally at the hearing, nor was his deposition offered in support of the alleged claim made in his behalf that he in good faith purchased the land in question for a

valuable consideration from the Platte Land Company. He was represented by counsel at the hearing, and although several applications were made for a continuance, the same do not appear to have been asked in order to secure his testimony; and from the record made at the hearing his absence was not explained or excused.

From the record before me, aside from the copy of the quit claim deed referred to, there is nothing to show that Gilmore ever purchased this land; that any consideration was ever paid by Gilmore; or that the conveyance to him was an honest transaction having as its purpose the actual conveyance of the land in question to Gilmore to be held by him in his own right and not for the ultimate benefit of his grantor.

At the time of the execution of this quit claim deed, it is shown that Gilmore was representing the Platte Land Company in Denver, Colorado, as its agent and attorney in fact, with authority to sell any of its real estate in Colorado and to make and deliver deeds of same, with or without covenants or warranty. It also appears that the bill which afterwards became the act of March 3, 1887, under which he is now seeking to purchase, was then pending in Congress, and under its provisions excluded from the benefit granted thereby the foreign corporation which he represented; and that in another case Gilmore made affidavit placing upon the land covered by said quit claim deed a total value of from twenty-five to thirty thousand dollars.

When viewed in the light of this showing, which tends to discredit the *bona fide* character of the alleged conveyance by the land company to Gilmore, it must be held that the showing made in his behalf in support of his protest looking to the purchase of this land under the fifth section of the act of March 3, 1887, falls short of establishing the alleged transaction as a *bona fide* and actual transaction, as distinguished from a feigned conveyance made to enable the Platte Land Company to indirectly obtain title to land to which it could not obtain title directly.

I therefore affirm your office decision and hold that, although due opportunity has been afforded Gilmore, he has failed to sustain his rights and claim to the land as a *bona fide* purchaser from the Platte Land Company, and his protest is therefore dismissed and Broadwell's entry permitted to remain intact, subject to compliance with law.

STATE SELECTION—MINERAL LAND—CERTIFICATION.

SIMON B. ARNOLD.

A hearing will not be ordered on an allegation that a tract of land, embraced within a certified list of State selections, was not, on account of its prior known mineral character, intended to be granted to the State, except upon a strong *prima facie* showing in support of such allegation.

Secretary Bliss to the Commissioner of the General Land Office, May 27,
(W. V. D.) 1897. (E. B., Jr.)

The land involved in this case is the SW. $\frac{1}{4}$ of Sec. 34, T. 33 N., R. 5 E., Seattle, Washington, land district. It was selected January 5, 1893, by the State of Washington, per list No. 2, under the grant to that State and certain other States by section sixteen of the enabling act of February 22, 1889 (25 Stats., 676), for the use and support of agricultural colleges therein. See also, in this connection, sections ten, eighteen and nineteen of the same act. The list containing this and other selections was approved by the Secretary of the Interior May 7, 1894, as provided in sections ten and sixteen of said act; and on May 12, 1894, the said list of selections was duly certified to the State by your office (section 2449 R. S.) and receipt thereof acknowledged by the governor of the State on May 21, 1894.

On October 8, 1895, Simon B. Arnold offered his coal declaratory statement for the tract above described, alleging possession thereof since March 18, 1895. The local office rejected his offered filing October 11, 1895, because of the previous selection by the State of said tract for its agricultural college. This rejection, on appeal by Arnold, your office, on February 9, 1896, affirmed, on the ground that by reason of said selection, approval and certification, the land department had, for more than a year prior to the offered filing, been without any jurisdiction to entertain an application for the land. Arnold prosecutes an appeal to the Department, assigning error by your office as follows:

1. Error in finding that the selection of the above described land by the State had been approved.
2. Error in not ordering a hearing and allow coal claimant to prove his case.

In his argument upon the first assignment of error appellant asserts that, although the records of the local office show the filing there, and approval by the local office, of the State's selection of said land, there is nothing in that office "to show that the selection had been confirmed by the General Land Office," meaning by the words quoted, presumably, that the records of the local office do not show the fact of the approval of the Secretary and the certification by your office of the approved list to the State. Your office records show that a copy of the approved list advising the local office of certification was sent to that office May 12, 1896, but they afford no evidence of the receipt of such copy by the local office.

Whatever the facts may be as to the receipt of such copy by the local office, and as to the alleged incompleteness of the records there in the premises, they are immaterial as bearing upon the question of the status of Arnold's offered coal filing. The approval and certification of said list appear to have been duly made long before said filing was offered or any possession of the land by Arnold is alleged. It was unfortunate, if it be true, that these facts were not of record in the local office at and prior to the alleged commencement of Arnold's possession of the tract. But incompleteness, as alleged, of the records there would not avail to change the actual status of the tract, nor furnish ground upon which your office or the Department could relieve Arnold against the rejection of his offered filing. Said certification operated, and will continue to operate under the terms of the grant and section 2449 R. S. until the Secretary's approval is canceled or vacated by competent authority, to divest the land department of jurisdiction over the land. Arnold's filing was therefore properly rejected.

Your office did not pass upon the question of ordering a hearing as to the character of the land, nor make any recommendation thereon, although in his appeal from the local office Arnold asked for a hearing. It would appear, however, from your office decision that the records of your office, at and prior to the date of certification to the State, afforded no suggestion that the tract was mineral in character. In his declaratory statement Arnold swears, concerning the land:

I have located and opened a valuable mine of coal thereon and have expended in labor and improvements on said land the sum of four hundred dollars, the labor and improvements being as follows: Running a tunnel in on the vein 256 feet and putting the coal out on the dump.

This is corroborated by two affiants. With his declaratory statement Arnold also presented for filing the joint affidavit of two other persons, who therein state that they know the land in question and "knew the coal was there prior to October 1, 1891, which was prior to the selection of said SW. $\frac{1}{4}$ Sec. 34, Tp. 33 N., R. 5 E., by the State of Washington." The means of their alleged knowledge of the existence of coal these persons do not state.

Section eighteen of said act excluded "all mineral lands" from the grants made by the act; and by section 2449 Revised Statutes, applicable generally to this and similar grants, in addition to providing that the certification by the Commissioner of the General Land Office, under the seal of his office, of the approved list of selections,

shall be regarded as conveying the fee simple of all lands embraced in such lists that are of the character contemplated by the act of Congress, and intended to be granted thereby,

it is further provided that—

but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.

Without passing upon the question here, it would seem that under the grant and the provisions of the last mentioned section, land known to be mineral in character prior to the Secretary's approval of the State's list therefor, and possibly prior to certification, would be exempt from the operation of the grant. It would be the duty of your office, as it might become the duty of the Department in due course of proceedings, upon proper showing that land selected by a State under said act was mineral in character, to order a hearing in the premises, notwithstanding the selection had been approved and certified, to the end that, in the event evidence adduced at a hearing should so warrant, it might be duly determined that the land was not of the character contemplated by the act and was not intended to be granted thereby, and that therefore no title or interest had passed to the State by the approval and certification. But after such approval and certification a hearing should be ordered only upon a strong *prima facie* showing that the land was known, prior to that time, to be of a character other than that contemplated by the act.

I do not think such showing is made in this case by the evidence presented by Arnold and hereinbefore set out—no facts being stated as a basis for the alleged knowledge of the existence of coal prior to the State's selection of the land—and his present request for a hearing is therefore denied. But this will not preclude him from presenting to your office, within a reasonable time, an application for a hearing, if he elects so to do, accompanied by such further evidence as he may be able to present in support thereof.

In accordance with the foregoing, your office decision is affirmed.

MINING CLAIM—ADVERSE AGRICULTURAL ENTRY.

CARIBOU LODGE.*

The failure of a claimant under a mineral location to make objection to the allowance of an agricultural entry of the land is conclusive as to the right of such claimant to be heard.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1896. (P. J. C.)

The record shows that George Henry Hewitt was permitted to make mineral entry No. 124 of the Caribou Lodge, lot No. 4020, Glenwood Springs, Colorado, land district, July 18, 1887. The record was regularly forwarded to your office, where, on consideration of the same, it was determined, by letter of August 4, 1894, that the application and entry were erroneous, because all the land included therein had been entered prior thereto, and he was given sixty days in which to show cause why his entry should not be canceled.

* Not heretofore reported.

No attention seems to have been given to this order, and your office, by letter of November 10, 1894, held the entry for cancellation, whereupon Hewitt prosecutes this appeal, assigning numerous grounds of error.

The statements of your office, showing the prior entries by the Aspen townsites, Joseph Thaler and Michael Gannon, are not disputed, but it is said by counsel that the location of the Caribou antedates the entries of the two latter, and, it is suggested, by reason thereof Hewitt's right is superior to the others.

It is true that the Caribou was located prior to the date of the Thaler and Gannon entries, but, so far as disclosed by the record before me, there was no objection interposed on behalf of Hewitt or his grantors thereto, and, in the absence of any proceeding instituted for the purpose of testing the prior right of the land, the Department must assume that none exists. This is especially true when there are alleged conflicts between agricultural and mineral claimants, because in the location of a mining claim the record evidence thereof is not made in the United States land offices, but in the recorder's office of the county where the land is situated, and the first official information the local office has of the location is when the application for patent is filed therein. This is not true of agricultural entries. All the record is made in the local office. Hence, when an application to enter agricultural land is made, if the locators of mining claims on the land have any objections, they must be vigilant in presenting them. The rules and regulations provide ample means for this purpose, and if the remedies provided are not pursued, the mineral claimants will not be heard to complain.

Your office judgment is affirmed.

PRACTICE—APPEAL—MILLE LAC INDIAN LANDS.

HAGGBERG ET AL. *v.* MAHEW.

An appeal will not be entertained in the absence of specification of errors.

Notice of an appeal may be served either upon the adverse party or his attorney.

The joint resolution of December 19, 1893, confirming bona fide preemption filings, and homestead filings, or entries, within the Mille Lac Indian reservation, allowed between January 9, 1891, and the receipt of notice at the local office of the departmental decision of April 22, 1892, operates to validate settlement rights covered by filings or entries thus allowed, whether initiated before or after January 9, 1891, hence, as between parties claiming under said protective legislation, priority of settlement may properly form a material issue.

Secretary Bliss to the Commissioner of the General Land Office, May 28,
(W. V. D.) 1897. (E. B., Jr.)

This is a contest for title to the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 11, and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 12, T. 42 N., R. 35 W., St. Cloud, Minnesota, land district, the same being cov-

ered by the pre-emption declaratory statement, No. 2016, filed by Moses Mahew on February 3, 1891, alleging settlement March 5, 1890.

On the same day that Mahew filed his said statement, Peter P. Haggberg and David Johnston also filed declaratory statements; that of the former being No. 2005, for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section 11, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 2, same township and range, alleging settlement April 4, 1888, and of the latter being No. 2022, for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section 12, alleging settlement December 29, 1890. It thus appears that Haggberg's filing conflicts with Mahew's as to the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section 11, only, while Johnston's conflicts with Mahew's, only, as to all of the land claimed by the latter in said section 12.

Hearings were duly held between Johnston and Mahew and Haggberg and Mahew, in March 1892, which resulted in a decision by the local office, December 29, 1893 (the cases being considered together), in favor of Mahew and adverse to both the other parties. Upon appeals by Haggberg and Johnston, your office, on September 18, 1896, affirmed the decision of the local office on the ground that Mahew's rights under his settlement, followed by due filing, were superior to those of the other parties, respectively, and held the filings of Haggberg and Johnston for cancellation to the extent of their conflict with that of Mahew. Haggberg and Johnston now prosecute appeals here.

The appeal of Haggberg is found to be fatally defective in that, although the time allowed by the Rules of Practice for giving notice of an appeal has long since expired, he has, as appears from the record before me, filed no specification of errors as required by Rule 88 of Practice. His appeal is accordingly dismissed. This disposes of Haggberg's connection with the case before this Department.

The attorney for Mahew has filed a motion to dismiss the appeal of Johnston on the ground that no notice thereof was served upon him (attorney). It appears that a copy of Johnston's appeal was served upon said Mahew himself, by registered letter, November 12, 1896, as provided in Rule 94, within the time allowed by the Rules of Practice. It is well settled that notice of appeal may be given either to a party or his attorney (Rule 96; *New Orleans Canal and Banking Co. v. State of Louisiana*, 5 L. D., 479; and *Northern Pacific R. R. Co. v. Bass*, 14 L. D., 443). The motion is accordingly denied.

The land in controversy is within what was formerly the Mille Lac Indian reservation. By act of July 4, 1884 (23 Stat., 89), any disposal of the lands in said reservation was prohibited "until further legislation." Such "further legislation" respecting these Mille Lac lands is found in the act of January 14, 1889 (25 Stat., 642). By section six of this act "the agricultural lands on said reservation not allotted under this act nor reserved for the future use of said Indians" were to be disposed of "to actual settlers only under the provisions of the home-

stead law," subject, however, to certain provisos not here in point. Under the decision of the Department in the case of Amanda J. Walters *et al.*, dated January 9, 1891 (12 L. D., 52), and departmental letter of January 21, 1891, unreported, which, together, held that these lands should be disposed of as other public lands under the general laws, pre-emption filings were allowed by the local office for Mille Lac lands on and after the receipt of said departmental letter by the local office (then at Taylor's Falls, Minnesota), on February 3, 1891. Subsequently, however, by departmental letter of April 22, 1892 (14 L. D., 497), your office was instructed that the Mille Lac lands were not subject to disposition under the general land laws, but under the special provisions of the act of January 14, 1889 (*supra*). These instructions were duly communicated to the local office by your office.

On December 19, 1893, the following joint resolution of Congress was approved (28 Stat., 576):

That all *bona fide* pre-emption or homestead filings or entries allowed for lands within the Mille Lac Indian reservation in the State of Minnesota between the ninth day of January, eighteen hundred and ninety-one, the date of the decision of the Secretary of the Interior holding that the lands within said reservation were subject to disposal as other public lands under the general land laws, and the date of the receipt at the district land office at Taylors Falls, in that State, of the letter from the Commissioner of the General Land Office, communicating to them the decision of the Secretary of the Interior of April twenty-second, eighteen hundred and ninety-two, in which it was definitely determined that said lands were not so subject to disposal, but could only be disposed of according to the provisions of the special Act of January fourteenth, eighteen hundred and eighty-nine (twenty-five Statutes, six hundred and forty-two), be and the same are hereby, confirmed where regular in other respects, and patent shall issue to the claimants for the lands embraced therein, as in other cases, on a satisfactory showing of a *bona fide* compliance on their part with the requirements of the laws under which said filings and entries were respectively allowed.

The filings of both Johnston and Mahew were made within the period specified in said resolution. If priority of filing were alone to control, Mahew's claim to the land in controversy between him and Johnston is clearly superior to Johnston's. But their filings were made, as already indicated, under instructions which provided for the disposition of the Mille Lac lands under the general land laws, that is, in their cases, under the pre-emption law then in force, and said resolution expressly confirmed them "where regular in other respects," and provided for the issuance of patent "to the claimants for the lands embraced therein," subject, however, to

a satisfactory showing of a *bona fide* compliance on their part with the requirements of the laws under which said filings . . . were respectively allowed.

The effect of these instructions and this legislation was clearly, therefore, to subject these claims of Mahew and Johnston to the operation of the pre-emption law as in force at the date of their filings, in so far as the same could be applied in view of the peculiar situation then and theretofore existing. The question of priority of settlement thus arises

necessarily in these cases. The question whether pre-emption settlement rights could have been acquired as to lands covered by these filings, by the parties who made such filings, is forever settled in the affirmative by said joint resolution. That resolution operated to authorize and confirm such settlement rights by such parties, whether initiated prior or subsequent to January 9, 1891, and the decision of your office, dated March 15, 1895, in the case of *Elggren v. Dewey*, which was affirmed by the Department April 24, 1896, is based on that view.

It only remains to determine the question of priority of settlement as between Mahew and Johnston. I find the facts upon this point to be substantially as set out in your office decision. Mahew first went on the land he claims in January, 1889, but, while he made some improvements thereon during that year and lived there part of the time, he did not establish his permanent residence there until about March 5, 1890. Since that date, although he was away from the land at work, as was also his wife (most of the time in attendance upon sick persons), from November 3, 1890, to February 10, 1891, the evidence shows he had no other home, and that he at no time since March 5, 1890, abandoned the land. Since March 5, 1890, he has in good faith complied with the requirements of the pre-emption law. On August 10, 1894, he submitted his final proof for the land covered by his filing.

Johnston did not go upon the land until December 29, 1890, and did no act of settlement thereon until January 6, 1891. Mahew's house, household goods, and farming implements were there, to give Johnston notice of Mahew's settlement. The fact that the house was then (January 6, 1891) temporarily occupied by Indians, without Mahew's knowledge or consent, could not efface Mahew's settlement, nor validate an attempted settlement by Johnston. The contention of counsel, that Mahew's failure to *attempt* to file for the land prior to January 9, 1891, subjected it to settlement by Johnston, is without force. There was no authority of law under which the local office could have received a pre-emption filing for the land subsequent to the act of July 4, 1884, *supra*, and prior to January 9, 1891; and after that date, and during the period hereinbefore indicated, pre-emption filings for Mille Lac lands were receivable only by virtue of the then prevailing departmental construction of the act of January 14, 1889, *supra*. Under the joint resolution of December 19, 1893, hereinbefore set out, Mahew can not be held to have been required to do what would have been, in law, prior at any rate to January 9, 1891, a vain thing. He made his filing on the very day the decision first referred to in said joint resolution was officially communicated to the local office, and that was sufficient.

The foregoing disposes of all material questions presented by the appeal. The decision of your office is affirmed in accordance with the views herein expressed. Johnston's filing will be canceled to the extent of the conflict between the same and the filing of Mahew. Herewith are returned the papers.

REPAYMENT—SECTION 7, ACT OF MARCH 3, 1891.

MARY O. LYMAN.

On application for repayment under an entry canceled for fraud, the applicant will not be permitted to go back of the judgment of cancellation, and show that in fact there was no fraud.

The provisions of section 7, act of March 3, 1891, do not in terms, nor by implication have any application to the matter of repayment.

Secretary Bliss to the Commissioner of the General Land Office, June 3, 1897.
(W. V. D.) (W. M. W.)

Mary O. Lyman's appeal from your office decision of March 7, 1896, rejecting her application as alleged transferee of Maud Vaniel for repayment of the purchase money paid by said Vaniel on her pre-emption cash entry for the SE. $\frac{1}{4}$ of Sec. 22, T. 26 S., R. 25 W., Garden City, Kansas, land district, has been considered.

Said application was filed in your office by Messrs. Copp and Luckett, resident attorneys for Lyman, and your office disposed of it by saying:

That said entry was canceled by office letter "P" April 27, 1889, because the entry was fraudulently made. The law governing the return of purchase money does not apply to cases of this character.

The first and second specifications of error in the appeal take issue with the statement in your office decision that said entry was canceled because it was fraudulently made.

The judgment canceling the entry was based upon a finding of fact that said entry was fraudulently made; in this proceeding such finding and judgment must be regarded as conclusive upon all parties concerned that the entry was fraudulently made. In other words, upon an application for repayment under a canceled entry, when the judgment of cancellation shows that the entry was canceled for fraud, the party applying for repayment will not be permitted to go back of the judgment of cancellation and show that there was no fraud. Such judgment is conclusive as to the facts and the law. It follows that the second alleged error presents an immaterial question.

The third and fourth specifications of error are as follows:

3. In not holding that as between appellant, a *bona fide* purchaser for value of the land covered by said entry after issuance of final certificate, and the United States, the charge of fraud is barred by section 7 of the act of March 3, 1891, and that the purchase money should be refunded to said purchaser or the entry reinstated.

4. In declining to recommend repayment.

No brief or argument has been filed in support of the errors assigned in the appeal presenting either reasons or authority to sustain them.

It is not easy to perceive just what counsel for appellant mean by the statement in the third specification of errors that "the charge of fraud is barred by section 7 of the act of March 3, 1891." If counsel mean to be understood by the use of this language as claiming that

section 7 of the act of March 3, 1891 (26 Stat., 1095), changed, amended, or in any manner affected the laws relating to repayment, then such contention or claim can have no force in reason or law. Said section relates to the correction of clerical errors, committed in the entry of the public lands, and the confirmation, under certain conditions, of certain entries of the public land. It does not in terms nor by implication have any application to the matter of repayment.

Your office decision appealed from is accordingly affirmed.

RELINQUISHMENT—INSANE ENTRYMAN—CONTEST.

DYCHE *v.* BELEELE.

A relinquishment executed by the guardian of an insane entryman, under the direction of a probate court, is unauthorized by law and invalid.

A contest against the entry of an insane homesteader must fail if it appears that the entryman had complied with the law up to the time when he became insane.

Secretary Bliss to the Commissioner of the General Land Office, June 3, (W. V. D.) 1897. (C. W. P.)

Anthony Beleele on July 8, 1889, made homestead entry of the SW. $\frac{1}{4}$ of Sec. 29, T. 19 N., R. 3 W., Guthrie land district, Oklahoma.

On November 2, 1892, Edward W. Dyché filed affidavit of contest, alleging abandonment, change of residence for more than six months next prior to the date of affidavit, and that the land was not settled on and cultivated as required by law.

On August 24, 1893, a hearing was had before the local officers, and, on January 14, 1895, they found that Beleele "cultivated and improved the land in good faith, as required by law, until his departure for Iowa in April, 1891;" and also found that,

at the time he left his claim in April, 1891, he was mentally incapacitated from attending business affairs on account of old age and brooding over his financial misfortunes in Kansas, as shown by the testimony,

and recommended that the contest be dismissed. Dyché appealed to your office.

During the pendency of said contest, on August 29, 1893, the probate court of Logan county, Oklahoma Territory, having found that the said Anthony Beleele was incapable of taking care of himself, and of managing his property, and otherwise mentally incompetent, appointed his daughter, Clara E. Beliel, guardian of the person and estate of the said Anthony Beleele.

Subsequently, letters of guardianship being issued to the said Clara E. Beliel, on April 23, 1895, on the same day, the probate court, having found that "it is to the best interest of said Anthony Beliel, for the SW. $\frac{1}{4}$ of Sec. 29, Tp. 19 N., R. 3 West, be canceled by relinquishment, and that the proceeds from said homestead be converted into money,"

authorized the guardian "to relinquish to the Government of the United States all of the right, title and interest of said Anthony Beliel in and to" the said land. And on the same day, Clara E. Beliel presented to the local officers a relinquishment of the land, and, at the same time, the said Dyche presented an application to enter the same under the homestead laws; the former was rejected by the local officers "because the guardian is not authorized to relinquish the same and to authorize its cancellation;" and the latter, "for conflict with homestead entry 3418, of Anthony Beliel covering said land." Clara E. Beliel and said Dyche appealed to your office.

On June 19, 1895, the probate court removed the said Clara E. Beliel from the guardianship, and appointed Peter Beliel guardian in her stead; and rescinded the order authorizing the said Clara E. Beliel to relinquish the land in controversy.

Your office, without passing upon Dyche's appeal from the decision of the local officers dismissing his contest, reversed the action of the local officers in refusing to receive the relinquishment and cancel the entry, and also their rejection of Dyche's application to enter said land. Anthony Beleele by his guardian, Peter Beliel, has appealed to the Department.

It is contended that your "decision is erroneous in not holding the entry of Anthony Beliel intact and not dismissing the contest of the contestant."

In your decision you say that you "find it unnecessary to pass on the appeal of Dyche" from the action of the local officers "in dismissing his contest, but, it appearing the entryman had complied with the law to the time when he became insane, it would seem that the said contest was properly dismissed."

I have read the testimony and fully concur with you in the opinion that the contest was properly dismissed and think that you should have affirmed the judgment of the local officers dismissing the contest.

Upon the question of the force and effect of the relinquishment of the claim by Clara E. Beliel, as guardian of the entryman, under the authority of the probate court of Logan county, Oklahoma Territory, I am clearly of opinion that said relinquishment can not be regarded as valid and binding on the entryman. The probate court had no authority to authorize the relinquishment.

The act of May 14, 1880 (21 Stat., 140), authorizes a pre-emption, homestead, or timber culture claimant to relinquish his claim to the government. The act of June 8, 1880 (Id. 166), which is the only legislation by Congress on the subject of settlers who become insane, provides that the rights of a pre-emption or homestead claimant, who has become insane, may be proved up, and his claim perfected by any person duly authorized to act for him during his disability. But no authority is given to sell or relinquish his claim.

I am therefore of opinion that the judgment of the local officers

rejecting the relinquishment and Dyche's application to enter the land, is correct and should be affirmed.

It is unnecessary to consider the protest of Peter Beliel, the guardian appointed by the probate court upon the removal of the said Clara E. Beliel.

Upon a careful consideration of the whole record, I am satisfied that the decision of your office is erroneous. I therefore reverse your decision, and direct that Dyche's contest be dismissed. Anthony Beleele's entry will remain intact.

HERSHEY *v.* BICKFORD ET AL.

Motion for review of departmental decision of December 23, 1896, 23 L. D., 522, denied by Secretary Bliss, June 3, 1897.

REPAYMENT—MORTGAGEE—ASSIGNEE.

J. W. THOMAS.

An application for repayment, made by a mortgagee of the land, who also holds an alleged assignment of the right to repayment, does not present a case wherein the status of the applicant, as an assignee, must be determined, if the duplicate receipt is not surrendered, and all claims to the land properly relinquished.

Secretary Bliss to the Commissioner of the General Land Office, June 3,
(W. V. D.) 1897. (W. M. W.)

On May 16, 1896, your office transmitted the papers in the application of J. W. Thomas, Receiver of the American Savings Bank, of Omaha, Nebraska, for repayment of the purchase money, fees and commissions paid to the government by John L. Corey, under his pre-emption cash entry, No. 6061, made on March 15, 1888, for the SW. $\frac{1}{4}$ of Sec. 9, T. 1 S., R. 38 W., Oberlin, now Colby, Kansas, land district, together with said Thomas's appeal from your office decision of April 1, 1896, rejecting his application for repayment.

The facts in the case are as follows:

Corey made pre-emption cash entry March 15, 1888, and four days later executed to the American Loan and Trust Company a mortgage upon the land entered, to secure the payment to that company of \$550, borrowed by Corey from the company. At the same time, and as additional security, Corey executed and delivered to the trust company the following instrument:

AUTHORITY TO SETTLE WITH THE UNITED STATES.

Whereas, We, John L. Corey and Mary E. Corey, husband and wife, of Benkelman postoffice, Dundy county, Nebraska, have borrowed the sum of \$550.00 of the American Loan and Trust Company and have executed to said company, to secure the

payment thereof, a mortgage upon the following described real estate, situated in Cheyenne county, Kansas, namely: southwest quarter, section 9, township 1 south, range 36 west of 6th principal meridian.

Now, therefore, if we, or either of us, shall, at any time hereafter, be entitled to receive from the United States any money on account of said land, by reason of any defect, illegality, or irregularity in our right or title to said land, or for any reason whatever, we do hereby appoint the president of the American Loan and Trust Company our agent, and hereby authorize him, in our behalf, to receive said money from the United States, and in our name receipt therefor; and we do hereby order and direct that such money be paid to the said president of the said American Loan and Trust Company for us, by the proper officers of United States; and when the said president of the said American Loan and Trust Company, as our agent, shall have received said money, we authorize him to pay the same to the holder of said mortgage. This authority is given, in consideration of the aforesaid loan, from the said American Loan and Trust Company to us and we do hereby make this power of attorney irrevocable, until full payment by us, of said loan has been made.

Witness our hands this 19th day of March, 1888.

JOHN L. COREY.
MARY E. COREY.

In presence of—

EDWARD E. GILLEN.
E. M. MALLETT.

Thereafter the American Savings Bank became the owner and holder of the mortgage and of the instrument hereinbefore set forth. Thomas is the receiver of the bank. The American Loan and Trust Company has become insolvent and is also in the hands of a receiver. The latter, as the present executive officer of the trust company, relinquished any interest which that company may have in the land and certified that Thomas, as receiver of the bank, is the present holder of the instrument hereinbefore set forth.

It was ascertained that Corey's entry was erroneously allowed and could not be confirmed, and the same was canceled April 13, 1895.

December 1, 1888, Corey and wife conveyed the land to David O. Gilbert "subject to a mortgage of \$500.00." December 31, 1888, Gilbert and wife conveyed the land to Adam W. Smith "subject to a mortgage of \$550.00 and taxes for 1888," and July 20, 1891, Smith conveyed the land to John Oliver "subject to a mortgage of \$550.00 and accrued interest and taxes for 1891." The consideration named in the first two deeds is \$1600.00 and in the third it is an exchange of other property.

In your office decision it is held that—

The only person qualified to apply for a repayment is the one in whom the title to the land is vested at the date of cancellation of the entry, or the heirs of such party, and that a mortgagee whose claim is a mere lien on the land is not an assignee and as such entitled to repayment (11 L. D., 283; 14 L. D., 101 and 392).

In his appeal Thomas contends that—

The Hon. Commissioner erred in his decision herein in that he considered and held that the said John W. Thomas, receiver, etc., requested a repayment to him by virtue of the mortgage and as a mortgagee,

and in support thereof urges that the instrument hereinbefore set forth and executed by Corey to the original mortgagee, as an addi-

tional security, constituted an equitable assignment to the mortgagee by Corey, of the latter's right to repayment in the event of the cancellation of his entry.

Section 2 of the act of June 16, 1880 (21 Stat., 287), regulating repayments by the Secretary in cases like this, provides:—

In all cases where homestead or timber culture or desert-land entries or other entries of the public lands have heretofore or shall hereafter be canceled for conflict, or where from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land.

The "surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land" are thus made conditions precedent to repayment. The duplicate receipt has not been surrendered, and it is not shown to have been lost or destroyed. The applicant has executed and presented a relinquishment on behalf of the bank, of its claim to the land, but according to his own contention the bank is at most only a mortgagee of the land and an assignee of the right to repayment. Even if the instrument, or power of attorney, relied upon by the applicant be regarded as an assignment of the right to repayment, it did not in itself transfer to the applicant any claim to the land. Subject to the mortgage, the claim to the land passed to John Oliver. The mortgage was only an incumbrance which could not ripen into a claim to the land until after breach of condition and foreclosure. The statute requires a relinquishment of "all claims to said land." Here the greater claim is shown to exist in John Oliver and yet no relinquishment by him is presented.

The conditions named in the statute when repayment can be made "to the person who made such entry, or to his heirs or assigns," have not been fulfilled, so it is not necessary to determine whether Thomas, as receiver of the bank, is an assignee within the meaning of the statute. He may be entitled to repayment as against Corey, the entryman, and he may be equally entitled to repayment as against Oliver, a subsequent grantee, but under the statute no one is entitled to repayment as against the government, until after surrender of the duplicate receipt and relinquishment of all claims to the land.

Another matter which deserves mention is the fact that no showing is made as to whether the mortgage indebtedness or any part thereof, has been paid, or whether it still remains as a subsisting obligation.

For the reasons given, the decision appealed from is affirmed.

HOMESTEAD CONTEST—ADVERSE SETTLEMENT CLAIMS.

TAYLOR ET AL. v. EWART.

Priority of settlement must be determined by acts performed indicative of the settler's intent, and not by priority of presence on the land, or declarations of intention to settle thereon.

Secretary Bliss to the Commissioner of the General Land Office, June 3,
(W. V. D.) 1897. (G. C. R.)

On September 28, 1893, John Ewart made homestead entry for the NE. $\frac{1}{4}$ of Sec. 20, T. 21, R. 1 E., Perry, Oklahoma.

Affidavits of contest were filed against said entry, the first by Ezekiel W. Parker, on September 30, 1893, and the second by Edward R. Taylor, October 4, 1893, each alleging prior settlement, etc.

Hearing was had, commencing May 3, 1894, and closing June 12, of that year. The testimony was directed mainly to the issues raised in the contest affidavits and is quite voluminous.

The register and receiver, by their decision dated April 13, 1895, recommended that both contests be dismissed. On appeal, your office by decision of November 12, 1895, sustained the register and receiver as to their findings and recommendation in respect to Taylor, but modified the decision in respect to Parker, holding that both he and Ewart acted in good faith, that their respective settlements on the land were simultaneously made, and that the land should be divided between them, each taking the part embracing his improvements. From this judgment both of the contestants and the entryman have appealed to this Department.

The testimony clearly shows that both Ewart and Parker preceded Taylor to the land, and that their first acts of settlement were followed within a reasonable time by such evidences of good faith as to defeat any efforts made by Taylor. It may also be added that Taylor's residence on the land was not satisfactory, and the action of the local officers and your office in dismissing his contest is clearly right.

Parker testified that he entered the territory and reached the land on the day of opening (September 16, 1893), having ridden his horse about nine miles. He had no watch, but one Durkee testified that he saw him ride on the land and dismount, and that it was then 12:45 by his watch, which registered the correct time. On dismounting he stuck a stake on the land, which he had carried with him, and on which was a white flag, ten by twelve inches, with large letters printed thereon saying: "This claim taken by E. W. Parker." This flag was placed about thirty rods from the west line of the land and about midway from north to south; after putting up this flag, he went west about one hundred yards, tore a handkerchief in two and hung it on a buck bush, then went over near northeast corner and put up another stake and a flag, on which was printed: "This claim taken by E. W. Parker;" then he

wrote his name on a cottonwood tree near by; after which he went into camp, and dug a small hole with a stick; he slept on the land that night (16th), and the next day he, with others, surveyed the land, and placed small stakes at three of the corners; he then went to the land office to get his "numbers;" obtained supplies, and returned to the land on September 21; he then did some plowing and started a well; he lived in a camp on the northwest part of the claim until October 28, when he went to Texas—his former home after his family (wife and two children). In the meantime he built a sod house, completing it the day before he left for Texas. He was taken sick on his arrival at his former home, but as soon as he was able he started for the land, getting there December 16, 1893; he found that he could not live in his sod house, but used it as a stable, and built a dug-out, twenty-one by twelve feet, "rocked it up inside, put a board roof and tarred paper roof on it," and moved in the 28th of January, 1894. From the time of his arrival from Texas (December 16) he worked on the place. His residence has been continuous; his improvements consist of a dwelling house, ten acres plowed, about six acres planted to corn, a vegetable garden, well, fruit trees, etc.

He is a poor man, and the evidence, as a whole, shows that he has done all that could be reasonably expected of him, and that he is evidently in good faith in his efforts to comply with the requirements of the law and in making the land his home.

Ewart, the defendant entryman, was twenty-four years old at date of hearing. He testified that he settled on the land on the afternoon of the day of opening (September 16). He, too, rode on horseback and traveled about the distance that Parker did; he entered the tract about sixty rods west of the southeast corner and traveled a little west of north; before stopping he traveled on the tract about eighty rods; swears he could see all over it, and saw no one there and no signs of any improvement; he remained at the point where he first dismounted "about two minutes," and then went to the northeast part of the claim and cut a stake to put a flag on; he tied a red handkerchief to the stake, and stuck it about twenty rods west of east line and about half way from north to south. On returning from the place where he cut the stake, he met Parker, who told him not to stick the stake, as he had taken the claim; he testified that he told Parker, in reply, that he had been there some time and was going "to stay with him;" that while this conversation was going on he stuck his stake; that after he did this, Parker showed him where his (Parker's) stake and flag were placed, but he was positive that this stake was not there when he rode onto the claim.

Mr. Parker, in referring to this conversation, testifies that he told Ewart he had already staked, and that Ewart asked him if he knew where the lines were; that his reply was, that he did not; Ewart then said: "I will stake for the lines may be run between us;" that he then showed Ewart his flag, and Ewart went away.

Ewart appears to have made his home on the land, and was only away therefrom for apparently necessary purposes; he has built a house, ten by twelve feet, a barn and has a well and six or seven acres of breaking.

Like many other cases of this character, neither one appears to have seen the other when he first appeared on the land, and each is positive of having made the first settlement. But Ewart admits that Parker's flag was placed on the tract before he placed his own; of this fact, therefore, there can be no question. Your office, however, accepts Ewart's statement that he was upon the land some minutes before he cut his stake; and that he had declared his intention to appropriate it before he cut the stake; that since it does not appear that Parker stuck his stake before Ewart expressed his intention of appropriating the land, you were "inclined" to hold their settlements simultaneous, and accordingly held that the land should be divided between them.

It will not do to hold that a settlement may be made or initiated by a mere declaration of intention to settle; something must be done—some act in execution of that intention must be performed.

Ewart knew the conditions and circumstances attending the early settlement of Oklahoma; he appears to have run with all possible speed to reach the lands; his own testimony is to the effect that he had been on the land about fifteen minutes before he saw Parker, and yet he had done nothing—only to stand by his horse or walk around for some time thereafter; why his haste, if not to perform some act in connection with the land, so that subsequent comers thereon might observe it? He can not claim priority by simply riding or walking over the land; others did that in hastening to near by tracts; nor can he claim priority by a simple verbal declaration, unaccompanied by specific acts, observable by others.

In *Penwell v. Christian* (23 L. D., 10), it was held that the sole act of the contestant in setting a stake, with a handkerchief attached thereto, on the land, prior to any act being done by the entryman, was sufficient to give him the better right to the land, when such act was duly followed by other acts evincing an intention to make the land his home.

The same principle is laid down in *Hurt v. Giffin*, 17 L. D., 162.

The testimony shows that Parker performed the first act of settlement by setting the stake, above described. Having followed up that initial act by improvements and continuous residence, and having shown by his work and acts that it was his bona fide intention to make the land his home, he has, by virtue of his initial act, the superior right to the land. Should he present his application to make entry of the land within thirty days from notice of this decision, Ewart's entry will be canceled and his entry will be allowed.

The decision appealed from is modified accordingly.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATE OF RIGHT.

INSTRUCTIONS.

There is no authority of law for the insertion of a condition in a soldier's additional homestead certificate of right, requiring settlement and residence on the part of the soldier, where the original entry was abandoned; and it therefore follows that in recertifying the additional right in the name of a transferee, under the act of August 18, 1894, such a condition, contained in the original certificate, should be omitted.

Secretary Bliss to the Commissioner of the General Land Office, June 3,
(W. V. D.) 1897. (F. W. C.)

I have considered the matter presented by your office letter "C" of May 18, 1897, in which you request instructions as to whether, under the law, there is any objection to the re-certification of a certificate of additional right under section 2306 of the Revised Statutes, in the name of the transferee, without the condition of residence and cultivation on the land to be entered, where the original entryman failed to perfect title to his entry.

The facts relative to the application under consideration, as taken from your office letter, are as follows:

Under date of April 29, 1897, Messrs. Thayer and Rankin of this city inclosed a certificate of right issued by this office May 5, 1881, in the name of Abram M. Casteel, certifying his right to make additional entry under section 2306 R. S., for 120 acres, and made application for the re-certification thereof, in the name of John H. Howell, under the act of August 18, 1894 (28 Stat., 397).

The certificate in question shows on its face that it was based on "original H. E. No. 2813, made at Ironton, Missouri, March 1, 1870, for 40 acres, said entry having been canceled September 19, 1872, by reason of relinquishment," and that Casteel "is entitled to make additional homestead entry of not exceeding 120 acres, as prescribed in Sec. 2306, Revised Statutes of the United States, subject to the conditions of the homestead laws which require that Abram M. Casteel shall become an actual settler on any tract which he may so enter; that he shall reside upon improve and cultivate the same as his homestead for the period required by Sec. 2291, as amended by Sec. 2305, of the Revised Statutes of the United States, and that in default of his doing so his entry shall fail and the land revert to the public domain."

Proof of the purchase of said certificate by Mr. Howell for a valuable consideration and in good faith has been filed in this office, but there is a doubt as to whether the act of August 18, 1894, and the circular of October 16, 1894 (19 L. D., 302), issued thereunder, copy herewith, contemplate the re-certification of certificates which as in the case at bar bear on their face as issued the condition of future residence and cultivation of the land to be fulfilled by the original claimant as a pre-requisite to perfecting title thereunder, neither the act nor circular specifically providing for such cases.

Section 2306 of the Revised Statutes provides as follows:

Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

The question as to the right to an additional entry under this section, where the original entry was abandoned or relinquished, appears to have been first considered by this Department on May 8, 1876 (3 Copp's Land Owner, page 21), in which, although there was no actual case pending before the Department, the opinion was expressed that where a soldier or sailor had made a homestead entry of less than one hundred and sixty acres, prior to the passage of the act of 1872, which was afterwards incorporated into the section above quoted, his right to an additional entry under section 2306 is not dependent on his continued residence and improvement of the land covered by his original entry.

In said paper it was stated that—

The abandonment of an original homestead will not disqualify the soldier from making an additional one; but to perfect title to the additional entry he must comply with the law by actual residence thereon and cultivation thereof for the full required period.

This expression of opinion seems to have been made the basis for the issue of certificates of additional right by your office, in cases where the original entry had not been completed, containing a condition similar to that before quoted from the certificate issued to Abram M. Cas-teel, which is made the subject of the request under consideration.

In the case of *Webster v. Luther* (163 U. S., 331), although the question before the court was only as to whether the additional right granted by section 2306 was assignable, nevertheless, in considering the scope of said section, the court holds, on page 339 of the opinion as follows:

If, then, Congress did not burden the right to additional lands with the condition that they should be contiguous to those originally entered, it would seem necessarily to follow that the grant of additional lands was without restriction;

and later on quoted with approval the opinion of the supreme court of Minnesota in the case under consideration, wherein said court, speaking by Chief Justice Gilfillan, said:

There being nothing in the terms of the section requiring the things specified in the act of 1862, to wit, the making of proofs, affidavits, etc., is there anything in the policy of the government in respect to the subject-matters of the various acts referred to which raises the presumption that Congress intended any of the requirements of the act of 1862 to apply to the "additional right?" or intended the feature of alienability impressed on the homestead entered under the act of 1862, or the first section of the act of 1872, should attach to the "additional right?" The purpose of Congress in giving the right to enter and acquire a homestead under the act of 1862, and the first section of the act of 1872, was not merely to confer a benefaction on the citizen, or discharged soldier or sailor. There was also the purpose to secure, so far as possible, a *bona fide* settler on the public lands, to promote the peopling and cultivation of those lands. It was to prevent the evasion of this result that the person applying to enter a homestead is required to make affidavit that the application is made for his or her exclusive use and benefit, for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person, and on applying for the patent to make proof of residence on, and cultivation of, the land for five years, and an affidavit that no part of the land has been alienated; and it is provided that the land shall not be taken for debts, and that upon any change of residence or abandonment of the land for more

than six months the land shall revert. The end in view was the peopling of vacant public lands with settlers owning and cultivating their own homes. To secure settlers or require residence or cultivation was no part of the end in view in giving the additional right under the section as amended in 1872. No residence on or cultivation of the land as a condition of securing the additional right was intended. It was a mere gratuity. There was no other purpose but to give it as a sort of compensation for the person's failure to get the full quota of one hundred and sixty acres by his first homestead entry.

In the case of Owen McGrann (5 L. D., 10) this Department sustained your office in holding that where the original entry was canceled for failure to make proof, residence and cultivation would be required in case of entry under an additional certificate. In said opinion, however, the matter does not appear to have received an extended consideration, but rather to have been ruled upon the opinion expressed by this Department in the case of John W. Hays (3 Copp's Land Owner, 21), before referred to, in which no actual case was pending before the Department and in which no question was raised as to the requirement of residence and cultivation upon the additional entry.

It is plain that there is nothing in the language of section 2306 requiring residence and cultivation of the land entered under the additional right, whether the original entry was perfected or abandoned; and in view of the opinion expressed by the supreme court of Minnesota, and quoted with approval of the supreme court of the United States, before referred to, I am of opinion that there is no warrant for the insertion of the condition, in the matter of cultivation and residence, in any certificates of additional right issued under said section.

You are therefore authorized, in the re-certification of the additional right in the name of the transferee under the act of August 18, 1894 (*supra*), to eliminate from the certificate the condition incorporated in the former certificate issued to Abram M. Casteel requiring him to become an actual settler upon and to reside upon and improve and cultivate the land entered under the additional right granted by said section 2306.

TIMBER CUTTING—APPLICATION FOR PERMIT.

RILEY G. CLARK.

Applications for permission to cut timber should not embrace above one quarter section; and no applicant will be accorded a second permit unless it satisfactorily appears that a most urgent necessity exists therefor.

Secretary Bliss to the Commissioner of the General Land Office, June 5, 1897. (A. M.)

With your letter of the 15th ultimo you transmitted the application of Riley G. Clark of Panguitch, Utah, for a permit to cut timber on a tract of non-mineral public land which, when surveyed, will be two and a quarter sections as described.

In connection with this application, as regards the area embraced therein, you have adverted to the decision of the Department on April 8, 1893, 16 L. D., 363, in approving a permit to the Big Blackfoot Milling Company to cut timber on four sections of land, and for reasons stated have expressed the opinion that this decision was not intended to fix a rule as to the area for which permits may be issued.

You have also expressed your views at length as to the purpose of the act of March 3, 1891, 26 Stat., 1093, by virtue of which permits are issued, and have suggested that such permits should be limited to one hundred and sixty acres for each permit and that it shall not be allowable for any applicant to be a beneficiary of the act a second time, except where special circumstances render it necessary.

The decision in the Big Blackfoot case, above mentioned, did not establish a rule of action but was based on the circumstances surrounding the individual case.

Your suggestion of the limitation of the area in timber permits has for its object the restriction of the free privilege granted by the above act to the actual needs of the communities directly interested and to guard against the liability of the use of the privilege for speculative purposes.

To this end I hereby direct that any permit that may be hereafter submitted for departmental action shall not embrace above one quarter section and that no applicant shall be accorded a second permit unless it satisfactorily appears that a most urgent necessity exists therefor.

The papers are returned herein and the application of Clark should be disposed of in accordance with the foregoing.

ACCOUNTS—UNEARNED FEES AND UNOFFICIAL MONEYS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
General Land Office, Washington, D. C.,

REGISTERS AND RECEIVERS,
United States Land Office.

GENTLEMEN: Referring to departmental circular of December 26, 1896, 23 L. D., 573, requiring receivers to render a regular quarterly disbursing account for moneys designated as "Unearned fees and unofficial moneys," your particular attention is directed to the third paragraph thereof, which provides that for amounts earned it is sufficient to make proper reference in the quarterly account to each item earned, but for amounts returned or paid to publishers receipts must be furnished from persons to whom moneys are paid or returned.

You are further advised that the Treasury Department will not credit disbursing agents with repayments or other disbursements in

such account on vouchers less complete than are required for other disbursements made by them.

In order to secure uniformity and prompt adjustment of accounts the following requirements should be observed in the preparation of vouchers, viz:

1. Use voucher from 4-641a.
2. Fill blanks with ink.
3. Voucher must bear name of receiver as payor.
4. It must show exact date of payment or return.
5. It must show specifically on what account payment is made.
6. It must bear the signature of the payee in his own handwriting, or that of his authorized agent.
7. When repayment is not made direct to the depositor himself, the authority of the agent or attorney who signs the receipt to receive and receipt for same must accompany the voucher and be verified before some officer authorized to take acknowledgements, or before the register or the receiver. If before an officer other than a register or receiver the seal of such officer must be affixed, or his authority attested by an officer of a court of record having a seal.
8. If payee cannot sign his name his mark must be witnessed by a third person.
9. The payee's post-office must appear in connection with his signature.
10. Voucher for publication of final proof notice must show the name of the paper in which publication was made and be signed by the publisher or business manager of the same, and a copy of the printed notice must be attached to the receipt.
11. Vouchers that show alteration will not be accepted.

A careful observance of the foregoing rules and a strict compliance with departmental instructions of December 26, 1896, 23 L. D., 573, relative to quarterly accounts for "Unearned fees and unofficial moneys," and of May 14, 1895, id., 572, relative to monthly detailed statements for the same will greatly facilitate the settlement of such accounts and relieve both this office and receivers of much unnecessary annoyance and correspondence.

Quarterly accounts of unearned fees and unofficial moneys will be rendered on form 4-103 a.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved, June 5, 1897.

C. N. BLISS, *Secretary.*

SCHOOL INDEMNITY SELECTION—MINING CLAIM—PLACER LOCATION.

QUIGLEY *v.* STATE OF CALIFORNIA.

A discovery of mineral on each twenty acres of a placer location serves to except the whole location from school indemnity selection.

If the burden of proof as to the character of land is improperly placed, and accepted as placed without objection, the party so relieved from said burden is not in a position to complain of such action on appeal, in the absence of an attempt in the appellate tribunal to shift the burden, and apply the changed standard to the record made on the hearing in the local office.

Secretary Bliss to the Commissioner of the General Land Office, June
(W. V. D.) 3, 1897. (C. J. G.)

This case involves title to the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 29, T. 22 N., R. 9 E., Marysville land district, California.

On June 16, 1894, the duly authorized agent of the State of California filed an application to select the above described tract as indemnity for deficit of school lands in Sec. 36, T. 9 S., R. 30 E., which application was forwarded to your office.

On August 17, 1894, A. J. Quigley filed his duly corroborated protest against the allowance of said application, alleging that the land in controversy is valuable for the mineral it contains; that the mineral claimant has been personally acquainted with and has resided on the land since October 13, 1863; and that he relocated his placer claim thereon December 11, 1891, in order to conform to legal subdivisions.

By letter of March 6, 1895, your office ordered a hearing upon the mineral claimant's protest.

Upon the evidence submitted at the hearing the local office rendered opinion finding that the protestant had proven his allegations. It was stated in said opinion, however, that a small part of the land in question "which contains perhaps nearly five acres may be of greater value for agricultural purposes than for the mineral it contains."

The contestee appealed from the above decision, and on February 5, 1896, your office also found in favor of the mineral claimant; the contestee's application to select was accordingly rejected.

Without repeating the evidence here, I am of the opinion, after a careful examination of the record, that said land taken as a whole, is shown to be more valuable for the mineral it contains than for agricultural purposes. The appeal is really but a renewal of the application made to your office by the State for a segregation survey, based upon the finding of the local office that the land in controversy embraces about five acres which may be of greater value for agricultural purposes than for the mineral it contains.

The land in controversy, as a whole, having been satisfactorily shown to be more valuable for the mineral it contains than for agricultural purposes, there would seem to be no authority for a segregation survey, as suggested by appellant, of a part of said land for the purpose of

allowing the State to make a school indemnity selection thereof. In the case of *Ferrell et al. v. Hoge et al.* (18 L. D., 81), it was held that there must be a discovery of mineral on each twenty acres. Conversely, if there has been a discovery of mineral on each twenty acres in a placer location such discovery would serve to except the whole location from selection.

In the letter of March 6, 1895, ordering a hearing, your office placed the burden of proof upon the mineral claimant, using the following language in so doing:—"The burden of proof being upon the mineral claimant, the land having been returned as non-mineral and included in a selection." The burden of proof thus placed was accepted by the mineral claimant and the State acquiesced therein. The local office held that the mineral claimant successfully sustained this burden of proof, and on appeal your office was of the same opinion. In that appeal, no question respecting the burden of proof was raised by either party, but in your office decision, which is now under review, a change of opinion was expressed, and it was held that the burden of proof rested upon the contestee, the State.

Your office having by express direction placed the burden of proof upon the mineral claimant, the local office was bound by that direction and was not authorized to change or ignore it. If that direction was erroneous the error was not committed in the local office.

The hearing was ordered at the request of the mineral claimant and he was fully advised of the action of your office in placing the burden of proof upon him. If, for any reason, he believed this was erroneous, he should have applied to your office for a modification of its order in this respect. No such application was made and, as before stated, he accepted the burden of proof and the hearing was conducted accordingly. If the placing of the burden upon the mineral claimant was erroneous, the practical effect thereof at the hearing was to improperly relieve the State of a burden which it should have borne and to unjustly place the same upon the mineral claimant. After the burdens of the latter had been thus increased and had been successfully borne by him, the State was not in a position to complain in the absence of an attempt in the appellate tribunal to change the burden and apply the changed standard to the record made on the hearing in the local office.

In the appeal to the Department the State, referring to the changed holding of your office respecting the burden of proof, calls attention to the original direction fixing the burden upon the mineral claimant, and then says:—

It is not fair to the agricultural claimant, after a trial, to say the burden of proof was upon him; we claim this a grievous error, and such a one, if the last holding is correct, as to entitle him to a re-trial before the local office.

Where on appeal the accuracy of the finding below is dependent upon the view then entertained respecting the placing of the burden of proof, a question may arise whether any changed ruling on that subject

should be applied to the evidence taken, or whether a new hearing should be had with the burden of proof properly placed. In this case, however, weighing and measuring the evidence with the burden of proof adjusted as it was at the time of the hearing, I am satisfied that the mineral claimant has established his contention by a clear preponderance of the evidence. What was said in the decision appealed from respecting the burden of proof was not called for, but even if it were erroneous, it was not prejudicial because it did not cause, or contribute to, the judgment rendered; the result would have been the same if the burden of proof had not been considered or mentioned.

Your office decision is hereby affirmed.

SMITH ET AL. *v.* TAYLOR.

Motion for a new trial, on the ground of newly discovered evidence, denied by Secretary Bliss, June 7, 1897. See 23 L. D., 440, and 24 L. D., 64.

INDIAN LANDS—ALLOTMENT—SWINOMISH RESERVATION.

OPINION.

Allotments on the Swinomish Indian reservation may be made prior to the establishment of actual residence by the allottees, it appearing that the lands selected are partly covered by tidal overflow, and that the portion not so covered is cultivated by said allottees, and further, that when allotment is made the Indians will be enabled to protect their lands from said overflow and thus secure permanent homes.

Assistant Attorney-General Van Devanter to the Secretary of the Interior. (W. C. P.)

In response to your request for an opinion as to whether there is authority of law to make certain allotments on the Swinomish reservation in Washington, a list of which was submitted by the Commissioner of Indian Affairs with his letter of March 13, 1897, with the recommendation that it be laid before the President for his approval, I would respectfully submit the following.

This reservation was established by the treaty of January 22, 1855 (12 Stat., 927) between the United States and the Dwamish and other tribes of Indians in Washington Territory. The seventh article of that treaty, after providing that the President may remove said Indians from the several reservations named in the treaty, when their interest may require such action, reads as follows:

And, he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate upon the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Said treaty with the Omahas prescribes the quantity of land to be given each allottee, that the President shall make such rules and regulations as will insure to the family in case of the death of the head thereof the possession of the land, the manner of issuing patent, and provides for cancellation of the allotment, if the allottee shall at any time neglect or refuse to occupy and till a portion of the lands so allotted.

The list in question was submitted by the agent in charge of said reservation, with a certificate in the usual form to the effect that location had been made upon the lands so assigned, and that the parties were entitled to patent. The matter was submitted by the Commissioner of Indian Affairs without reference to any irregularity in connection therewith. Upon face of the allotment list and the letter of the Commissioner of Indian Affairs nothing appears to suggest that these allotments should not be approved.

The letter of the agent to the Commissioner of Indian Affairs transmitting this schedule of allotments, a copy of which is with the papers, presents the matter in a somewhat different phase. In that letter he said:

I have certified "that location has been made upon the lands so assigned"—this is the form which is required, but as a matter of fact these Indians have not made location on these lands, except to look after them and cultivate the portions which are not covered by the tide overflow; they have not made them their homes, because they could not possibly live there until the lands were protected by dikes.

For the purpose of enabling these Indians to lease their lands and thereby get dikes constructed, I hereby submit their applications for allotments.

These Indians have occupied the lands assigned to them to the extent at least of cultivating portions thereof, and so far as information is given they desire to make homes upon the lands, and have asked that these allotments be made as a means to that end. The requirements of the law have been substantially complied with, and the President has in my opinion authority to make the allotments. It would seem unfair to the Indians to require them to improve the land to the extent evidently required in these cases to make permanent homes thereon without this assurance that they will eventually be given the lands thus improved. If any of them shall hereafter abandon the lands thus allotted, the President has ample means to prevent such allottee from reaping any advantage from his allotment, because the treaty with the Omahas, *supra*, provides as follows:

And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall move from place to place, the President may, if the patent shall have been issued, cancel the assignment.

This same provision attaches to the assignments in question, and is sufficient to prevent the consummation of any attempt to secure the benefits of this treaty, without compliance with its requirements.

Approved, June 7, 1897,

C. N. BLISS, *Secretary*.

INDIAN LANDS—ALLOTMENT—ALIENATION.

OPINION.

The act of August 15, 1894, modifying, as to the citizen Pottawatomie and Absentee Shawnee Indians, the inhibition against alienation contained in the general allotment act, does not authorize a sale of allotted lands held by a minor heir,

Assistant Attorney-General Van DeVanter to the Secretary of the Interior. (W. C. P.)

I am in receipt, by reference of Assistant Secretary Reynolds "with request for an opinion on the matters herein presented" of a letter from the Commissioner of Indian Affairs, dated March 22, 1897, asking for a decision as to whether inherited lands of citizen Pottawatomie Indians or of Absentee Shawnee Indians, which were allotted to them under the act of 1887, may not be sold in accordance with the provisions of said act of August 15, 1894, by guardian duly authorized to sell under proper proceedings of the courts of Oklahoma Territory before the heir arrives at the age of twenty-one years.

The act of February 8, 1887 (24 Stat., 388) under which these allotments were made provides that patents shall issue in the name of the allottees, which patents

shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

It is also further provided as follows :

And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.

The inhibition against alienation was modified as to the Citizen Pottawatomie and Absentee Shawnee Indians by a provision incorporated in the act of August 15, 1894 (28 Stat, 286-295), which reads as follows :

Provided, That any member of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma, to whom a trust patent has been issued under the provisions of the act approved February eighth, eighteen hundred and eighty-seven (Twenty-fourth Statutes, three hundred and eighty-eight), and being over twenty-one years of age, may sell and convey any portion of the land covered by such patent in excess of eighty acres, the deed of conveyance to be subject to approval by the Secretary of the Interior under such rules and regulations as he may prescribe, and that any Citizen Pottawatomie not residing upon his allotment, but being a legal resident of another State or Territory, may in like manner sell and convey all the land covered by said patent, and that upon approval of such deed by the Secretary of the Interior the title to the land thereby conveyed shall vest in the grantee therein named.

The act of 1887 contained a general and absolute prohibition against alienation for a period of twenty-five years. The prohibition extended

to every conveyance by whomsoever made, as is shown by the words "and if any conveyance shall be made . . . before the expiration of the time above mentioned, such conveyance . . . shall be absolutely null and void." This language includes not alone the original allottee, but also his heirs. The act of 1894 creates an exception to this general prohibition, in favor of the persons described in the later act. Statutes of this character are limited in their operation to persons coming within the class therein described. The general law continues with all its original force, and applies to and includes all who are not named in the excepting statute. Where the language of the latter is is clear, it is not to be enlarged by the addition thereto of persons who might, in the opinion of the executive branch of the government, be as much entitled to the benefits of such exception as are persons coming within the letter thereof.

The act of 1894 not only does not include a minor who holds land by inheritance, but does expressly limit itself to original allottees "being over twenty-one years of age" and by necessary implication, excludes all who have not arrived at the age of twenty-one years. Every reason which would exclude a minor allottee from the benefit of the excepting statute would apply equally to a minor heir.

Under the rules of construction applicable to statutes of this character, it seems clear that it was not the intention of Congress to authorize the sale of lands by or for a minor Indian owner during the prohibited period. A minor holding by inheritance is within the prohibition contained in the original act and is not within the exception made in the act of 1894.

Approved, June 8, 1897,

C. N. BLISS, *Secretary*.

MINING CLAIM—PATENT—ERRONEOUS SURVEY.

EUREKA AND EXCELSIOR CONSOLIDATED GOLD MINING CO.

The Land Department has no jurisdiction to correct an alleged erroneous survey of a patented placer claim, while the patent is outstanding, so as to include land not applied for or surveyed.

Secretary Bliss to the Commissioner of the General Land Office, April 29, 1897. (P. J. C.)

It appears that patents were issued for the Willamette placer, entry No. 75, and for the Webb Foot placer, entry No. 77, La Grande, Oregon, land district, in 1892. In 1895 it was represented to your office by the United States surveyor-general and Jonathan Bourne that the surveys of the two placer claims as patented were erroneous, and asking that they be corrected.

Your office, by letter of February 15, 1896, decided that while the

patents were outstanding you had not jurisdiction to act in the premises, but suggested two methods by which the owners might proceed to get the land that they claimed should have been included in the patents. One of these was to surrender the patents and make application *de novo*, the other to retain the patents issued and apply for the land omitted. A motion for review of this decision was denied May 26, 1896, whereupon the petitioner prosecutes this appeal.

It seems to me that the Department is powerless to grant any relief in the premises, except as suggested by your office. The land that was entered was identical with that surveyed, for which application was made and notice given. There is no method by which the patent can be corrected under such circumstances so as to include land not applied for or surveyed.

The office decision is therefore affirmed.

INDIAN LANDS—APPRAISAL—BONA FIDE PURCHASER.

EMMA L. PAPE.

An appraisal of unallotted Pottawatomie lands, as provided for in the treaty of November 15, 1861, is not called for, if it appears that there is a bona fide claimant therefor who is within the protective clause of the subsequent treaty of February 27, 1867.

Secretary Bliss to the Commissioner of the General Land Office, June 7,
(W. V. D.) 1897. (E. M. R.)

The land involved is lot 8 of Sec. 29, and lot 8 of Sec. 30, T. 11 S., R. 15 E., Topeka land district, Kansas.

On March 30, 1897, your office addressed a communication to the Department requesting that authority be given

to direct the register of the land office at Topeka, Kansas, within a few miles of which city the land lies, to make an appraisal of the land and to sell the same.

On April 1, 1897, this letter was referred to the Commissioner of Indian Affairs (the land being within the old Pottawatomie reservation), who, on April 20th following, replied, recommending that the authority asked for be granted.

Subsequently, on April 28, 1897, your office called the attention of the Department to the communication from the attorney of Emma L. Pape, dated April 20, 1897, asking that patent issue to the said Pape for the above described lots, which together form an island in the Kansas river, and offering, in the event her alleged original grantor the Atchison, Topeka and Santa Fe Railroad Company had not paid for the land as provided by law, to do so.

Previous, however, to the proceedings just related, it appears that prior to July 3, 1895 (21 L. D., 290), one Level and one Belk made applications to this Department for the survey of two islands in the Kansas river, as unsurveyed public land. The application of Level

referred to the island now under consideration. On the last mentioned date an opinion was given by Assistant Attorney-General Hall, and approved by Secretary Smith, denying the application of Belk for survey of the island, prayed for by him, and granting the petition of Level.

The survey was made and plat thereof was approved in September, 1896, and on October 14, 1896, Frank Level, at whose instance the land was surveyed, was allowed to make homestead entry, which was canceled by your office on March 30, 1897, as being erroneously allowed.

In the opinion of the Assistant Attorney-General it was held that as the island existed at the date of the original survey of the lands within the Pottawatomie reservation, as now, in a meandered stream, it did not inure to the riparian owners, and, therefore, could be lawfully surveyed.

By the fifth article of the treaty of November 15, 1861 (12 Stat., 1191), between the Pottawatomie Indians and the United States, which was proclaimed on April 19, 1862, the Leavenworth, Pawnee and Western Railroad was given the right to purchase from said Indians, the remainder of certain lands at one dollar and twenty-five cents per acre; and it was provided that—

In case said company shall not purchase said surplus lands, or, having purchased, shall forfeit the whole or any part thereof, the Secretary of the Interior shall thereupon cause the same to be appraised at not less than one dollar and twenty-five cents per acre, and shall sell the same, in quantities not exceeding one hundred and sixty acres, at auction to the highest bidder for cash, at not less than such appraised value.

This company having failed to purchase these lands, the same privilege was given by the treaty of February 27, 1867, proclaimed August 7, 1868 (15 Stat., 531), to the Atchison, Topeka and Santa Fe Railroad Company, to purchase within thirty days, the purchase price having been fixed at one dollar per acre.

Your communication states that the said last named company never exercised this right; that under the authority of the fifth article of the treaty of 1861, providing, in case of failure to purchase or forfeiture of the lands purchased upon the part of the railroad company, that "the Secretary of the Interior shall thereupon cause the same to be appraised," your office recommended that the authority asked for should be granted.

In the amendments to the treaty of February 27, 1867, *supra*, it was provided that the Atchison, Topeka and Santa Fe Railroad Company should have the privilege of purchasing the unallotted lands of these Indians, with the exceptions therein mentioned, at the price of one dollar per acre, and it was stated that—

The said purchase money shall be paid to the Secretary of the Interior in trust for said Indians within five years from the date of such purchase, with interest at the rate of six per cent per annum on all deferred payments, until the whole purchase money shall have been paid; and before any patents shall issue for any part of said

lands, one hundred thousand dollars shall be deposited with the Secretary of the Interior, to be forfeited in case the whole of the lands are not paid for as herein provided; (said money may be applied as the payment for the last one hundred thousand acres of said land;) payments shall also be made for at least one fourth of said unallotted lands at the rate of one dollar per acre, and when so paid the President is authorized hereby to issue patents for the land so paid for; and then for every additional part of said land upon the payment of one dollar per acre. The interest on said purchase money shall be paid annually to the Secretary of the Interior for the use of said Indians. If the said company shall fail to pay the principal when the same shall become due, or to pay all or any part of the interest upon said purchase money within thirty (30) days after the time when such payment of interest shall fall due, then this contract shall be deemed and held absolutely null and void, and cease to be binding upon either of the parties thereto, and said company and its assigns shall forfeit all payments of principal and interest made on such purchase, and all right and title, legal and equitable, of any kind whatsoever, in and to all and every part of said lands which shall not have been, before the date of such forfeiture, paid for as herein provided: *Provided, however,* That in case any of said lands have been conveyed to bona fide purchasers by said Atchison, Topeka and Santa Fe Railroad Company, such purchasers shall be entitled to patents for said lands so purchased by them upon the payment of one dollar and twenty-five cents per acre therefor; under such rules and regulations as may be prescribed by the Secretary of the Interior.

In this connection it is deemed proper to call to your attention the application of Emma L. Pape, hereinbefore referred to. It is alleged that the Atchison, Topeka and Santa Fe Railroad Company, on the third day of January, 1872, by warranty deed, conveyed this land to Arron Sage, and that by regular mesne conveyances this land became the property of Emma L. Pape on the fourth day of November, 1891.

This showing is not sworn to, and the Department has not deemed it proper to pass upon the question thus raised, it being the well established usage of the Department to await a determination by your office upon such questions before the taking of final action here.

It is therefore determined that it would not be proper at this time to grant the request of your office that the register at Topeka be authorized to have the lots in question appraised, in view of the fact that should it be determined that Emma L. Pape is entitled to patent for the land, the act itself (*supra*) has fixed the price.

Should Emma L. Pape, after a reasonable time given her, to be fixed by your office, fail to properly assert her claim, there appears to be no good reason why, at the expiration of such time, the register at Topeka should not be authorized to have the said lots appraised, and you are accordingly so directed.

The papers are herewith returned, and you will proceed to the adjudication of the rights of the said Emma L. Pape as, after investigation, may appear just and proper.

RAILROAD GRANT—WITHDRAWAL ON GENERAL ROUTE.

SHANNAHAN *v.* NORTHERN PACIFIC R. R. CO.

The withdrawal for the benefit of the Northern Pacific railroad company, on the map of general route filed August 15, 1873, cannot be pleaded by the company as against the operation of a pre-emption claim filed after the abandonment of such route by the company, and prior to definite location.

Secretary Bliss to the Commissioner of the General Land Office, June 15,
(W. V. D.) 1897. (F. W. C.)

John Shannahan has appealed from the decision of your office, dated June 14, 1895, holding for cancellation his homestead entry covering the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 35, T. 27 N., R. 6 E., Seattle land district, Washington, for conflict with the grant for the Northern Pacific Railroad Company.

Motion was filed on behalf of the company to dismiss said appeal on the ground that proper service was not made upon the company, the notice having been served upon Thomas Cooper, land agent of the company at Tacoma, Washington.

In the case of *Boyle v. Northern Pacific R. R. Co.* (22 L. D., 184), similar service was held to be sufficient and the motion under consideration is accordingly denied.

The company's claim to this land is made on account of its branch line.

The map of general route of said line was filed August 15, 1873. Its map of amended general route was filed on June 11, 1879, the latter map being accepted by the Department and withdrawal ordered thereon, the tract in question falling without the limits established upon the said map of general route. Upon definite location of the road, as shown by the map filed September 3, 1884, this tract fell within the primary limits of the grant.

Prior to the filing of the map of definite location, to wit, on February 29, 1884, one John Pugh filed pre-emption declaratory statement covering this land in which he alleged settlement February 16, 1884.

Your office under the authority of the decision of this Department in the case of said company *v. McMahon* (18 L. D., 435) held that—

Whatever equities the pre-emptor might have asserted under his settlement and filing were he still claiming the land, can not therefore inure to the benefit of Shannahan, a settler subsequent to definite location, nor be made the basis for holding that the land was excepted from the company's grant.

Since the date of your said office decision, the Department has rendered decision in the essentially similar case of *Morrill v. The Northern Pacific Railroad Company* (22 L. D., 636-7), in which it held that the route of 1873 was abandoned by the company, and the Department duly notified thereof as early as 1876, and that the withdrawal on the map of 1873 cannot be pleaded as against those who settled upon or entered the land prior to the filing of the map of definite location.

In view of said decision, I am of opinion that the pre-emption declaratory statement of John Pugh, in February, 1884, was properly allowed, and served to except the tract in controversy from the operation of the grant, upon the subsequent filing (on September 3, 1884, *supra*,) of the map of definite location. (*Whitney v. Taylor*, 158 U. S., 85.)

The decision of your office is therefore reversed, and Shannahan's homestead entry will remain intact.

CHIPPEWA PINE LANDS—PURCHASE—APPRAISAL.

JAMES REVOR ET AL.

Cash entries of Chippewa pine lands, made after due offering under section 5, act of January 14, 1889, and the amendatory act of February 26, 1896, should not be canceled for inadequacy of consideration, where the appraised value of the land was paid, and there is no evidence of collusion between the purchaser and the government appraiser, unless such inadequacy is so great as to amount to a fraud or imposition.

Directions given for withholding said lauds from sale until further orders, and the Commissioner instructed to proceed with the survey of said lands, and report with respect thereto.

Secretary Bliss to the Commissioner of the General Land Office, June 15,
(W. V. D.) 1897. (C. J. W.)

By letter "C" of April 2, 1897, your office transmits the answers of six purchasers of Chippewa pine lands, whose entries were suspended by order of January 4, 1897, in response to notices issued from the local office at Crookston, Minnesota, calling upon them to show cause why their entries should not be canceled. These showings are before the Department, without recommendation from your office as to their sufficiency. They embrace cash entry No. 2, issued to James Revor, cash entry No. 9 to Byron R. Lewis, cash entry No. 114 to Charles A. Weyerhaeuser, cash entry No. 266 to Th. S. Berg, cash entry No. 381 to William Parker, cash entry No. 393 to John Cronon.

The lands embraced in these entries are not covered by any special report. In the case of Revor his answer sets up that he purchased in good faith and paid for the tract appraised at \$50 the sum of \$150. Th. S. Berg answers that he made his purchase on the estimate made by the government and did not know whether it was a proper estimate or not, and does not yet know. The other answers neither admit nor deny the underestimation of the lands purchased, but allege good faith, and urge that if the examiners appointed by the government committed any error it ought not to affect their purchases. In two of the cases the entrymen have transferred their interests to other parties who join in the answers and claim to be innocent purchasers. In no one of the cases does any evidence of collusion between the purchasers and government examiners appear. None of the lands involved in these six

entries are covered by the report of special agent Wright, and there is therefore no evidence that there was any underestimate of the quantity of timber upon them. There would seem to be no reason for longer holding these entries suspended, and they are accordingly released from the order of suspension and may pass to patent if otherwise free from defect. This disposes of the cases in which formal answers have been filed in response to the notice to show cause.

The public sale at the Crookston land office took place July 15, 1896. Thirty thousand four hundred and twenty acres were then sold at public auction, and 32,236.78 acres, not then commanding bidders, were afterwards sold at the appraised value at private sale, aggregating 1604 tracts sold and paid for in cash before January 4, 1897, the date of the Secretary's order suspending the issuance of patents. In the meantime, however, patents had been issued for 1155 tracts, leaving, to be affected by the suspension, only four hundred and forty nine tracts represented by one hundred and thirty one entries and held by twenty two purchasers.

Your office calls attention to the fact that the report of special agent Wright who made the investigation of the Chippewa pine lands, covers only six tracts or subdivisions which are unpatented, and subject to the order of suspension of January 4, 1897. It appears that this report covered eighty-five subdivisions. Sixty-one of these subdivisions have been sold and twenty-one remain unsold. The six unpatented tracts which come under the rule to show cause were entered as follows: Five by Frank P. Hixon and one by Sumner C. Bagley. They have failed to respond to the notice to show cause. The only cause of complaint against their purchases known to the Department is the alleged under-estimation of the quantity of timber on the lands by the government examiners, and the only evidence of underestimation is the discrepancy between the estimate of chief examiner Douglass and the subsequent one of special agent Wright, after the sales. In reference to this discrepancy your office reports as follows:

C. E.	No. 356	F. P. H.	Gov. est.	51 M. feet.	Spc. Agt. est.	70 M.
"	" 347	"	"	" 83	"	" 121
"	" 287	"	"	" 602	"	" 588
"	" 363	"	"	" 73	"	" 129
"	" 362	"	"	" 104	"	" 167
"	" 379	S. C. B.	"	" 182	"	" 265

There is a difference shown between the Douglass estimate and that of special agent Wright of one hundred and sixty-two thousand feet in the aggregate on the five tracts purchased by Hixon, and a difference of eighty-three thousand feet on the tract purchased by Bagley. Both estimates were made by persons representing the government, and in its services, and, while the later estimate was evidently made with much greater care and is much more reliable, neither can be said to be absolutely accurate. The Department accepted the Douglass esti-

mate and made it the basis upon which the lands in question were appraised and offered for sale; they were thus offered in accordance with the fifth section of the act of January 14, 1889 (25 Stat., 642), as amended by the act of February 26, 1896 (29 Stat., 17), which reads as follows:

SEC. 5. That whenever, and as often as the survey, examination, and appraisal of one hundred thousand acres of said pine lands, or of a less quantity, in the discretion of the Secretary of the Interior, have been made, the portion so surveyed, examined, and appraised shall be proclaimed as in market and offered for sale in the following manner: The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shall cause notices to be inserted once in each week, for four consecutive weeks, in one newspaper of general circulation, published in Minneapolis, Saint Paul, Duluth, Stillwater, Taylors Falls, Fosston, Saint Cloud, Brainerd, Crookston, and Thief River Falls, Minnesota; Chicago, Illinois; Milwaukee, Wisconsin; Detroit, Michigan; Philadelphia, Pennsylvania; and Boston, Massachusetts, of the sale of said land at public auction to the highest bidder for cash at the local land office of the district within which said lands are located, said notice to state the time and place and terms of such sale. At such sale said lands shall be offered in forty-acre parcels, except in case of fractions containing either more or less than forty acres, which shall be sold entire. In no event shall any parcel be sold for a less sum than its appraised value. The residue of such lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same, upon application at the local land office:

The intended sale was advertised in fifteen leading newspapers published in the cities and towns named in the act aforesaid, and these lands failed to find bidders at the public sale, who offered the appraised value, and thus they became subject to private sale under the terms of said act. Hixon and Bagley each paid the appraised value, and purchased at private sale. No collusion is shown between them, or either of them, and the government estimators, and no act performed by either in connection with the sale is complained of. The question arises whether under the circumstances stated these entries should be canceled. The report of special agent Wright was referred to the Commissioner of Indian Affairs for examination and report, and it was recommended by the latter that the offered lands be withdrawn from sale (which has been done), and where sales had already been made of tracts shown to contain a large excess of timber over that found by the government examiners, that the entries be canceled for inadequacy of consideration, allowing the sales to stand where the actual amount of timber standing on the lands is not greatly in excess of the estimate on which the same was sold. The officer making this recommendation recognized the fact that inadequacy of consideration, which is made the ground for setting aside a sale, must be great.

Mere inadequacy of consideration is not sufficient to invalidate a sale unless it be so great as to amount to fraud or imposition. (Amer. and Eng. Ency. of Law, 21-468.)

Here the government fixed the price and the purchasers merely acquiesced by acceptance of the offer, and purchased. Considering that the public sale had been so thoroughly advertised and that the

lands, although offered, failed to find bidders who would then take them, at the appraised value, I find no such inadequacy in the price paid as will now authorize the cancellation of these entries and they are released from the order of suspension and may pass to patent.

Pending the preparation of this letter, your office transmitted a letter from Otis Staples in reference to his cash entries Nos. 317 to 327 inclusive, in which he claims to have purchased in good faith. The fact that Mr. Staples had been connected with a corps of examiners who inspected and reported upon a portion of the lands afterwards examined and reported upon by the Douglass examiners is mentioned in the report of special agent Wright. It appears, however, that Staples' estimates were wholly disregarded, and the subsequent estimates of Douglass and his examiners were accepted and made the basis of departmental action in offering the lands for sale. Staples' purchases were not made upon or controlled by his own estimates. No evidence of collusion between Staples and any one connected with the Douglass examination appears. The mere fact that he had served as an examiner would not prevent his afterward becoming a bidder for and purchaser of lands offered on an estimate with which he had no connection, and no cause appears for holding his entries longer in suspension.

T. B. Walker has submitted an informal answer to the rule against him, relative to suspended entries Nos. 364 to 368 inclusive, embracing five hundred and sixty acres, appraised at \$5,555.00, for which he paid the appraised value. He alleges good faith in the purchase made, and the fairness of his entries is unimpeached by any testimony before me. They are released from the order of suspension and may pass to patent.

The order of January 21, 1897, to show cause, in so far as it embraced entries not covered by the report of special agent Wright was, in a large measure, precautionary, to afford opportunity for discovering fraud, if it existed. Some of the purchasers have not yet responded to the notice to show cause, and as to these cases your office reports that you have no information upon which to base further adverse action, and you ask for instructions.

The question fairly presented is, whether or not the failure upon the part of purchasers who purchased at the appraised value, to respond to the notice served upon them to show cause why their entries should not be canceled, shall itself be taken as sufficient cause for the cancellation of their entries. The rule recites that it has been charged that "the estimate of timber upon the land described was smaller than should have been made," and the charge is the reason given for the showing required. In my opinion the charge without any proof of the truth of it will not authorize further action. As this proof is wanting, and the purchases were all made at or above the minimum at which the lands were appraised, and after the fact that they were offered had been fully advertised, the continuance of the order of suspension would seem to be unnecessary.

Therefore, the order of my predecessor, Secretary Francis, of January 4, 1897, so far as it directed your office "to withhold your approval from whatever sales may have been made during the month of December (1896) which are not already approved" is hereby revoked and annulled. Your office order of January 21, 1897, approved by Secretary Francis, directing the register and receiver at Crookston land office, Minnesota, to notify purchasers to whom patents have not been issued, that they are allowed fifteen days from date of said notice, within which to show cause before your office, why their entries should not be canceled and the land re-appraised, is also hereby revoked and annulled. And your office is directed to consider and adjudicate said purchasers' applications for patents, as if said orders had not been issued.

The order of my predecessor, Secretary Francis, of January 4, 1897, "stopping all sales of timber until further orders" is reaffirmed. Your office is hereby directed to forthwith instruct the local officers at Crookston and also at Duluth, Minnesota, to make no more private sales of "pine lands" under the schedule of appraisement approved April 24, 1896, and heretofore published, until further orders from this Department.

In the meantime, your office will proceed with all possible diligence, within appropriations heretofore and hereafter made, to complete the surveys of all the lands ceded to the United States by the Chippewa Indians in Minnesota by the agreements approved by the President on March 4, 1890—as required by the fourth section of the act of January 14, 1889.

Your office will also, as soon as possible, report in detail to this Department what quantity of the "lands so ceded to the United States" have been heretofore surveyed, and the amount of money that has been expended on account thereof; describing the townships and parts of townships so surveyed, and the number of acres contained therein. Your office will also report what part of the "lands so ceded" have not been surveyed; describing the same and the locations thereof and giving the names of the reservations to which they belong, and estimating the number of acres therein, according to the best information now accessible; and also report an estimate of the shortest time within which surveys of all of said lands can be completed as required by law, and of the amount of money that will be necessary to complete them; in order that Congress may be asked to make the necessary appropriations, and that the Secretary may be able to determine what steps should be taken to carry out the act of Congress of January 14, 1889, do justice to the Indians, and protect the Treasury of the United States.

SWAMP GRANT—CONFLICTING STATE GRANT.

STATE OF OHIO.

The grant of swamp lands does not include alternate reserved sections within the limits of a prior grant to the State for canal purposes.

Secretary Bliss to the Commissioner of the General Land Office, June 15,
(W. V. D.) 1897. (G. C. R.)

The State of Ohio has appealed from your office decision of August 29, 1894, which rejects its claim for all of Sec. 7, T. 6 S., R. 4 E., Columbus, Ohio, as inuring to the State under the act of September 28, 1850 (9 Stat., 519), known as the swamp land act.

It appears that the section of land so applied for is within the limits of the grant to the State of Ohio, to aid in extending the Miami Canal from Dayton to Lake Erie by the Maumee route, under the act approved May 24, 1828 (4 Stat., 305); also that said section of land is one of the reserved sections as provided for in the act. Said act provides that the alternate reserved sections "shall not be sold for less than two dollars and fifty cents per acre."

The land so applied for appears to have been placed at two dollars and fifty cents per acre, as provided in the act, and proclaimed at that price September 2, 1844. There is no contention that the section in question was not so reserved before the passage of the swamp land act.

The lands so situated did not pass to the State under the subsequent grant of 1850 (*supra*), even though they were swamp in character. The lands were reserved to the government for the purpose of reimbursing itself for other lands granted. State of Ohio, on review, 10 L. D., 394.

The decision appealed from is affirmed.

HOMESTEAD SETTLEMENT—ENTRY—ACT OF MAY 14, 1880.

STEWART v. PROVENCE.

Under the departmental construction of section 2297, R. S., a homestead entryman has six months from the date of his entry within which to establish actual residence on the land; but during such period his entry occupies the status of a settlement claim, and will defeat the right of entry on the part of a prior homestead settler who has failed to assert his claim within the statutory period.

Secretary Bliss to the Commissioner of the General Land Office, June 15,
(W. V. D.) 1897. (W. A. E.)

On January 4, 1895, Thomas V. Provence made homestead entry for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 4, the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 9, the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 5, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 8, T. 8 S., R. 24 E., Roswell, New Mexico, land district.

On March 27, 1895, James H. Stewart filed affidavit of contest, alleging that on December 7, 1894, he settled upon a portion of the land now

embraced in said entry, viz., the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 4, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 9; and that he has since continuously resided upon and improved the same.

A hearing was had on May 13, 1895, and on June 11, 1895, the local officers rendered their decision recommending the dismissal of the contest for the reason that Stewart, the contestant, had not filed his application or initiated contest prior to the expiration of three months from the date of the alleged settlement.

On appeal, your office, by letter of January 2, 1896, affirmed the decision below, whereupon Stewart filed further appeal to the Department.

The testimony shows that on December 7, 1894, Stewart settled upon the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 4, and the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 9, said township and range; that he has since resided there; and that at the date of the hearing his improvements consisted of a dugout, a well, some fencing, breaking, and a few trees set out, the total value of the improvements being about \$150. Provence, the entrymen, had neither established actual residence nor made any improvements on the land at the date of the hearing, which was held before the expiration of six months from the date of his entry.

Prior to the passage of the act of May 14, 1880 (21 Stat., 140), a homestead right was initiated solely by entry. He who first filed a valid application for the land had the superior right. Settlement prior to entry availed nothing under the homestead law, and could not defeat the right of one who made entry subsequent to the settlement and prior to the time the settler filed his application. Said act of May 14, 1880, provided (Sec. 3):

That any settler who has settled, or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record; and his right shall relate back to the date of settlement, the same as if he had settled under the pre-emption laws.

Section 2265 of the Revised Statutes of the United States, relative to pre-emptions, read as follows:

Every claimant under the pre-emption law, for land not yet proclaimed for sale, is required to make known his claim in writing to the register of the proper land office, within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler in the order of time on the same tract of land, who has given such notice and otherwise complied with the conditions of the law.

Stewart made settlement on December 7, 1894, but did not "make known his claim in writing to the register" within three months from the date of his settlement. The question presented here, then, is,

whether or not Provence is the next settler in the order of time on the same tract of land, who has given such notice and otherwise complied with the conditions of the law.

The homestead law requires settlement and residence. The Department has uniformly ruled that a homestead entryman has six months from date of entry within which to establish his actual residence on the land. This rule is a departmental construction of section 2297 of the Revised Statutes of the United States, as amended by the act of March 3, 1881 (21 Stat., 511), which reads as follows:

If, at any time after the filing of the affidavit, as required in section twenty-two hundred and ninety, and before the expiration of the five years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event, the land so entered shall revert to the government: *Provided*, That where there may be climatic reasons the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe.

It is held, however, that, in contemplation of law, the residence of a homestead entryman commences from the date on which he makes his entry. Thus, in the case of Barney Phillips (1 L. D., 94), it was held (syllabus) that

the five years allowed in a homestead entry, date from entry and not from the commencement of personal residence on the land entered.

In the case of J. J. Caward (3 L. D., 505) it was said:

It is my opinion that the law contemplates that the residence of the homestead claimant commences from the date on which he makes entry, and while exceptions have been made in his behalf in the statutes, still he can not invoke such aid to enable him to maintain two separate residences on public lands, under two separate and distinct laws, either of which exacts a single continuous residence.

In Austin *v.* Norin (4 L. D., 461) it was held that:

The residence of the homestead claimant commences from the date on which he makes his entry. Whilst a pre-emption claim is pending, the claimant can not make a homestead entry without abandoning his pre-emption claim, because bona fide residence can not be maintained upon two different tracts at the same time.

In the case of Krichbaum *v.* Perry (5 L. D., 403), it was said:

Whilst a homestead entryman is allowed six months within which to establish his actual residence upon the tract embraced in his entry, the law regards his residence as commencing from the date of his entry, and if it appears, or as in this case is shown by proof, that residence after that date is elsewhere, then clearly the homestead entry was illegal.

The effect of these various rulings is that a homestead entryman has six months from the date of his entry in which to establish his actual, personal residence on the land, and if he establishes residence within that time, such act relates back to the date of his entry, and he then becomes, in contemplation of law, a resident from the date of said entry.

Applying this rule to the present case, Provence, the homestead entryman, had six months from the date of his entry, that is, from Janu-

ary 4, 1895, in which to establish his actual personal residence on the land, and such residence, if established within that time, would relate back to the date of his entry. He would thus become a resident, in contemplation of law, from the date of his entry, and would be

the next settler in the order of time on the same tract of land who has given notice and otherwise complied with the conditions of the law,

and would have a better right than Stewart, who took no steps to protect his settlement rights until after the expiration of three months from the date of his settlement and after the intervention of Provence's claim.

As before shown, the proviso to Sec. 2297, as amended, reads:—

That where there may be climatic reasons the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe.

Here the entryman, who has not yet commenced his residence upon the land, is spoken of as "the settler." The statute authorizes the Commissioner to "allow the settler twelve months from the date of filing in which to commence his residence." The person who has filed, but has not commenced his residence upon the land, is by legislative interpretation called a "settler." Being a "settler" and having filed upon the land, he is a "settler . . . who has given such notice" within the meaning of Sec. 2265.

The trial in this case was held before the expiration of six months from the date of Provence's entry, so that, although he had not at that time established his actual, personal residence on the land, he was not in default, as the law gave him six months in which to establish an actual, personal residence which would relate back to the date of his entry. As the record is presented to the Department, Provence has the superior right to the tract in dispute.

Your office decision is affirmed.

PRACTICE—MOTION FOR REVIEW—ATTORNEY.

EDWIN F. FROST ET AL. (ON REVIEW.)

A motion for review filed by an alleged agent and attorney of a State will not be entertained where such attorney has not complied with the regulations in regard to the admission of attorneys-at-law to practice before the Department, and has shown no authority to represent the State either as attorney or agent; and where it must be presumed that the State would not give such authority to any person, on account of its having executed a quit-claim deed of the land involved to the United States.

Secretary Bliss to the Commissioner of the General Land Office, June 15,
(W. V. D.) 1897. (J. L.)

This case involves lots 3 and 4 of section 35, and lots 3 and 7 of section 36, T. 31 S., R. 39 E., Gainesville land district, Florida.

One B. F. Hampton, describing himself as agent and attorney for the State of Florida, has filed in the name of the State, a motion for a review of departmental decisions of December 26, 1896, and February 6, 1897, 24 L. D., 228, in this case.

Said motion cannot be entertained. I am informed by your letter of transmittal that Mr. Hampton has never complied with the regulations in regard to the admission of attorneys-at-law to practice before the Department of the Interior. He has shown no authority to represent the State of Florida either as agent or as attorney. Moreover, the decision sought to be reviewed shows, that the Commissioner of the General Land Office informed the governor of Florida that the lots of land in question had been inadvertently and through mistake certified to the State, requested him to transmit a deed relinquishing and reconveying said lots to the United States, and offered to permit the State to select an equal quantity of land elsewhere in lieu thereof. Accordingly, the governor transmitted to the General Land Office a quit-claim deed to the United States for the four lots of land involved, bearing date August 17, 1895, and executed by the Board of Education of the State of Florida. Therefore, it is presumed, that the proper authorities of the State have not authorized and will not authorize any person to file a motion for review, or to attempt to take any step inconsistent with the deed aforesaid.

Said motion for review is hereby denied; and your office will proceed to comply with the directions contained in the departmental letter of February 6, 1897, above referred to.

CALDWELL v. GOLD BAR MINING CO. ET AL.

Motion for review of departmental decision of March 15, 1897, 24 L. D., 258, denied by Secretary Bliss, June 15, 1897.

TOWNSITE—ACT OF INCORPORATION—ADDITIONAL ENTRY.

CITY OF CHAMBERLAIN v. KING ET AL.

An act of a territorial legislature establishing the corporate limits of a city, so as to include therein lands embraced at such time within an Indian reservation, is inoperative as to the lands so reserved, and on the removal of the reservation no bar to the allowance of a homestead entry.

The right to make an additional townsite entry only exists where the applicant has, prior thereto, made a townsite entry of public land, and is limited then to land contiguous to that embraced within the original entry.

Secretary Bliss to the Commissioner of the General Land Office, June 15,
(W. V. D.) 1897. (C. J. W.)

On April 15, 1895, Henry J. King made application to make homestead entry for lots 3 and 4 and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 10, and lots 1 and 9,

Sec. 15, T. 104, N., R. 71 W., 5th P. M., Chamberlain land district, South Dakota. On the same day J. W. Orcutt, as mayor of Chamberlain, made application to make townsite entry of said land, for the use and benefit of the occupants thereof, and on the same day Eliza Reynolds applied to make homestead entry for lots 1 and 9 of Sec. 15.

Henry J. King's application was first presented, and with it the lawful fees were tendered. Orcutt and Eliza Reynolds were present, and each protested against the allowance of the entry. The fees were rejected, and the application received and filed. Orcutt, as mayor, then presented his application to make townsite entry (and tendered the fees), which was disposed of in the same way; and next in order Eliza Reynolds presented her application to make homestead entry for lots 1 and 9 of Sec. 15, T. 104, R. 71 W., with a tender of the fees, which application was similarly treated.

The various applications set out the basis of their respective claims. A hearing was ordered, that the parties might have opportunity to offer proof of their claims, and on the day set, the several parties appeared in person and by counsel, and the case was duly continued, and the hearing finally commenced on June 20, 1895, with all parties present. Each party offered evidence from time to time, until the hearing closed,—two continuances occurring before the close, on July 19, 1895. On September 24, 1895, the local officers rendered their decision, in which they reject the application of Orcutt, Mayor, and hold that Eliza Reynolds is entitled to make homestead entry, for the land applied for by her, and that Henry J. King is entitled to make homestead entry, for the lands applied for by him, except lots 1 and 9 of Sec. 15.

From this decision appeal was taken to your office, and on March 24, 1896, your office modified the decision by limiting the right of entry of Eliza Reynolds to lot 9, and awarding to King the right to make entry for all the land applied for, except lot 9. The application of the mayor was dismissed. The modification of the decision of the local officers as between the homestead applicants was in accord with a stipulation and agreement between them, filed December 16, 1895. Orcutt filed a motion to strike out this agreement and certain affidavits from the record. No specific action seems to have been taken on this motion. April 20, 1896, a motion for review of your office decision of March 24, 1896, was filed, and on July 6, 1896, the same was overruled and the decision adhered to. Counsel for the townsite claimants filed an appeal from this decision on July 18, 1896 and brief in support of the same. On motion of counsel for homestead applicants, the case was made special, and a hearing had, at which counsel for both sides appeared and were heard orally and by brief. The appeal undertakes to specify forty grounds of error, but it is not deemed necessary to set them out here, or to treat them in detail in this opinion, since all that is vital and material to the case, in the contentions of appellant, can be stated

in more concise form. The land involved is a part of the Crow Creek and Winnebago Indian reservation, and for which the Chicago, St. Paul and Milwaukee Railway Company treated with said Indians, with the approval of the Secretary of the Interior, and occupied it under agreement made with them; but it does not appear that the agreement was ratified by Congress.

By section 16 of the act of March 2, 1889 (25 Stat., 888), the land in question was provisionally included in the grant to the Chicago, St. Paul and Milwaukee railway company, and in the event of the forfeiture of the company's rights, the land covered by the grant was to revert to the United States and become a part of the public domain, and be open to homestead entry under the provisions of said act, upon notice of its restoration. The forfeiture of the company's rights was declared by proclamation of the President on December 5, 1894 (19 L. D., 431). The land thus forfeited and restored was duly opened to entry under the homestead laws, on April 15, 1895. Such rights as the railroad company had were acquired while the land was in reservation, and the effect of its agreement with the Indians was to keep it in reservation, except for its own use, so long as held by virtue thereof, and it may therefore be said that it was never subject to entry, until April 15, 1895, and all applications to enter before that time go for naught (*Smith v. Malone*, 18 L. D., 482). The act of March 2, 1889 (Section 23) makes provision for preference rights to persons who attempted settlement upon lands declared to be open to settlement under proclamation of February 27, 1885, between said date and April 17, 1885, when it was revoked. This provision has no application as between persons claiming to have made or attempted settlement during this period, but is applicable as between such settler or settlers, and applicants who neither made nor attempted to make settlement under said proclamation.

The status of the land as well as of the claimants is to be considered as it existed on the 15th of April, 1896, when in fact and law the land was opened to settlement. As to this particular land, the 16th section of the act of March 2, 1889, provides, if it remains the property of the railroad, that no part of it shall directly or indirectly be used for townsite purposes, and in the event of the forfeiture of the rights of the railroad, that it shall be open to homestead entry under the provisions of this act. It may be questioned whether it is subject to other than homestead entry, but be that as it may, the claims of the townsite settlers will be further considered.

Their contention is, that the land in controversy is within the corporate limits of the city of Chamberlain, and is therefore not subject to homestead entry, but is subject to entry for townsite purposes. It is shown that the legislature of the Territory of Dakota, amended the act incorporating the city of Chamberlain, so as to include the land in controversy, which amending act was approved, March 7, 1885, a short time before the various attempts at settlement were made.

It is apparent that the alleged fact that the land is within the corporate limits of the city, depends upon the validity of the act mentioned, and its validity depends upon the power and authority of the territorial legislature to exercise control over it. It is to be observed from the date of the act, that it was passed during the interval between the proclamation opening the Crow Creek and Winnebago Indian reservation to settlement, February 27, 1885, and the subsequent proclamation, revoking that order on the ground that it was violative of the treaty stipulations with said Indians, which later proclamation bears date, April 17, 1885. Presumably the legislature assumed legislative control of this territory, on the theory that it was no longer an Indian reservation, but by order and proclamation of the President, had become and was a part of the public domain, and lawfully within its jurisdiction. Under this view it was not asserting a right to exercise jurisdiction over territory within an Indian reservation, but simply over territory which had once been a reservation, but was then a part of the public domain. Under any other view it would appear to have ignored section 1839 R. S., which contains an express prohibition of territorial interference with the rights of Indians or their property where they have rights unextinguished by treaty between them and the United States. The proclamation of the 17th of April, 1885 (23 Stat., 844), revoking the order of February 27, 1885, declares the ground of its revocation to be that it is in contravention of the treaty obligations of the United States, with the Sioux tribe of Indians, and that the lands intended to be embraced were existing Indian reservations. The treaty to which reference is made was concluded April 28, 1868, and proclaimed February 24, 1869 (15 Stat., 685). The land in dispute is embraced in a reservation created and set apart by article 2 of said treaty, and declared to be for the absolute and undisturbed use and occupation of the Indians, and to be free from settlement; use or occupancy of any other persons than said Indians.

The act organizing the Territory of Dakota, March 2, 1861 (12 Stat., 239), which fixes the general boundaries and authority of the Territory, excepts therefrom the rights of person and property of Indians, so long as they remain unextinguished by treaty.

Section 1851 U. S. Rev. Stat., provides :

The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States.

The Sioux treaty was a law of the United States, and a territorial statute attempting to extend a city or town government over a reservation established by that treaty was inconsistent therewith and beyond the legislative power of the Territory. The attempt to include the land in controversy within the corporate limits of the city of Chamberlain was consequently abortive. Its inclusion in an Indian reservation was the obstacle in the way. It has been considered, whether or not, upon the removal of that obstacle, *ipso facto*, the act of the legislature

illegal at the time of its passage would be cured of its defect and become operative. The conclusion reached is, that it would not. When Congress came to deal with the question of extinguishing the Indian title to the land involved, it doubtless could have given validity to the act of the territorial legislature by then recognizing it, but notwithstanding this particular tract was made the subject of discussion and special consideration in connection with the claim of the railroad to it, Congress did not do so, but treated it as a tract outside city limits. It is so regarded in this opinion, and this objection to the homestead applications disappears. It is incumbent then upon the townsite applicant to show compliance with existing townsite laws, and actual occupancy of the land for townsite purposes, prior to the occupancy of the homestead applicants. It appears from the evidence in this case that the city of Chamberlin was founded upon private land, and that of such land it had not less than thirty-six hundred acres within its corporate limits, of which 880 acres had been laid off and platted. It further appears that there is a strip of land lying along the north edge of the platted portion of the city, which belongs to the Chicago, St. Paul and Milwaukee Railway Company, consisting of about thirty-five acres, which separates the city from the land in dispute. It also appears from the evidence and the Census Report for 1890, that the population of the city consisted of 939 persons. It is apparent that the city possesses an area ample for the accommodation of its present population for all legitimate townsite purposes.

Section 2389, R. S., provides for the entry of public lands for townsite purposes, according to population, and as amended by the act of March 3, 1877 (19 Stat., 392) fixes the maximum of public lands which may be acquired by any city at 2560 acres, for such purposes.

It would appear that the city of Chamberlain possesses already an area in excess of this maximum, but I am of opinion that as no part of this area was of the public domain, it would be entitled to add to it from the public domain to meet actual wants of its population, for space to carry on trade and business and for residence in connection therewith, if such necessity was shown to exist.

No such necessity is shown in this case, but on the contrary the city appears to have land and space in excess of population and business, and it does not appear that any part of the land in question is occupied and used for trade and business, unless the use of a boat landing, by King, one of the homestead applicants, is to be thus classed.

The improvements made by the townsite settlers in 1885 were estimated at from \$12,000 to \$15,000, but were composed chiefly of buildings moved from Chamberlain proper, and afterwards moved back again. The value of the improvements of the present settlers is estimated at from seven to nine thousand dollars, which includes the improvements of the two homestead applicants, the railroad pump, or waterworks, and a county bridge. Most of the buildings are such as

have been removed from elsewhere. The present alleged occupants include about twenty families most of whom are shown to reside in fact in Chamberlain, and only three were settlers in 1885.

On February 14, 1896, counsel for townsite claimants suggested the death of J. W. Orcutt and the substitution of acting mayor R. H. Somers as a party in his stead. The right of the successors of Orcutt, as mayor, to represent the interests of the townsite settlers is recognized, and their rights and standing are unaffected by the death of said Orcutt.

The pleadings do not indicate whether it is the purpose of the applicant to make original townsite entry, or additional. If the latter is intended, it cannot be allowed, for the right only exists where the applicant has prior thereto made a townsite entry of public land, and is limited then to contiguous tracts, and the proof shows this land to be non-contiguous to the present limits of the city. If it is intended to found a new town, the law in reference to this class of entries has not been followed or complied with.

Your office properly modified the decision of the local office, so as to conform to the stipulation between the homestead applicants. It affects only matters in controversy between them, and about which they had a right to agree, and the objection to such agreement by the townsite applicant is not well founded. The homestead applicants made their respective settlements on February 27, 1885, and claim to have remained on the land ever since, apparently with the consent of the railroad company, while its rights were in doubt. King's improvements are estimated at from three to four hundred dollars, and Mrs. Reynolds' at \$200. They seem to have acted in good faith, and no valid reason appears why they should not be allowed to make entries according to the terms of your office decision. King's right to make entry in the event of the forfeiture of the railroad company's rights was virtually conceded in the case of *King v. Chicago, Milwaukee and St. Paul Railway Company* (14 L. D., 167).

Your office decision is accordingly affirmed.

HOMESTEAD—SECOND ENTRY.

ANNA LEE.

The right to make a second homestead entry may be accorded to one who in good faith relinquishes the first on account of an adverse claim asserted to the land included therein.

Secretary Bliss to the Commissioner of the General Land Office, June 15,
(W. V. D.) 1897. (G. B. G.)

Anna Lee has filed a motion for review of departmental decision of December 23, 1896 (unreported), rejecting her application to make a

second homestead entry—the land applied for being the SW. $\frac{1}{4}$ of Sec. 12, T. 22 N., R. 6 W., Enid land district, Oklahoma.

In view of the allegations contained in the motion for review it will be necessary to set forth in detail the proceedings heretofore had in this case and in connection therewith.

On May 4, 1892, one James Burke made homestead entry for the NE. $\frac{1}{4}$ of Sec. 15, T. 16 N., R. 8 W., Kingfisher land district, Oklahoma.

On May 6, 1892, one Elmer Wells instituted contest against Burke's entry, alleging prior settlement.

On June 11, 1892, the said Anna Lee filed contest against Burke's entry, alleging prior settlement.

On July 1, 1892, Burke relinquished his entry, and Mrs. Lee entered the land.

On July 10, 1892, it appears from a report of the register of the Kingfisher land office, Wells was notified by registered letter that the relinquishment of Burke had been filed, and that Anna Lee had made entry for the land, and directed him to appear within thirty days and take proper steps, or his contest would be dismissed.

On September 14, 1892, Wells filed motion and protest, a copy of which, according to the report of the register and receiver, were attached to his contest record and made a part thereof, but such paper can not now be found in the record.

On December 22, 1892, Mrs. Lee's entry was canceled for relinquishment, and her father, Leonard Doty, made homestead entry of the tract.

Wells appears to have taken no further steps in the matter of his claim to the land, and on June 26, 1893, the local officers dismissed his contest for want of prosecution.

On September 18, 1893, Mrs. Lee filed application to make a second homestead entry, which was transmitted by the local officers to the General Land Office, and in considering the same, on March 20, 1895, your office held that her relinquishment was her voluntary act, and rejected her application; and on September 7, 1895, a motion for review of said decision was denied.

The applicant appealed to the Department, and on December 23, 1896, the action of your office was concurred in and your decision affirmed.

Said departmental decision summed up the report of the local officers as showing—

That there is no record of any contest against said entry by Wells, or any other person; that there was at the date of her relinquishment no adverse claim of record.

The motion for review alleges:

(1) If the record of the NE. $\frac{1}{4}$ 15-16-8, Kingfisher district, shows, as stated in the decision, that there was no contest or other adverse claim of record for said land at date of relinquishment by her, it is erroneous

(2) At the date of her relinquishment of her former entry (December 22, 1892), the

prior contest of Elmer Wells was still of record, and was not dismissed for more than six months after her relinquishment.

(3) The supplemental affidavits filed by Mrs. Lee show . . . that while the contest of Elmer Wells was not against her, but James Burke, it was nevertheless for the same land, and an adverse claim based on a prior contest.

(4) The entry of James Burke having been made by mistake, the real claimants for the Kingfisher tract were Elmer Wells and Anna Lee; and a reference to the record will show that this was the reason of the oversight in the local office at that place in reporting, as they did, that there was no contest against Anna Lee for said land.

(5) If the application for second entry fails to show that she relinquished on account of the adverse claim of Elmer Wells, and on account of her poverty and inability to defend a contest, the supplemental showing made by her reveals these facts, and should have been considered in connection with her application.

Your office decisions of March 20 and September 7, 1895, each state: "The contest of Wells was dismissed for want of prosecution; and, on July 1, 1892, Burke relinquished his entry for the tract." The construction of the sentence above quoted would indicate the understanding on the part of your office that the dismissal of Wells' contest preceded Lee's homestead entry—so that when the latter was made the land was free from all conflicting claims.

It is probable that the statements of your office, and it is certain that the statement of the Department, were based upon the paragraph in the report of the register of the local office at Kingfisher to your office, under date of February 14, 1895:

"June 26, 1892, the contest case of Elmer Wells, No. 1552, was dismissed for want of prosecution."

Attached to the motion for review is an alleged transcript from the docket of the Kingfisher office, showing that Wells' contest was dismissed on June 26, 1893—not 1892.

It is unquestionably the fact that Wells' contest was dismissed on June 26, 1893.

It appearing, therefore, that the contest of Wells was pending at the date of Mrs. Lee's relinquishment, on December 22, 1892, the effect of this changed statement of facts on the conclusion reached in the decision under review remains to be seen.

It will be remembered that the contest of Wells against the entry of Burke was based on the same ground as that of Mrs. Lee's contest against the same entry, to wit, prior settlement.

Mrs. Lee's subsequent entry of the tract was not the result of an adjudication on her contest, but because hers was the first application for unappropriated public land after Burke had relinquished his entry. Inasmuch as the contest of Wells was pending at that time, the proper practice would have been to order a hearing to determine the question of priority between Wells and Mrs. Lee. If this had been done, the question now before the Department could not have arisen.

It is well settled that a homestead right is not exhausted by an entry which through no fault of the entryman can not be perfected; and this rule should, in my judgment, be held to embrace all cases in which the entryman in good faith believes, and has reasonable grounds to believe,

that the entry can never ripen into a perfect title, such belief being founded on information acquired after the entry is made.

It is against the policy of the law to require an entryman to continue to reside on and improve a tract of land, unless he may reasonably hope for a consummation of title, and it would be altogether inequitable to hold that a qualified homesteader, who has in good faith made entry of a tract of land for the purpose of making it his home, and afterwards abandons it, thereby forever exhausts his homestead right, if it appears to have been abandoned without fault. See *Thurlow Weed* (8 L. D., 100); *Chas. Wolters* (Id., 131).

In this case it is urged by Mrs. Lee, under oath,—

That soon after making said entry she was contested by a person by the name of Wells, whose first name is unknown to affiant, and that he located upon the land and commenced improvements by building a house thereon, and breaking the ground, and doing lasting and valuable improvements, and claimed to be a prior settler; and this affiant was not positive whether she was the first settler or not. Affiant further says that she is a widow, and not possessed of sufficient means to stand the expense of a contest; that she had no relatives or friends from whom she could procure means to fight said contest against the claim of prior settlement of the said Wells; that she was at the time, and still is, compelled to support herself by her own manual labor; that she was at the time engaged in sewing for a living, in the city of Kingfisher, and that the land referred to was five or six miles from said town, and affiant could not procure work to support herself in the neighborhood of her said former claim; and for all the foregoing reasons affiant relinquished said claim.

She further states, in a supplemental affidavit, that she made settlement on the land now applied for

for the purpose of making homestead entry thereof, on the afternoon of Sept. 16, 1893, and was the prior settler thereon, and that she had made said tract her home and resided thereon continuously since said time. That she is now residing thereon in good faith making said tract her home, to the exclusion of a home at any other place, and has the following improvements thereon, to wit, a frame house fourteen feet by sixteen feet, shingle roof, two doors, two windows, floor, and finished complete with wall paper, suitable for habitation, that she has about three acres broken and other valuable improvements worth in all at least one hundred and fifty dollars.

If the facts stated in these affidavits are true, this would seem to be a proper case in which to permit a second entry, in the absence of a prior valid adverse claim to the land applied for.

It appears from the statement of the local officers that on September 19, 1893, one Henry J. Roach applied to make homestead entry for said land, and on December 5, 1893, filed a second homestead application for the same tract, having theretofore, on October 30, 1893, filed contest and protest against Anna Lee's application for second entry.

It appears further, that on February 8, 1894, one George D. Herring filed homestead application for the same land.

The protest of Roach alleges, that the said Mrs. Lee relinquished, abandoned and sold, for a valuable consideration, the land covered by her first entry, without any honest effort to comply with the law in the

matter of residence or improvements, and without having any valid reasons for the failure to comply with the law as aforesaid.

In consideration of the premises, I have therefore to direct that a hearing be ordered herein, on the protest of Roach, at which hearing evidence may be offered going to the good faith of Mrs. Lee's relinquishment of her entry, as also the question of any prior valid adverse claim to the land now applied for, of which hearing Mrs. Lee, Roach and Herring should have notice.

HOMESTEAD CONTEST—DESERTED WIFE—RELINQUISHMENT.

DOYLE v. BENDER.

The right of a deserted wife, who is living on the land covered by the entry of her husband, attaches at once on the filing of his relinquishment, and defeats the intervening adverse entry of another.

Secretary Bliss to the Commissioner of the General Land Office, June 17,
(W. V. D.) 1897. (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of Sec. 15, T. 11 N., R. 2 E., Oklahoma land district, Oklahoma Territory.

The record shows that on September 28, 1891, one Samuel Doyle made homestead entry of the above described tract. June 17, 1893, he filed his relinquishment of the land, and, on the same day, Sydna Bender, the defendant in this cause, made homestead entry.

July 25, 1893, Sarah E. Doyle, the plaintiff herein, filed her affidavit of contest against the entry of Miss Bender, alleging that she was the deserted wife of Samuel Doyle, who made entry September 28, 1891, for the land in dispute, and that she had been residing upon the land for a period long antedating the relinquishment by her husband.

A hearing was had to determine the rights of the parties and, thereafter, on June 6, 1895, the local officers rendered their decision, sustaining the contest and recommending the cancellation of the defendant's entry.

Upon appeal, your office decision of February 17, 1896, was made, affirming the action below. Further appeal brings the case to the Department.

An examination has been made of the rather voluminous record in the case—the greater portion of which is foreign to the issue joined—and it appears that on June 16, 1893, Samuel Doyle, the original entryman and husband of this plaintiff, left his house upon this land with the twofold determination of selling his claim and of deserting his wife.

It is apparent from the record that this plaintiff had no notice of this intention upon his part, and such negotiations as had transpired between him and the representative of the Benders, had been carefully kept from her. The sale was consummated, the purchase price agreed upon being five hundred dollars.

There is nothing to show that this defendant knew that these facts were being kept from Mrs. Doyle, but it is evident that she took no steps to bring the matter to the plaintiff's attention. When the defendant went upon the land, after her purchase of the improvements of Doyle and before she invested more money on the land, it appears that Mrs. Doyle told her that she would assert claim to the land and warned her to take no steps in the way of improving the same. Despite this notice, the defendant built a valuable house upon the land and put other improvements thereon amounting, together with the money paid for the relinquishment, to a considerable sum.

At the time this relinquishment was made by the husband of this plaintiff, she was living in their home upon the land having improvements amounting to six or seven hundred dollars. She was at such time a deserted wife, with the right of entry, and an actual settler upon the land. As such qualified settler her rights attached the instant the relinquishment was filed, and were superior to those gained by the defendant under her entry. *Ex parte* Sarah E. Pierce, 1 L. D., 59; *Kamanski v. Riggs*, 9 L. D., 186; and *Tyler v. Emde*, 12 L. D., 94.

I am, therefore, of opinion that the decision appealed from is correct, and it is affirmed.

REPAYMENT—DESERT LAND ENTRY.

CHRISTOPHER W. MCKELVEY.

A final decision under which a desert land entry is canceled, on account of the non-desert character of the land, can not be impeached collaterally on application for repayment.

Repayment of the money paid on a desert land entry can not be made, where such entry is properly allowed on the proofs presented, but, on subsequent proceedings, is canceled on account of the non-desert character of the land.

Secretary Bliss to the Commissioner of the General Land Office, June 17,
(W. V. D.) 1897. (J. L.)

Christopher W. McKelvey filed in your office an application bearing date October 31, 1896, for repayment of \$160 paid by him on March 25, 1887, upon making desert land entry No. 327 of the whole of Section 20, T. 9 N., R. 14 W., San Bernardino meridian, Los Angeles land district, California.

By letter "H" of January 21, 1890, your office canceled said entry "because it was found that the land included in said entry would produce all kinds of grain without artificial irrigation." While the sworn declaration of McKelvey and the affidavits of his two witnesses filed March 25, 1887, had alleged "that this land is desert land within the meaning of the act of March 3, 1877; and that said land will not, without artificial irrigation, produce any agricultural crop."

On December 10, 1896, your office denied McKelvey's application for repayment, saying that, "the law governing the return of purchase

money (Section 2 of the act of June 16, 1880, 21 Stat., 287) does not apply to land of this character." McKelvey appealed to this Department.

The statute in question authorizes repayment only where the entry has been "canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed."

Your office decision of January 21, 1890, held that the land was not desert in character, and, therefore, that the entry thereof under the desert land act was wrongfully obtained. That decision is final and cannot be impeached collaterally by means of an application for repayment of money.

McKelvey's desert land entry was not "erroneously allowed." Upon the showing made by McKelvey and his witnesses in 1887, the local officers were bound by law to allow the entry. They would have erred if they had not allowed it. The entry was based upon McKelvey's allegation that the land was desert in character. The subsequent proceedings developed that the land was not desert in character, and that it would produce agricultural crops without artificial irrigation. This demonstrated that the entry was wrongfully obtained by the entryman, but it fell far short of demonstrating that the entry was "erroneously allowed" by the officers of the land department. They acted upon the proof presented by the entryman. The proofs presented required the allowance of the entry. The error in the transaction was in the presenting of such proof by the entryman, and not in the action thereon by the land office.

In the case of Thomas Guineau, 9 Copp's Land Owner, 153-154, on May 9, 1881, Secretary Kirkwood said:

The entry was good and valid upon the showing made by the party seeking it, sworn to by him and corroborated by those whom he had selected as his witnesses. If true, his allegations entitled him to an entry, and it would have been error to refuse his application. Consequently it was not error to accept it, and the entry was not erroneously allowed. Afterwards, it is true, he attempted to prove his allegations; but they were overwhelmingly refuted by the testimony taken by the government; and the finding of my predecessor was that the application was made "in fraud of the law." It is in effect the same as a similar finding upon default of answer when cited for hearing; the only difference being that in one case the fact is taken as admitted, in the other it is established by testimony.

In the case of James R. Royce, 10 C. L. O., 25, on March 26, 1883, Secretary Teller said:

In such cases the Department has invariably held that if there was no error on the part of the United States, or if the proof showed compliance with the legal requirements at the date of the entry, and the entry had been canceled because the proofs were false, the entry could not be regarded as having been erroneously allowed, nor could repayment be authorized.

In the case of John Carland, 9 C. L. O., 168, and 1 L. D., 531, Secretary Teller said:

It appears that Carland, an officer in the army of the United States, made said entry under the supposition that the homestead laws did not require his residence

on the tract. On being advised of his mistake, he voluntarily abandoned the entry, and now applies for repayment of the fees and commissions. . . . The entry was not erroneously allowed, and might have been confirmed. As there has been no fault or error on the part of the government, this Department is without authority in the matter.

In the case of William E. Creary, 2 L. D., 694, Secretary Teller said:

These affidavits do not support applicant's allegation that the government is responsible for his error. They show as you suggest that an erroneous survey by the Gila Bend Canal Company, and not any mistake in the government survey, led applicant and others to purchase particular lands.

Had the mistake resulted from any erroneous action on the part of the government, then clearly the act of June 16, 1880, would afford the relief desired.

On the facts as they appear however, while there seems to be an equity in favor of the applicant, I am unable to find in the law anything which would authorize repayment as asked. . . . The words 'erroneously allowed' clearly refer to an act of the government.

The statute does not authorize the repayment of purchase money in this case.

Your office decision is hereby affirmed.

REPAYMENT—PAYMENT IN CASH AND BY WARRANT.

SYLVESTER KIPP ET AL.

The statutes providing for repayment contemplate only the return of money actually paid, and where land is paid for in part by cash, and in part by a military bounty land warrant, the Secretary of the Interior has no authority, in allowing repayment, to draw his warrant upon the Treasury for a sum larger than the cash payment made by the entryman.

Secretary Bliss to the Commissioner of the General Land Office, June 17,
(W. V. D.) 1897. (J. L.)

Your letter "M" of April 6, 1897, enclosing two letters from the Auditor for the Interior Department, dated March 29, 1897 and May 7, 1896, respectively, in relation to the joint application of Sylvester Kipp and Orrin Kipp for repayment of the sum of \$40.47, has been received.

It appears that on April 26, 1866, George Harris made cash entry No. 2654 of the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 1, T. 42 N., R. 30 W., St. Cloud land district, Minnesota, containing 90.23 acres of land at \$1.25 per acre, aggregating \$112.92. Harris paid for said land \$100 with a Revolutionary bounty land warrant No. 11,287 issued to C. Whitney, and \$12.92 with money. By quit claim deed dated September 24, 1883, and recorded December 30, 1885, Harris for an alleged consideration of \$400, conveyed to Sylvester Kipp and Orrin Kipp the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 1 aforesaid, containing 32.38 acres of land. By letter "F" of May 11, 1895, your office canceled the whole of Harris's entry, "because of conflict with the prior grant to the Western Railroad Company."

Therefore it appears, that said land was "erroneously sold by the United States," and that Harris's entry was "erroneously allowed," and that "the sale cannot be confirmed;" and that, by virtue of section 2362 of the Revised Statutes, and the second section of the act of June 16, 1880 (21 Statutes 287), the money paid for said land must be repaid to said George Harris, or "to his legal representatives or assignees" or "to his heirs or assigns," out of any money in the Treasury not otherwise appropriated. By letter "M" of February 15, 1897, your office decided that the sum of \$40.47, the value of 32.38 acres of land at \$1.25 per acre, should be paid to Sylvester and Orrin Kipp jointly; and on February 23, 1897, First Assistant Secretary Sims certified that the evidence of the illegality of the sale was satisfactory.

The question presented by your letter and by the Auditor for my consideration is: Whether under the statutes above referred to, the Secretary of the Interior has authority to "draw his warrant on the Treasury," for a sum of money larger than the amount of money actually paid by the entryman?

Independent of any statutory provisions on the subject, if a land warrant for one hundred and sixty acres were given in exchange for a final receipt and certificate on an entry of one hundred and sixty acres, and the entry should subsequently be canceled without fault of the entryman, because the land had been "erroneously sold," or "for conflict", or because the entry was "erroneously allowed", the Commissioner of the General Land Office would return to the entryman his land warrant; or if the original had been mutilated by cancellation, the Commissioner would tender a copy of it, with a certificate attached, stating the facts, and endowing the copy with all the value and usefulness of the original. This would be done upon the ground that the warrant had not been used; that the attempt to use it had failed; that it had not been satisfied, and was still the property of the disappointed entryman in full force and effect. This transaction would be an act of natural justice and equity, so simple and plain, that an act of Congress would not be necessary to make it lawful.

If the entryman had given his one hundred and sixty acre warrant in exchange for a one hundred and twenty acre, he would (upon the cancellation of his entry as aforesaid), receive from the Commissioner his original warrant for the larger quantity of land. If the entryman had purchased his one hundred and twenty acre entry by paying \$100 in money and \$100 with an eighty acre land warrant, the Commissioner would return the land warrant, and advise the entryman that he had no authority under the law to repay his \$100 paid in money. The Constitution provides that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law" (Article 1, section 9). Hence explicit acts of Congress were necessary to authorize the repayment of moneys once paid into the Treasury. Yet the moral and equitable right of the entryman to his \$100 in money, was the same as his right to his land warrant.

To remedy this mischief, Congress, on January 12, 1825 (4 Statutes 80), enacted:

That every person, or the legal representative of every person, who is or may be, a purchaser of a tract of land from the United States, the purchase whereof is or may be void, by reason of a prior sale thereof by the United States or by the confirmation or other legal establishment of a prior British, French or Spanish grant thereof, or for want of title thereto in the United States from any other cause whatsoever, shall be entitled to repayment of any sum or sums of money paid for or on account of such tract of land, on making proof to the Secretary of the Treasury that the same was erroneously sold in manner aforesaid by the United States, who is hereby authorized and required to repay such sum or sums of money paid as aforesaid.

In the year 1825 there were no general pre-emption, homestead, desert-land, or timber culture laws, and the act above quoted seems to have provided a perfect and exhaustive remedy for the mischief as it then existed.

On February 28, 1859 (11 Statutes 387), Congress enacted:

That the act of Congress, "authorizing repayment for lands erroneously sold by the United States," approved January 12, 1825, be and the same is hereby amended so as to authorize the Secretary of the Interior, upon proof being made to his satisfaction, that any tract of land has been erroneously sold by the United States so that from any cause whatever the sale cannot be confirmed, to repay to the purchaser or purchasers, or to the legal representatives or assignees of the purchaser or purchasers thereof, the sum or sums of money which may have been paid therefor, out of any money in the Treasury not otherwise appropriated.

These two acts were consolidated in the Revised Statutes as follows:

Section 2362. The Secretary of the Interior is authorized, upon proof being made to his satisfaction, that any tract of land has been erroneously sold by the United States so that from any cause the sale cannot be confirmed, to repay to the purchaser or to his legal representatives or assignees, the sum of money which was paid therefor, out of any money in the Treasury not otherwise appropriated.

And under the head of Permanent Annual Appropriations in the Revised Statutes, by section 3689 (page 728), Congress appropriates such sums as may be necessary "to pay to the purchaser or purchasers the sum or sums of money received for lands erroneously sold by the United States."

In all of said statutes the authority of the Secretary is limited to the repayment or refunding of *money paid*.

The act of June 16, 1880 (21 Stat., 287), is entitled:

An act for the relief of certain settlers on the public lands, and to provide for the repayment of certain fees, purchase money and commissions paid on void entries of public lands.

Sections 2, 3, and 4 of said act read as follows:

SEC. 2. In all cases where homestead or timber culture or desert land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict or where from any cause the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns the fees and commissions, amount of purchase money and excesses paid upon the same, upon the surrender of the duplicate

receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office; and in all cases where parties have paid double-minimum price for land which had afterwards been found not to be within the limits of a railroad grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.

SEC. 3. The Secretary of the Interior is authorized to make the payments herein provided for, out of any money in the Treasury not otherwise appropriated.

SEC. 4. The Commissioner of the General Land Office shall make all necessary rules and issue all necessary instructions to carry the provisions of this act into effect; and for the repayment of the purchase money and fees herein provided for, the Secretary of the Interior shall draw his warrant on the Treasury, and the same shall be paid without regard to the date of the cancellation of the entries.

The manifest intention of this act was to extend to entrymen under the homestead, timber-culture, desert-land and other laws, the same remedy that had been provided by former statutes for cash entrymen under the laws relating to public and private land sales. The terms of the act limit the authority of the Secretary of the Interior to the repayment or refunding of moneys actually paid to the officers of the government. Under the 4th section of the act, the Secretary can draw his warrant on the Treasury for the repayment of purchase money and fees paid with money, and for nothing else.

In the case of the application of Sylvester and Orrin Kipp for repayment now before us, First Assistant Secretary Sims, on February 23, 1897, decided that the evidence of the illegality of the sale made to George Harris on April 26, 1866, was satisfactory, and referred said application for repayment to your office for settlement. The fact that Harris's entry was canceled for conflict with a prior railroad grant, is proof that the land (which contained 90.23 acres in two lots or subdivisions and was of the value of \$112.92), was "erroneously sold." But it appears that the government received therefor, a Revolutionary bounty land warrant No. 11,287 for eighty acres of land valued at \$100, and which is now under the control of your office, and only \$12.92 in money which was paid into the Treasury. I am constrained to hold that the Secretary of the Interior has no authority in this case to draw his warrant upon the Treasury for more than \$12.92, and that the application of Sylvester and Orrin Kipp for the repayment in money of the sum of \$40.47, the estimated value of 32.38 acres contained in one of the subdivisions of the land erroneously sold to Harris, must be and the same is hereby denied.

There is no evidence before me tending to show whether George Harris is living or dead; or what disposition has been made by him of the 57.85 acres of land contained in the other sub-division included in Harris's purchase, which was made more than thirty-one years ago. Harris, if alive, or "his personal representatives or assignees" or "his heirs or assigns," if he be dead, are interested in the subject matter involved in the application now before me, and they should be made parties thereto, in order that their rights may be adjudicated, and that

the Department may know to whom it may with safety and propriety return the bounty land warrant, and issue a warrant for the \$12.92 in money.

Your office will cause Christopher Kipp and Orrin Kipp to be notified of this decision, and advise them that it is made without prejudice to any other application they may hereafter make in connection with the other parties interested as above indicated, and in accordance with the opinions herein expressed.

REPAYMENT—DESERT LAND ENTRY—RELINQUISHMENT.

LUCY C. HALLACK.

A desert land entryman who fails to reclaim part of the land embraced within his entry, and thereupon relinquishes such tract, is not entitled to repayment of the money paid on the tract so relinquished.

Secretary Bliss to the Commissioner of the General Land-Office, June 17,
(W. V. D.) 1897. (W. M. W.)

The appeal of Lucy C. Hallack from your office decision of March 6, 1896, denying her application for repayment of purchase money paid on the SE. $\frac{1}{4}$ of Sec. 23, said tract being a portion of desert entry No. 60 for the SE. $\frac{1}{4}$ of Sec. 23 and the SW. $\frac{1}{4}$ of Sec. 24, T. 22 S., R. 43 W., Lamar, Colorado, land district, has been considered.

This application for repayment is controlled by section 2, of the act of June 16, 1880 (21 Stat., 287), which provides—

In all cases where . . . desert land entries . . . of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior, shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land.

The conditions upon which the Secretary of the Interior is thus authorized to cause such repayment to be made are expressly and clearly named in the statute, and thereby repayment upon any conditions other than those so named, is excluded. The conditions named are: First, where the entry has been canceled for conflict; and Second, where the entry has been erroneously allowed and cannot be confirmed. In this case it is not, and cannot be, contended that the entry was canceled for conflict, and it is not, and cannot be, contended that the entry was erroneously allowed.

The land was subject to entry and was regularly entered. No error or mistake of any kind, with respect to the entry, was made on the part of the government. If any error or mistake was made, it was simply an error of judgment on the part of the entryman, as to whether the portion of the entry afterwards canceled, could be reasonably and success-

fully reclaimed. The land embraced by the entry was voluntarily selected by the entryman, but failing to reclaim a portion of the entry, she executed a relinquishment of that portion and, hence, the cancellation.

The decision appealed from is affirmed.

RAILROAD GRANT—SELECTIONS—ACT OF JANUARY 12, 1891.

SOUTHERN PACIFIC R. R. CO.

In the exchange of lands, provided for in the act of January 12, 1891, between the United States and the Southern Pacific railroad company, the company should file a relinquishment of the lands in lieu of which it proposes to make selections, and present to the local office a formal application to select the lien lands, as duly listed for such purpose, and pay the statutory listing fees on the selections so made.

Secretary Bliss to the Commissioner of the General Land Office, June 17,
(W. V. D.) 1897. (P. J. C.)

I am in receipt of your office letter (F) of April 30, 1897, in reference to the exchange of lands as provided for by the act of January 12, 1891, (26 Stat., 712) between the United States and the Southern Pacific Railroad Company. It appears from your office letter that there now exists no reason shown by the records of your office why the tracts selected by the railroad company in lieu of those surrendered, which are within the primary limits of its grant, may not be patented to the company, and your office asks to be advised

whether or not the company shall be required to formally list them and to present this list at the district land office the same as it would do were it to perfect its claim to the lands relinquished. And in the event you decided that this should be done, whether or not the district land officers are entitled to the usual fee for final locations of granted lands.

The act of January 12, authorizes the appointment of Commissioners to select a reservation for the Mission Indians, and provided that in case any land shall be selected under this act to which any railroad company is or shall hereafter be entitled to receive a patent, such railroad company shall, upon releasing all claim and title thereto, and on the approval of the President and Secretary of the Interior, be allowed to select an equal quantity of other land of like value in lieu thereof, at such place as the Secretary of the Interior shall determine.

In pursuance of this act the Commissioners selected certain lands within the primary limits of the grant to the Southern Pacific Railroad Company for the Morongo reservation, which the company agree to relinquish and in lieu thereof selected an equal amount of other lands. The President of the United States and the Secretary of the Interior on December 29, 1891, approved the report of the Commissioners with an exception that is not material to this issue, and withdrew the lands awarded the Indians from settlement. The final adjustment of the matter so far as the railroad company is concerned seems to have been

delayed because the land selected by it had to be surveyed and also because of a protest as to one of the tracts selected. These matters having been disposed of there seems to be no obstacle in the way now of closing the matter up, so far as disclosed by the records of your office.

I do not understand that the approval by the President and Secretary of the Interior of December 29, 1891, went to the extent of approving the selections made by the company, but only approved the report of the Commissioners as to its selection for the benefit of the Indians. Hence the contention of counsel that there has been an official approval of the company's selection is not tenable.

It is stated in your office letter submitting this question:

In view of the number of exchanges of this character contemplated it is important, I think, that the manner of effecting them should be determined at the outset.

The orderly way in which all selections or listing of lands under a grant are made is for the company to present at the local office a formal application to make the same. The local officers approve this as a clear list, or refuse to do so, as the case may be, being guided entirely by their own records. It is not at all improbable that their records may disclose some objection to the approval of the application that is not shown by the records of your office. If the record in the local office be clear the list is approved, notations made on the proper records and then forwarded to your office where it is again examined and finally acted on. Thus there is a complete record made in a formal manner that renders it easy to trace for all time the transaction in its entirety.

It seems to me that any other course than the regular one defined would lead to confusion and might prove embarrassing. Suppose, for instance, your office on the record as it now stands, should issue the patent for these lands, and it should be discovered that there was a valid claim to any part of them initiated under the land laws and shown by the records of the local office? Such a condition would tend to work a serious injustice to innocent persons, and should be avoided. There is no way to avoid it except to pursue the regular course provided by your office rules in such matters.

It seems to be contemplated by the act of Congress quoted above that the railroad company shall before making the selections provided for, file its relinquishment for the lands surrendered. It is therefore apparent that the company should file its relinquishment either in your office, before applying for the selections, or tender it with its application in the local office.

Section 2238 of the Revised Statutes provides that "registers and receivers, in addition to their salaries, shall be allowed each the following fees and commissions, namely:" By the seventh paragraph it is enacted:

In the location of lands by States and corporations under grants from Congress for railroads and other purposes (except for agricultural colleges) a fee of one dollar for each location of one hundred and sixty acres; to be paid by the State or corporation making such location.

If it is necessary that the selection should be made by formal application in the local office, it follows that the statutory fee must be paid. The payment of these fees works no hardship on the company in this case. They are required to be paid in all cases of lands "listed", that is, lands within the primary limits of a grant, as well as in cases of land "selected" as indemnity. In the case at bar the company has paid no listing fees on account of the lands surrendered, and in paying the fees on the lieu lands it will do no more than it would have been required to do if the exchange had never been made. Therefore no additional requirement and no inconvenience will be imposed by the enforcement of the rule.

It is understood that it has been the universal rule in the administration of the act of June 22, 1874 (18 Stat., 194), which is in all material respects similar to the act of July 12, 1891, to require the payment of fees on account of lands selected under that act in pursuance of the provisions of section 2238 of the Revised Statutes. If the provisions are applicable to the act of 1874, they are equally so to the act under consideration. The statute is mandatory, as I view it, and its terms cannot be avoided.

In connection with the subject of this decision the attention of your office is directed to the act of July 31, 1876 (19 Stat., 121); the decision of the Department in the case of St. Paul, Minneapolis and Manitoba Ry. Co. (20 L. D., 22), and of the supreme court in *Pacific Ry. Co. v. United States* (124 U. S., 124).

In the adjustment of this matter you are directed to proceed as herein indicated.

ALASKAN LANDS—SURVEY—APPLICATION.

CENTRAL ALASKA COMPANY.

In the survey of Alaskan land desired for a fishing station, under the provisions of section 12, act of March 3, 1891, a failure to observe the requirement that the land shall be taken as near as practicable in a square form, will not be excused on the ground that the land excluded is valueless for fishing purposes.

Surveys under said section are not authorized in the absence of a formal application therefor, verified by affidavit, showing the character, extent, and approximate value of the improvements owned by the claimant.

Secretary Bliss to the Commissioner of the General Land Office, June 17,
(W. V. D.) 1897. (W. M. B.)

The Central Alaska Company, an alleged corporation, appeals from your office decision of May 14, 1895, rejecting survey No. 118, executed August 11, and 12, 1893, under sections 12 and 13, act of March 3, 1891 (26 Stat., 1095), by Albert Lasey, U. S. deputy surveyor, including a tract of land containing an area of 38.52 acres, situate near Five Mile

point, known as Northeast Harbor, on the coast of Kadiak Island, district of Alaska, and used during the fishing season as a fishing station.

In the decision appealed from it is stated that the survey was rejected,—

for the reason that the land claimed is not occupied with such permanent improvements as evidence such a business as is contemplated by law, and because the tract is not as near as practicable in square form.

The plat shows that the tract embraced in the survey is a long narrow strip of land, the length of the shore or meandered line thereof being ten times greater than the width of the tract at several points.

The deputy, under the head of explanations attached to his return of this survey, states that the survey was completed before receipt by him of the *ex officio* surveyor-general's letter of July 8, 1893, informing him that these surveys should not be executed except under special instructions, and states further that the survey was made under general printed instructions of March 17, 1892. The referred to instructions were issued more than sixteen months before the field work upon this survey was commenced. The survey, however, was not executed in conformity with said general instructions, which among other things directed deputy surveyors engaged in making this class of surveys to "conform to said act of March 3, 1891, and . . . regulations thereunder dated June 3, 1891."

Section 12 of the act of March 3, 1891, required that lands sought to be entered thereunder should be "taken as near as practicable in a square form," and paragraph 13 of the regulations of June 3, 1891 (12 L. D., 583), prescribed that:

The land to be surveyed, . . . must be in one compact body and as nearly in square form as the circumstances and configuration of the land will admit.

The attorney for claimants contends that:

The form of the survey is as near as practicable in square form, without including valueless mountain land of no benefit to claimant for the purposes of fishing.

It appears from the plat that more than four fifths of the area embraced in the survey in its present or existing form is mountainous land, there being only a narrow strip of land, about one chain in width, between the meandered coast line and the foot of the mountain, which extends almost the entire length of the survey.

There appears to be no reason why the front or meandered coast line of the survey which is 57.30 chs. in length should not have been shortened and the survey extended inland and made in square form as required by law and regulations. The configuration of the land would admit of a survey in such form.

There is no statutory provision which excludes mountainous lands from the area embraced in these surveys—where such mountainous lands do not contain coal or the precious metals—and the failure to follow the requirements of law and regulations as to "square form" in the execution of said surveys will not be excused upon the ground

that the exclusion of such lands is proper because they are valueless for fishing purposes.

In prescribing that these lands should be "taken as near as practicable in a square form" it was evidently the intention of Congress to require purchasers and entrymen to take some of the less valuable lands lying along the interior or back lines of the surveys together with the more valuable lands lying adjacent to the water or meandered shore line of the surveys, which would prevent purchasers from entering long narrow strips of land, and thereby secure an exclusive monopoly of extended coast lines and of the more valuable lands bordering thereon. In most instances deputy surveyors state in their returns that these non-mineral lands are valueless except for fishing and cannery purposes, and there appears to be no reason why there should not be included in those portions of the surveys lying back from the water valueless mountain lands as well as level lands which are valueless for fishing purposes.

If this survey was objectionable in no other particular than those above mentioned it might be suspended with the right of amendment, but there appear to be reasons why it should be wholly rejected.

With reference to the improvements upon and occupancy of the land claimed, the deputy makes the following statement:

The improvements consist of the four large barrabarries on the right bank of the creek, and the different barrabarries and sheds along the beach as designated on the plat, valued at \$200.00.

The claimant is in possession and has used the place for several years as a station during the fishing season.

The record fails to show that an application was made to the *ex officio* surveyor-general for this survey wherein "the character, extent, and approximate value of the improvements" alleged to be owned by claimants are required to be shown by verified affidavit prior to the execution of said surveys, as is directed to be done by paragraph one of the regulations of June 3, 1891. It would appear that the survey was made without such application, since the entire deposit for the cost of the survey was made *subsequent* to the completion of the field work. Surveys and deposits made in such manner are not authorized by law or regulations.

The record does not show whether the improvements upon the land included in the survey were placed there by claimants or whether they were made by others. Though the claimants, as stated by the deputy, have for several years been using the tract in question as a fishing ground or station, during a portion of each year, it does not appear that they had, up to the time of the survey, placed thereon improvements of such character and value as would indicate permanent occupation of the land for the purpose designated in section 12 of the act of March 3, 1891.

For the foregoing reasons the decision of your office rejecting survey No. 118 is hereby affirmed.

CIRCULAR PRESCRIBING RULES AND REGULATIONS FOR MAKING SELECTIONS OF LAND IN THE STATES OF MONTANA, NORTH DAKOTA, SOUTH DAKOTA, AND WASHINGTON, UNDER THE GRANTS TO SAID STATES.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 27, 1891.

*The Registers and the Receivers of U. S. Land Offices
in Montana, North Dakota, South Dakota, and Washington.*

GENTLEMEN: The following rules and regulations are prescribed for making selections of land in the States of Montana, North Dakota, South Dakota, and Washington, under the provisions of the acts of Congress of February 22, 1889 (25 U. S. Stat., 676), entitled "An act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States," and of February 28, 1891 (U. S. Stat., 51st Cong., Sess. II, p. 796), entitled "An act to amend sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes of the United States providing for the selection of lands for educational purposes in lieu of those appropriated for other purposes."

Section 10 of the act of February 22, 1889, provides:

That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township . . . and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior.

Said section contains the following proviso:

That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

Section 11 relates to the sale and leasing of the lands granted in the sections 16 and 36, and provides:

And such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

The proviso to section 10, and the portion of section 11, above cited, in so far as they are in conflict with sections 2275 and 2276, Revised

* Not heretofore reported.

Statutes of the United States, as amended by the act of February 28, 1891, are superseded by the provisions of said amended sections, and the grant of school lands provided for in the act of February 22, 1889, should be administered and adjusted in accordance with the later legislation, (12 L. D., 400).

Section 2275, Revised Statutes, as amended by the act of February 28 1891, grants to the several States and Territories as indemnity for sections 16 and 36, lands of equal acreage with those lost, to be selected anywhere within the State or Territory where such losses occur, in the following cases, viz:

1. Where sections 16 or 36, or any portions thereof, have been settled upon prior to survey, under the provisions of the pre-emption or homestead law.

2. Where such sections are mineral lands, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States.

3. Where sections 16 or 36 are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

Section 2275 contains the following provisos:

Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. *It is also provided:* That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

Said section further provides:

And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations.

Section 18 of the act of February 22, 1889, relates to mineral lands, and to indemnity for sections 16 and 36 found to be mineral. This class of indemnity is also provided in the later general act above referred to, and instructions in relation thereto will be found on page 4 of this circular.

Section 19 of the act of February 22, 1889, provides:

That all lands granted in quantity or as indemnity by this act shall be selected, under the direction of the Secretary of the Interior, from the surveyed, unreserved, and unappropriated public lands of the United States within the limits of the respective States entitled thereto. And there shall be deducted from the number of acres of land donated by this act for specific objects to said States the number of acres in each heretofore donated by Congress to said Territories for similar objects.

1. Under the provisions of the foregoing acts where either of the sections 16 or 36, or any parts thereof, have been sold or otherwise disposed of in the manner indicated above, the State will be entitled to select an equal quantity of land in lieu thereof. The selections must be made of surveyed agricultural, non-mineral lands, in legal subdivisions, according to the approved township plats on file at the time.

2. The selections should be made by the Governor or by any agent duly appointed, acting under the authority of the legislature of the State, evidence of whose right so to act must be filed in the local offices and in this office.

3. The law allows selections to be made of surveyed lands, whether offered or unoffered; but no selection is admissible of lands to which a valid pre-emption or other claim shall be legally established, nor of any land which is, or may be, reserved from sale by any law of Congress, or proclamation of the President of the United States, nor of land which is reserved or withdrawn from market for any purpose, nor of mineral land. The character of the selected lands will be determined under the rules existing as to agricultural land entries. In all cases the selected tracts must be covered by non-mineral affidavits made by the duly appointed selecting agent, or by an agent appointed by the selecting agent for the purpose, and if by the latter, evidence of his appointment should accompany the affidavits.

4. The lists of selections under the several grants should have a regular, but separate and distinct, series of numbers commencing with number one. In the case of school-land indemnity selections, the selected tracts on the one side must be connected with specific bases of exactly the same quantity on the other side. Respecting the method of so balancing the selections, you are referred to the circular letter from this office of July 29, 1887, page 124 of the Commissioner's annual report for 1887, which was sanctioned by the Department in the case of *Melvin, et al. v. California* (6 L. D., 702), and is now applicable to your districts.

5. In presenting selections of indemnity lands, based on sections sixteen and thirty-six, or portions thereof, found upon survey to be in the occupancy and covered by the improvements of an actual pre-emption or homestead settler, whose settlement was made before the survey of the land in the field, the State may proceed in one of two ways to have its rights defined:

First. By proving such occupation at the date of survey, and up to the time of the selection, by the testimony of at least two respectable disinterested witnesses. In such instances the qualifications of the alleged pre-emptor or homesteader must be shown, and also the occupancy and improvements as to each subdivision used as the basis of selection.

Second. By relying on the proofs of pre-emption and homestead settlers claiming by virtue of settlement prior to survey, after entry by them.

The validity of such basis of selection would depend upon the establishment of the fact of such settlement before this Department.

6. In making selections founded on deficiencies in the school sections the bases should be carefully described in the list of selections, by subdivisions, section, township and range, or by fractional townships, where the school sections are entirely wanting.

7. The language of the law is plain as to the quantity of indemnity lands that may be selected in lieu of mineral lands upon a determination of their mineral character, and respecting such determination the following is prescribed:

First. A determination by the Secretary of the Interior, or a decision by this office, or by the local officers, which has become final under the Rules of Practice, that a portion of the smallest legal subdivision in a section numbered 16 or 36 is mineral land, will place the entire subdivision in the class of bases that may be used in selections of land as indemnity.

Second. All the lands in said sections 16 or 36, returned as non-mineral, must be presumed to be school lands, for the purposes of this act, until the presumption is overcome in the manner hereinafter indicated. The bare return of lands as mineral by the surveyors-general will not be regarded as conclusive in classifying them as mineral, the returns of the deputy-surveyors as to the character of the land surveyed having been found in many cases to be indefinite or erroneous.

Third. In the absence of a decision by this Department that land in a school section is either mineral or non-mineral in character the State may proceed as follows:

(a) By applying to this office, through the proper district office, where the land has been returned as non-mineral, for a certificate that the land was rightly so classed. Such certificate will determine whether the reservation for schools took effect upon the lands in place so as to place it beyond attack by mineral claimants. Notice of such proceeding must be given by publication and posting in the manner prescribed by the Rules of Practice.

(b) By proceeding to prove land which has been returned as mineral to be in fact non-mineral, in the manner prescribed in circulars "N" of September 23, 1880, and October 31, 1881.

(c) By relying upon the record for indemnity where lands have been entered as mineral. Where the State authorities have information that the mineral character of tracts in sections 16 and 36 is shown by evidence in this office, a list thereof may be sent here through the proper district office, to determine whether they may be used as bases for selections. If the decision should be in the negative, the character of such tract may be determined under the procedure indicated in the first and second subdivisions of this paragraph.

8. The remaining grants made by the act referred to are as follows, and the rules prescribed in numbered paragraphs 3 and 4 are also applicable to the selections of these.

9. By section 12 there are granted for the purpose of erecting public buildings at the several capitals for legislative, executive, and judicial purposes, 50 sections (32,000 acres).

10. Section 14 vests in the States of Montana, North Dakota, and South Dakota, the lands granted to them respectively by the act of February 18, 1881, for university purposes, viz: Seventy-two sections to each, (46,080 acres) and provides that any portion thereof remaining unselected may now be selected.

11. Section 15 vests in the State of South Dakota, the lands granted by the act of March 2, 1881, for a penitentiary, together with the buildings thereon, and any unexpended balances of the \$30,000 heretofore appropriated for that purpose, and extends like grants for the same purpose to the States of Montana, North Dakota, and Washington.

12. Section 16 grants to each of the said States, except South Dakota, for the use and support of agricultural colleges therein, 90,000 acres, and to South Dakota, 120,000 acres.

13. Section 17 provides that in lieu of the grant for internal improvements by section 8 of the act of September 4, 1841, and also in lieu of any claim for swamp or saline lands, the following amounts are granted for the purposes specified, viz:

To the State of Montana:

	Acres.
For a school of mines.....	100,000
State Normal schools.....	100,000
Agricultural colleges, in addition to the amount hereinbefore granted.....	50,000
State reform school.....	50,000
Deaf and Dumb Asylum.....	50,000
Public buildings, in addition to the amount hereinbefore granted.....	150,000
Total amount.....	500,000

To North Dakota and South Dakota, each:

	Acres.
For the school of mines.....	40,000
Reform school.....	40,000
Deaf and Dumb Asylum.....	40,000
Agricultural college.....	40,000
University.....	40,000
State normal schools.....	80,000
Public buildings at the capital.....	50,000
For such other educational and charitable purposes as the legislature may determine.....	170,000
Total amount.....	500,000

To the State of Washington:

	Acres.
Scientific school.....	100,000
State normal schools.....	100,000
Public buildings in addition to grant hereinbefore made.....	100,000
State charitable, educational, penal, and reformatory institutions.....	200,000
Total amount.....	500,000

These instructions are also applicable to all States and Territories, except the State of Nevada, which has a grant in quantity, and Alaska for which no reservation of public lands has been made.

Very respectfully,

W. M. STONE,
Acting Commissioner.

Approved:

GEO. CHANDLER,
Acting Secretary.

STATE SELECTIONS—ACTS OF FEBRUARY 22, 1889, AND FEBRUARY 28, 1891.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 17, 1897.

*Registers and Receivers of U. S. Land Offices
in Montana, North Dakota, South Dakota and Washington.*

GENTLEMEN: Circular of May 27, 1891, prescribing rules and regulations for making selections of lands under the provisions of the acts of February 22, 1889 (25 Stats., 676), and February 28, 1891 (26 Stats., 796), is revoked in so far as it provides for the issuance of a certificate by this office that school sections returned as non-mineral were rightly so classed (page 4, paragraph 7, third subdivision (a)).

BINGER HERMANN,
Commissioner.

Approved:

C. N. BLISS,
Secretary.

AGRICULTURAL ENTRY—MINING CLAIM—CHARACTER OF LAND.

MACKALL ET AL. v. GOODSSELL.

The non-mineral character of a tract of land having been determined as the result of a hearing had on that issue, the Department is not justified in ordering another hearing on the same issue, in the absence of a clear showing of development made since the prior hearing, such as, if supported by the evidence at the hearing applied for, would clearly demonstrate that since such prior hearing mineral has been discovered in such quantities, and by such thorough work on the premises, as to overcome the effect of the previous judgment as to the character of the land.

Secretary Bliss to the Commissioner of the General Land Office, June 22,
(W. V. D.) 1897. (P. J. C.)

This is an application for a hearing to determine the character of the land in lots 1 and 2, Sec. 26, T. 10 N., R. 9 E., Sacramento, California, land district.

Inasmuch as it is disclosed by the records of this office that the

question as to the character of this particular tract of land has been the subject of contention for about thirty years, it may not be amiss to briefly recite its history.

The official plat was filed in the local office on June 16, 1866, and shows this tract to be returned as agricultural in character.

In August, 1866, one Allen T. Gray filed a pre-emption declaratory statement for this and other lands, claiming settlement in 1856. A protest was filed against this filing alleging the land to be mineral in character, and in June, 1871, your office affirmed the judgment of the local office sustaining this charge. It appears, however, that but a part of the land was thus charged, and Gray was allowed the privilege of having a segregation survey made. Failing to do this, his final proof was rejected by your office in February, 1881, and it appears his pre-emption filing was then allowed to lapse. In December, 1884, he made application to make homestead entry of the land, which was allowed.

In April, 1892, Mildred L. Goodsell, the defendant in this case, filed a protest against Gray's entry, alleging abandonment; and this charge was sustained. At the same time she filed her homestead application for the land.

In October, 1892, A. S. Bosquit *et al.* attempted to make mineral entry of the land, but the application was rejected because of Goodsell's contest against the heirs of Gray. The mineral applicants appealed from this decision, and also filed the relinquishment of the Gray heirs to the tract, when the record was forwarded to your office, and by letter of April 10, 1893, you affirmed the action of the local office in the matter of the contest between Goodsell and the heirs of Gray. You ordered a hearing, however, to determine the character of the land, a preference right being given to Goodsell in case the land should be adjudged to be non-mineral. The hearing was accordingly had, and the local officers decided the land to be non-mineral. On appeal your office affirmed their judgment, and by departmental decision of December 5, 1895, the concurring judgments below were affirmed; and on April 6, 1896, a motion for review was denied.

In said departmental decision of April 6, 1896, the testimony of the several witnesses on both sides of the controversy is gone into at great length, and seems to have been given very careful consideration.

It appears that on May 12, 1896, Goodsell's homestead application to enter the land in controversy, and others, was allowed, and on the following day she gave notice of her intention to submit final proof on June 25th following. On that day J. P. Mackall, and others, appeared and filed a protest against said proof, alleging that he and his associates are the owners and in possession of the tracts by reason of a placer mine location made on the same on June 10, 1896. He recites the former adjudication and states that between the date of the former hearing (July 20, 1893)

and down to the present time, portions of said lots 1 and 2 have been mined upon, prospected and developed by different parties, affiant and his co-owners among the

number, with the result that the land is, as a present fact, more valuable for mining and for the mineral therein contained than for agricultural purposes; that the character of the land, by virtue of said mining, prospect and development work, has changed in favor of its mineral character since July, 1893;

that the protestant and his co-owners enjoy facilities and privileges for working said placer mine that the former protestant did not; that they have secured the use of water, the right of drainage, etc. They state that work has been done on the Pelton placer mining claim, which adjoins the tracts in controversy, since 1893, and "that the mining work done upon said lots 1 and 2 has demonstrated the land to be more valuable for mineral than for agricultural purposes"; that affiant has worked from the Pelton placer mine workings over and beyond the line dividing lots 1 and 2 from the Pelton and found gravel in paying quantities; and

that drifts have also been run by affiant and others and gravel extracted from said drifts, working from the Dividend (Pelton) side and beyond the boundary thereof to points on the Mackall placer and the land in controversy, the prospects from which and results obtained thereby justify affiant in believing that the Mackall placer mine is very valuable for the gold therein contained.

There are some other allegations contained in this protest, but they are not deemed of vital importance in deciding the question that is presented.

The protest is corroborated by one Hodgkin, who says that he is the owner of the Dividend placer mine, which is said to be the same as the Pelton; that it is situated east of the land in controversy; that he knows the nature and character of said land;

that the channel running through the said Dividend placer mine extends into and passes through the greater part of the said above described land claimed by Mildred L. Goodsell, so far as I can ascertain;

that where he has been working in the Dividend placer mine is about twenty-five feet from the line of the above described land; and "that from my acquaintance with the above described land I believe it to be much more valuable for mineral than for any other purposes."

Coval, another corroborating witness, says that he has been engaged in mining on adjoining land,

and did mine on a part of the above described land in the winter of 1895-6, as foreman for Dividend Mining Company, and the operations of mining have resulted in obtaining gold in large paying quantities, and beyond any doubt now in my mind the channel carrying gold in paying quantities extends into and through said above described land.

He is positive that the channel runs into and through the lands included in the homestead entry; says he was a witness for the homestead claimant in the former hearing but did not think at that time that the pay channel extended into the land in controversy, but has found that he was under a wrong impression, from actual workings, and "can now testify understandingly that said pay channel does extend through said above described homestead lands."

Upon consideration of this protest the local officers declined to order a hearing, and held that the agricultural claimant should submit her proof. On appeal your office affirmed this action and dismissed the application for a hearing; whereupon the protestant appealed to the Department.

It will be observed from the above statement of the history of this tract that as a result of the hearing before the local officers in the first contest against Gray's pre-emption filing, a part, at least, of the land in controversy was adjudged to be agricultural in character, and the order in that case was that Gray should make a segregation survey of the land shown to be mineral. To what extent the ground was found to be valuable for mineral does not appear by anything before this Department.

It would appear that Gray still continued to hold the land under his pre-emption filing until February, 1881, when the final proof he had submitted was rejected. Again, in 1884, he was permitted to make homestead entry, which was contested by Goodsell on the ground of abandonment. Subsequently came the contest of Bosquit and others against her, distinctively alleging the ground to be mineral in character, and the question was tried with the single end in view, apparently, of proving its mineral character. There were concurring conclusions all along the line holding that this charge was not sustained.

In view of all this, the Department would not be justified in ordering a hearing upon this same charge, unless it is based upon a distinct showing of development made since the prior hearing, such as, if supported by the evidence at the hearing applied for, would clearly demonstrate that since such prior hearing mineral has been discovered in such quantities, and by such thorough work on the premises, as to overcome the effect of the previous judgment as to the character of the land.

The protest and corroborating affidavits do not, in my judgment, show that the work done and results accomplished on the land in controversy, warrant a further hearing in the premises.

It will be observed that there is no claim made by either the protestant or his witnesses that any systematic or thorough work has been done on the ground in controversy by which it has been developed that there is valuable mineral therein. It would appear that they rely almost entirely upon work that has been done in the Dividend or Pelton placer, which adjoins this, as a basis for their statement that they believe the land in controversy to be valuable for mining purposes. This is not sufficient, where there has been a prior determination as to the character of the land.

The statements made as to the mineral character of the ground are chiefly the opinions of the parties making them as to what *may* be found by *future* development. The showing required is one dealing with what *has* been found as the result of *present* development.

Your office judgment is therefore affirmed.

HOMESTEAD ENTRY—DESERTED WIFE—RESIDENCE.

JENNIE W. LINDSEY.

A deserted wife who secures the cancellation of her husband's homestead entry, and, as the head of a family, thereafter makes a homestead entry of the land, is entitled, on final proof, to credit for her residence on the land prior to the date of her husband's desertion.

Secretary Bliss to the Commissioner of the General Land Office, June 22,
(W. V. D.) 1897. (E. B., Jr.)

The land involved in this case is the NE. $\frac{1}{4}$ of section 27, T. 31 S., R. 66 W., Pueblo, Colorado, land district.

John H. Lindsey made homestead entry No. 5077 therefor December 28, 1887, which, after being contested by Jennie W. Lindsey as his deserted wife, was canceled by your office July 5, 1895. Thereupon Jennie W. Lindsey, as the head of a family, made homestead entry No. 9038, July 30, 1895, for the tract above described, submitted final proof September 17th following, and received final certificate No. 3403 for the land October 8, 1895. The papers in the case having been transmitted to your office, it was there held, February 5, 1896, that Mrs. Lindsey could not claim the benefit of residence on the land prior to January 15, 1893, when her husband deserted her, and that she would be required to reside upon and cultivate the land for the period of five years after the date of such desertion. She appeals from this decision, contending that she is entitled to have credit for her residence on the land with her husband prior to the date of his said desertion.

It appears that she commenced to reside with her husband upon the land in March, 1888, and resided there, thence, continuously, until March 15, 1892, when, by reason of sickness and upon the advice and direction of physicians, she went to her father's home in Pennsylvania and was compelled to remain there on account of continuous sickness until about January 23, 1894, when she returned to the land, upon which she has resided ever since, her only subsequent absences having been at intervals while engaged in teaching school in the city of Trinidad, only a few miles from the land, in order to earn a support for herself and her infant daughter.

In the case of Maggie Adams, a deserted wife (19 L. D., 242), citing *Bray v. Colby* (2 L. D., 78), it was held that upon the cancellation of her husband's entry at her instance, she might make entry for the land involved, as such wife, "and be given credit in her final proof for the time she has resided upon the land." These cases are conclusive of the case at bar in favor of the contention of the appellant.

The decision of your office is accordingly reversed. Mrs. Lindsey will be credited with her residence on the land prior to the time of her husband's said desertion.

TOWN LOT—OCCUPANCY—TRESPASS.

AMICK v. CARROLL.

Occupancy of a town lot acquired through trespass, and the wrongful dispossession of a prior occupant, will not defeat the right of such occupant to a deed, though the trespasser may be the sole occupant at date of the townsite entry.

Secretary Bliss to the Commissioner of the General Land Office, June 22,
(W. V. D.) 1897. (G. C. R.)

This case involves lot 3, block 22, Newkirk, Oklahoma Territory (Enid land district), and is here on appeal by Lewis L. Amick from your office decision of July 13, 1896, awarding said lot to Benjamin F. Carroll.

The record discloses the following:

On February 5, 1894, Benjamin F. Carroll filed his application before the townsite board of trustees for a deed to said lot, alleging that he took possession of the same on the 26th day of September, 1893, and had occupied it ever since, having improvements thereon of the value of \$100, was duly qualified, etc.

On March 15, 1894, Lewis L. Amick filed his application for a deed to said lot, alleging his qualifications, etc., and that he was entitled to the same.

At the hearing, which was had before the trustees, December 7, 1894, it was shown that on September 25, 1893, Amick purchased the lot from a former occupant, one Metz, or Mitts, who claimed to have exclusive possession of it, giving in exchange therefor a horse, which cost him \$35. With the lot, he purchased a tent, then erected thereon, and with the tent he also purchased its contents—bunk, cooking stove, cooking utensils, etc. He slept in the tent the night of September 25, and took his meals there; on the next day, he started to his home in Kansas to prepare for moving to the lot, and to make it his home and place of business (conducting a feed store). During his absence, he permitted one Thompson to stay in the tent, giving him directions to care for the tent, lot, etc. He returned to the lot in about one week, and found that Thompson had built a small house thereon. He at once paid Thompson for it. He also discovered that Carroll had put a tent on the lot during his absence. He again went back to Kansas, and on his return he discovered that his house had been moved off the lot; he put it back again.

It appears that on September 26, the day after Amick made settlement, Carroll stretched his tent on lot 2, southeast of Amick's tent. Finding by a survey that his tent was placed on a lot he could not get, Carroll, about September 29, and during the absence of Amick, moved his tent on lot 3, the one in controversy. At that time, he knew this lot was occupied by some one, the tent being there, and, in all probability, he knew it was Amick's tent. Thereafter, Carroll continuously occupied the lot, and was an occupant on the day (January 20, 1894,)

the townsite entry was made, having built thereon a half dugout and half sod house, and a sod stable for his horses.

When Amick first settled on the lot, he was not certain which way it and the adjacent lots faced—whether east and west, or north and south; a survey showed the lot to face south, but in either case his tent was on lot 3, as testified by him. The finding of your office in this respect was erroneous.

The townsite trustees state that Carroll's testimony "was evasive and insincere, clear up to his last answer, which was a direct violation of the truth." The record justifies this statement. Amick's house, as above shown, was twice moved from the lot; both times probably by or under the directions of Carroll. On his first examination, he positively denied doing it, or of knowing who did it; a witness then came on the stand, and swore he saw Carroll moving the house. After this, Carroll again took the witness stand, and admitted it, claiming he was "bothered" when he first testified. His testimony throughout his whole examination is so evasive and unreasonable as to cast a doubt upon all his testimony relating to disputed questions of fact, except wherein such testimony was corroborated by other witnesses.

After Carroll had obtained possession of the lot in the manner above shown, Amick notified him to quit possession; this notice Carroll ignored, and Amick brought suit for possession; the suit was dismissed at the instance of Amick's attorney, because of the absence of an important witness.

Your office erroneously finds that Amick did not notify Carroll to leave the premises.

The entry of the land for townsite purposes was made "for the several use and benefit of the occupants thereof." Upon the date of that entry (January 20, 1894,) Carroll was the sole occupant, but the evidence shows that such occupancy was obtained by trespassing upon the known rights of another. Carroll well knew that Amick's tent was on the lot at the time he (Carroll) moved his tent thereon; in the absence of Amick, he moved the latter's house from the lot in the night time, and then built thereon a sod house and sod stable.

A recent examination of the townsite plat shows lot 3 to be forty by one hundred and ninety feet.

Amick did not live on the lot after Carroll took possession of it, nor did he make further improvements. In the nature of things, this could not be reasonably expected of him. For him to have undertaken to live on or improve the lot while Carroll was there would have been to invite constant annoyances, trouble and possible danger.

The circumstances and conditions attending the occupancy of a small lot by hostile competing claimants at the same time are wholly different from those which easily permit the occupancy of a quarter section of land by such claimants, and where it is shown that a first *bona fide* occupant of a town lot has, through the wrongful or tortious

acts of another, lost possession of, or has been ousted from, his rightful occupancy of the lot, which by unjustifiable and illegal means has been reduced to the occupancy and possession of the trespasser, the wrong doer will not be permitted to profit by his unlawful acts. Although the trespasser may be the sole occupant of the lot at date of the townsite entry, he will not be permitted to receive his deed therefor; he can not be held as a *bona fide* occupant. Having been wrongfully dispossessed of the lot and thereafter unable to obtain possession thereof, Amick's occupancy will be considered as unbroken from the date of his first entry thereon.

The decision appealed from is reversed. The lot in question will be deeded to Amick.

RIGHT OF WAY—ACTS OF MARCH 3, 1891, AND MAY 14, 1896.

H. W. O'MELVENY.

The right of way acts of March 3, 1891, and May 14, 1896, differ so widely in the character of the estate granted, as well as in the uses to which the right of way may be devoted, and the extent thereof, that an application can not properly be allowed on the two acts taken together; the permission must rest either upon one act or the other.

Secretary Bliss to the Commissioner of the General Land Office, June 23, (W. V. D.) 1897.

With your letter of April 6, 1897, you submitted the application and accompanying documents, filed by H. W. O'Melveny, trustee, etc., asking for permission to use right of way under the act of May 14, 1896 (29 Stat., 120). You recommend that the permission desired be given and the accompanying map be accordingly endorsed.

The application is couched in the following language:

I hereby make application for a right of way over the lands described in the map hereunto attached, said right of way to be twenty-five feet on each side of the central line of the proposed ditch and conduit, as designated upon said map, in accordance with the provisions of the act of Congress approved March 3, 1891, 26 Stat., 1095, and the act of Congress passed May 14, 1896, and under the rules and regulations concerning rights of way for canals, ditches and reservoirs over the public lands and reservations, for the purpose of irrigation and development of water power, approved Feb. 20, 1894.

The certificate on the map accompanying the application contains this statement:

And I further certify that the right of way for said canals and reservoirs is desired for the purpose of supplying agricultural communities with water, and for purposes of irrigation and for the purpose of generating electric power and for no other purposes whatsoever.

The two acts of March 3, 1891 (26 Stat., 1095), and May 14, 1896 (29 Stat., 120), are so different in the character of estate or permission therein provided for, as well as in the uses to which the right of way

may be devoted and the extent of such right of way, that no permission or grant can be sanctioned which is based upon the two acts. The permission granted must rest either upon one act or the other.

The right of way named in the act of May 14, 1896, is only authorized "for the purposes of generating, manufacturing, or distributing electric power." Since your letter Mr. O'Melveny and his associates, through their attorney, Mr. D. A. Chambers, have signified their desire to confine the application in this case to the act of May 14, 1896, and have stated that the right of way is desired "for the purposes of generating, manufacturing, or distributing electric power."

The fact that the application and accompanying documents asked more than can be granted, is no reason for the entire rejection thereof. I have granted the permission authorized by the act of May 14, 1896, "for the purposes of generating, manufacturing, or distributing electric power," and have denied the application in other respects.

HOMESTEAD—SECOND ENTRY—COMMUTATION—SOLDIERS' HOMESTEAD.

WILLIAM A. ATCHINSON.

The commutation of a homestead entry prior to the passage of the act of March 2, 1889, defeats the right to make a second entry under section 2, of said act. There is nothing in section 2304 R. S., which authorizes a soldier to make a homestead entry who has perfected an entry under the provisions of the general act.

Secretary Bliss to the Commissioner of the General Land Office, May 13, 1897. (J. L. McC.)

William A. Atchinson has appealed from the decision of your office, dated July 23, 1895, rejecting his application to make homestead entry for the SE. $\frac{1}{4}$ of Sec. 34, T. 12 N., R. 19 W., Los Angeles land district, California.

The ground of said decision appealed from was, that Atchinson had previously (on January 29, 1866,) made a homestead entry, which he had (on June 23, 1868,) commuted and paid for with a military bounty land warrant; for which patent has since issued (on November 2, 1868).

Atchinson contends that the second section of the act of March 2, 1889 (25 Stat., 854), permits him to make another homestead entry, inasmuch as he has not "had the benefit of the homestead act," and has not perfected title by living on the land for five years.

The opportunity was afforded him to obtain the land by living upon it for five years, but he chose not to avail himself of that opportunity, and commuted his entry to cash—which is held by the Department to be equivalent to perfecting an entry under the homestead law. (Frank J. Lipinski, 13 L. D., 439; Happel v. Hamline, 21 L. D., 283; and many other cases.)

Atchinson contends that his former entry was a "citizen's home-

stead," and that he is entitled in addition to a "soldier's homestead entry."

When he made his former entry he was entitled, by virtue of having been a soldier, to certain advantages: (1) he might have filed his claim through an agent (R. S. 2309); and (2) he might have had his term of service in the army (if not exceeding four years) deducted from the period of residence required under the homestead laws (R. S. 2305). He was entitled to these advantages in connection with one entry; but there is no law granting him a "soldier's homestead entry" in addition to a "citizen's homestead entry."

The decision of your office was correct, and is hereby affirmed.

DESERT LANDS—ACT OF AUGUST 18, 1894.

STATE OF WYOMING.

A relinquishment on the part of the State of desert lands included in a contract made under section 4, act of August 18, 1894, to be effective must be executed by the officers designated by the State legislature to manage and dispose of said lands.

Under the provisions of said act, the departmental regulations thereunder, and the terms of the State act, the maps, and lists of selections shown thereby, are properly authenticated by the signature of the chief clerk of the State board of land commissioners.

Secretary Bliss to the Commissioner of the General Land Office, June 25,
(W. V. D.) 1897. (J. I. P.)

By your office letter "F" of the 15th instant you submitted for my consideration certain papers purporting to be relinquishments of certain lands signed on behalf of the State of Wyoming, by the chief clerk of the board of land commissioners of said State, in pursuance of a resolution of said board authorizing him to sign the same. The tracts involved are the SE $\frac{1}{4}$ and the S $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 25, T. 52 N., R. 97 W. of list 1: and lot 3, Sec. 7, T. 52 N., R. 95 W. of lists 2 and 4. The lists and maps showing these tracts have been heretofore approved by the Secretary of the Interior and the contract embracing them has been executed by the Secretary of the Interior and the governor of said state, and approved by the President. All of said proceedings having been had under the provisions of section 4, of the act of August 18, 1894 (28 Stat., 372-422), known as the Carey act.

For reasons stated in your said office letter "F" of the 15th instant, you express doubt as to the validity of said relinquishments and ask instructions in regard to them.

In reply you are advised that the act of the legislature of the State of Wyoming, approved February 14, 1895, accepting the provisions of the Carey act, provides, in section 2 thereof, that "the selection, management and disposal of said lands" shall be vested in the State board of

land commissioners, as constituted by section 3 of article 18 of the constitution of the State. Section 3 of said act designates the governor of the State as president of said board and provides that "it shall be his duty to sign all contracts, papers and documents that shall be approved, made or directed by said board."

The authority vested in the Board of Land Commissioners by said act "to select, manage and dispose of said lands" cannot be delegated by it, unless the provisions of said act expressly authorize such delegation.

A relinquishment of said lands to the government can only be made under the authority vested in the board to "dispose" of said lands. After careful examination I have been unable to find in said act any express provision that authorizes said board to delegate that authority.

There is a provision in section 6 of said act which prescribes the duties of the chief clerk of the board of land commissioners, that he shall "do any and all work required by the board in carrying out the provisions of this act." But the "general" terms of that section could not be construed into an "express" provision authorizing a delegation of the authority vested in said board to "dispose" of said lands. To so construe it would be to cause the "general" terms of said section to govern as against the "express" provisions of sections 2 and 3 of said act which fix the powers and duty of said board and of the governor of the State. And such a construction would be in violation of the rule that "specific provisions relating to a particular subject will govern in respect to that subject as against general provisions contained in the same act." (Sutherland on Statutory Constructions Sec. 158.)

I am of the opinion, therefore, that the relinquishments in question have not been executed by the powers authorized by law to execute them; that they should be executed by the board of land commissioners on behalf of the State and signed by the governor of the State as governor and ex-officio president of the board of land commissioners.

You also, in this connection, request consideration of the former practice by which the maps of the lands to be segregated and the lists of the lands have been accepted under the authentication of the chief clerk who was authorized to select the lands by resolution of the board, while the signature of the governor has been required only to the contract.

On that point I desire to state that in my judgment the former practice which is now in vogue is in strict accord with the provisions of section 4 of the act of August 18, 1894 (*supra*), the act of the legislature of Wyoming accepting the provisions of said act, and the regulations of this Department, as found in 20 L. D., 440.

Section 6 of the Wyoming act, above referred to, makes it the duty of the chief clerk "to prepare and keep for public inspection, maps, plats etc., of State lands selected; and section 11 of said act provides, among other things, that "the board shall instruct the chief clerk to

file in the local land office a request for the withdrawal of the lands described etc." The lands referred to are those which the state desires to have segregated.

Paragraph 4 of the departmental instructions found in 20 L. D., page 441 provide that

the maps should bear an affidavit of the engineer who made or supervised the preparation of the map or plan, form 1, page 443; and also of the officer authorized by the State to make its selections under the act, form 2, page 443.

As it is apparent that the chief clerk, when instructed so to do by the board, is the officer authorized to make the selections or request the withdrawal (which is the same thing) of the lands which the State desires to have segregated under the Carey act, it follows that his signature to the map is the one contemplated by the regulations of the Department above quoted, and that it is valid and authoritative. In addition it may be said that the contract required to be entered into between the State and the Secretary of the Interior refers to and identifies the map filed, and that contract is signed on behalf of the State by the governor and binds the State to anything that is shown by the map. It follows, also from what has been shown above that the lists filed by the chief clerk in the local office requesting the withdrawal of said lands, which lists are required by the 6th paragraph of the regulations of the Department (20 L. D., 442) to be filed in triplicate, are valid and authoritative.

The relinquishments transmitted by your office letter "F" of the 15th instant are returned herewith without approval or acceptance, with instructions to return them to the governor of the State of Wyoming; together with a copy of this letter.

COMMISSIONERS OF THE CIRCUIT COURT—UNITED STATES COMMISSIONERS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 25, 1897.

Registers and Receivers, United States Land Offices.

GENTLEMEN: Your attention is called to Sec. 9, act of May 26, 1896, 29 Stat., 184, which provides that the terms of office of all commissioners of the circuit court shall become vacant on June 30, 1897, and that such offices shall from that day cease to exist.

This act provides for the appointment of United States commissioners, and prescribes that they shall have the same powers and perform the same duties as are now imposed upon commissioners of the circuit court.

You will, therefore, in the future recognize such United States commissioners as being fully authorized to do any act in connection with

the disposal of the public lands which could heretofore have been lawfully performed by commissioners of the circuit court.

In the event that final proofs have already been advertised to be made before any commissioner of the circuit court on a date coming after June 30, 1897, it will be necessary to fix a new date before another officer authorized to act, and cause a new notice thereof to be published as though no notice had ever been published; unless the person holding the office of circuit court commissioner before whom said proof was advertised to be taken has been duly appointed United States commissioner, in which event the proof may be taken before him as such United States commissioner at the time and place named in the first notice, without new notice thereof being published.

If you have directed that testimony be taken before any commissioner of the circuit court after June 30, 1897, under Rule of Practice 35, you will at once upon the receipt of this circular proceed to name another officer authorized to administer oaths before whom such testimony shall be taken at the same or some other convenient time and place, and notify the parties in interest thereof.

Very respectfully,

BINGER HERMANN

Commissioner.

Approved June 25, 1897.

C. N. BLISS,

Secretary of the Interior.

PRACTICE—APPEAL—TOWN LOT—ADVERSE OCCUPANTS.

COSBY ET AL. *v.* AVERY ET AL.

A case on appeal, that involves the rights of several parties appellant, will be treated as properly before the Department on the whole record, though it may be alleged that one of the appellants filed his appeal out of time.

A certificate of right issued by the provisional authorities of a town to a lot claimant, is only to be regarded as *prima facie* evidence of title, where there is an adverse claim at the time the case is considered by the townsite board.

Adverse occupants in good faith of a town lot at the date of a townsite entry may be treated, in cases where priority of settlement does not determine their rights, as joint applicants, and receive a deed jointly, according to their respective holdings, though such occupants may have filed separate and adverse applications.

Secretary Bliss to the Commissioner of the General Land Office, June 29,
(W. V. D.) 1897. (C. J. W.)

Mary T. Cosby and Joseph D. Cosby (husband and wife) made joint application to townsite board No. 1, at Guthrie, Oklahoma, for a deed to lot 13, block 57, in said town alleging facts which, *prima facie*, would entitle them to such deed. John N. Parsons, Henry P. Townsley, Stephen S. Smith and Frank Hecock made separate applications for a deed to the same lot. Dillon S. Avery and Fred Meyer made joint

application for a piece of land described by metes and bounds, without reference to any authorized survey, which included a part of lot 13, block 57, as indicated by the survey and plat of the town, and subsequently and before a second hearing of the case, they filed application for a deed to lot 13, block 57, in said town of Guthrie. W. S. Smith, attorney for Charles A. Mathen, filed with said board, on September 23, 1890, a certificate signed by D. M. Ross, acting mayor, granting possession of lot 13, block 57, to said Mathen, and asked that leave be granted him to file an application for Mathen within a reasonable time.

On January 15, 1891, the board issued notice to the several applicants, including Mathen, naming February 5, 1891, as the day for hearing their claims. A hearing was had and on April 6, 1891, the board rendered a decision (one member dissenting) in which they awarded a deed to the Cosbys for the entire lot. The decision and record were transmitted to your office, and on April 28, 1895, upon the examination of the record your office found that some of the parties had not been served with notice of the hearing, and remanded the case for a rehearing upon proper notice to all the parties, unless the parties not properly served before the first hearing should fail to appear, in which event the record was to be returned to your office for proper disposition of the case. The parties were accordingly notified that a hearing would be had before townsite board No. 6, successors of board No. 1, on July 19, 1894, and on that day Townsley, Parsons, and Hecock defaulted. Stephen S. Smith, one of the applicants who had failed to appear at the first hearing, appeared at the second hearing, and thus restored his status as an applicant for a deed. A motion was made to return the record without the second hearing, by the Cosbys, which was overruled by the board. No testimony was offered, however, except that offered by the joint applicants. The townsite board, on July 1, 1895, rendered dissenting opinions, each member of the board taking a different view and arriving at a different conclusion. These several opinions, together with the record, were again transmitted to your office, and on May 29, 1896, your office considered and reviewed the entire record and awarded to Avery and Meyer thirty-one feet by twenty-five feet in width of the back end of said lot and the remainder to Mary T. and Joseph D. Cosby. On July 30, 1896, Mary T. and Joseph D. Cosby filed an appeal from said decision, and on the same date Mary T. Cosby filed a separate appeal in which she alleges that the deed should have been awarded to her solely and not jointly to her and her husband, and that it should have embraced the whole lot.

On July 31, 1896, Avery and Meyer filed an appeal from said decision on various grounds therein stated. On August 11, 1896, your office decided that the appeal of Avery and Meyer was filed out of time and notified them that the appeal would not be forwarded with the record. Avery and Meyer on the 4th of September, 1896, filed a petition for *certiorari* under Rules 83, 84 and 85 of Practice, alleging error upon the

part of your office in holding that their appeal was filed out of time, and praying that said appeal and the record be ordered up and considered. Briefs have been filed by counsel on both sides covering both the appeals and the petition for *certiorari*. Your office, in fact, forwarded the appeal of Avery and Meyer as a part of the record in the case, along with the appeals of Mary T. Cosby and of Mary T. Cosby and Joseph D. Cosby. The last named appeals being filed in time bring the case before the Department, and render necessary an examination of the entire record, and put in issue the rights of Avery and Meyer.

Under this state of facts it is not necessary to consider the controversy as to whether or not the appeal of Meyer and Avery was filed one day too late. The case will be considered as properly before me, with Avery and Meyer's rights in issue as well as those of the Cosby's, since the appeals of the Cosbys preserved the status of Avery and Meyer as parties to the litigation, even if they are not properly appellants.

The separate appeal of Mary T. Cosby requires no lengthy consideration. It is based upon the fact that pending the litigation she obtained a warranty certificate issued by the provisional authorities of Guthrie in her name only, and that said certificate is binding and conclusive upon the other parties, because Avery had notice of her application for said certificate, and refused to submit his claim for consideration and her husband consented to its issuing in her name. Such certificate is only to be regarded as *prima facie* evidence of title where there is an adverse claim at the time the case is considered by the townsite board (*Bender v. Shimer*, 19 L. D., 363).

In the light of the testimony in this case, the certificate is without force to affect the rights of Avery and Meyer and the Department will leave Mary T. and Joseph D. Cosby, who applied jointly for a deed, and who occupied a part of the lot jointly at the time of the townsite entry, and have filed joint appeal to adjust their respective rights between themselves. It is insisted that the record authorized and demanded that Mary T. Cosby be held to be the first settler upon the lot. This contention will be reserved for consideration with the like contention of Avery that he was the first settler. This is a question of fact, and before coming to it, a legal proposition insisted upon by both sides, will be considered.

It is alleged that your office erred in undertaking to divide the lot between rival applicants for a deed, and the case of *McGrath et al.* (20 L. D., 542) is cited as authority. In the later case of *Woodson et al. v. Johnson et al.* (22 L. D., 102), it was held that townsite boards should not execute deeds for fractional parts of a town lot, but for the protection of separate interests therein, may, on joint application, deed to the several parties jointly the entire lot according to their respective holdings. This is a clear recognition of the fact that there may be more than one legal occupant of a town lot, and the refusal of the Department to authorize the execution of separate deeds for fractional parts of a lot is

an administrative rule, the purpose of which is to remit to the courts, the actual partition of lots where such partition is not agreed upon by the parties. This rule may be yet enlarged in the interest of a less expensive administration of the townsite laws. It is apparent that there may be different occupants of a town lot, who have valid claims to different parts of a lot, but who may not agree to apply jointly for a deed. All applicants who show by proof that they were qualified settlers and actual occupants in their own right of any part of a town lot at the date of the townsite entry, in cases where there is more than one such occupant, should be treated as joint applicants, although they may not have filed joint applications, and may have filed separate and adverse ones, if it is adjudged on the final decision of the case, that they were legal occupants of the same lot at the time of its entry, and entitled to a deed for their respective holdings.

Such joint occupancy of a town lot can only exist in cases where from some cause the rule of priority of settlement is not conclusive as to the rights of the parties. Ordinarily, such priority of settlement, where occupancy has been maintained, will determine which one of two or more settlers is entitled to the whole lot, the rule being that settlement on any part of a lot is notice of an intention to claim the whole lot and is a segregation of it, but there are instances where this rule is inapplicable, and this case would seem to be one. The fact as to which of the parties,—the Cosbys or Avery—located first on the lot, on the day of the opening is left in some doubt, owing to the conflicting testimony; but if it be conceded that Avery occupied a part of the lot slightly in advance of the Cosbys, as was the opinion of your office, he so limited his occupancy then and thereafter as to amount to an abandonment of that part of the lot occupied by the Cosbys. The evidence indicates that his tent was first erected in First street, and afterwards moved so that it was partially on lot 13. He made selection of a certain plat of ground, the boundaries and limits of which he undertook to fix for himself arbitrarily, and which he insisted should control the survey into lots, blocks, and streets, and not be controlled by the survey. The plat of ground thus claimed by him was clearly indicated by measurement and stakes. It includes a small part of the north end of lot 13, and leaves vacant, and outside his claim, all the south end of the lot. If after the survey was made and the boundaries of lot 13 were made clear, Avery had adjusted his claim to the survey, the case might be different; but long after the survey and platting he continued to stand on his rights within the staked limits, and substantially disclaimed whatever was outside the plat indicated by his stakes. (See *Avery et al v. Freeman et al.*, 22 L. D., 505.)

The Cosbys were permitted to both occupy and improve all the south end of the lot, without protest and objection; and Avery and Meyer are now estopped from changing the character of their claim, so as to effect the occupancy and improvements of the Cosbys. From the time of their original location to the time of the hearing in December 1894,

the Cosbys have resided on the lot, paid all city taxes and street assessments, and have expended on the lot about \$700. It was not until July 19, 1894, five years and more after the original settlement that Avery and Meyer amended their application for a deed so as to make it an application for a deed to lot 13, and thus placed themselves in an attitude which would enable them to set up a claim as prior occupants of a small fraction of said lot, for the lot itself. The character of the occupancy of Avery and Meyer, and their acts indicating what they claimed, left out all that part of lot 13 occupied by the Cosbys, and they must be considered as having abandoned it.

Under townsite laws, actual occupancy in person or by a tenant at the date of the townsite entry is a prerequisite to the acquisition of title, and will entitle such occupant to a deed, unless the occupancy appears to be in fraud of the rights of an earlier occupant, whose occupancy has continued.

It is manifest that the Cosbys were occupants of part of lot 13, block 57, on the 2d day of August, 1890, the date of the townsite entry, claiming for and representing themselves, and that they had valuable improvements on the lot, and it is equally clear that Avery and Meyer were also occupants of a part of it on that day, claiming for themselves, and with valuable improvements on it. Looking to the incidents connected with the settlement, improvements and occupancy of the respective parties, I am unable to find that either acted in fraud of the other's rights, so as to make their actual occupancy on the day of the townsite entry of no avail.

Both parties having made valuable improvements, and having acted in good faith, on different ends of the lot, and each having maintained occupancy up to and including the time when the entry was made by the trustees, it seems that such entry must inure to the benefit of the several occupants according to their respective holdings; and it is accordingly held that Avery and Meyer—joint occupants of one part of the lot—and Mary T. Cosby and Joseph D. Cosby—as joint occupants of the other part—are entitled to one deed, in which their rights, according to their respective holdings, is recognized. The finding of your office as to the particular parts of the lot occupied by the parties respectively seems to be supported by the record. The parties will be allowed sixty days within which to file a joint application, as in the case of *Woodson et al. v. Johnson et al.*, before referred to, and failing to make such application, the acceptance of such deed by any one of the parties, for the joint use and benefit of all, according to their several rights, shall close the record as to departmental jurisdiction.

Your office decision is affirmed.

VAN DYKE *v.* LEHRBASS.

Motion for review of departmental decision of April 19, 1897, 24 L. D., 322, denied by Secretary Bliss, June 29, 1897.

CERTIORARI—FAILURE TO APPEAL IN TIME—PETITION.

SPURLOCK ET AL *v.* CRANE.

Where failure to appeal in time is due to accident or mistake, which is satisfactorily explained, certiorari may be allowed, if such action will not result in injury to innocent parties.

The writ of certiorari will not be granted if the petitioner fails to show that the decision complained of is erroneous, and did not render substantial justice in the premises.

Secretary Bliss to the Commissioner of the General Land Office, June 29,
(W. V. D.) 1897. (C. W. P.)

On May 20, 1897, you transmitted an application, on the part of Charles W. Spurlock, for a writ of certiorari, requiring you to certify to the Department the record in the case of the said Spurlock and others against Calvin C. Crane, under the rules of practice.

The land involved is the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 30, T. 27 N., R. 4 E., Perry land district, Oklahoma.

It appears from the papers transmitted that on July 25, 1896, your office affirmed the decision of the local officers, dismissing Spurlock's contest of Calvin C. Crane's homestead entry, for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 30, and on December 3, 1896, your office denied a motion for review of said decision on the part of said Spurlock.

On February 5, 1897, Spurlock filed in the local office an appeal from your office decision of July 25, 1896, and Nicholas Biehler, in whose favor you had decided the case, filed a motion to dismiss said appeal: to which Spurlock's attorneys filed an answer, supported by the affidavit of one of said attorneys, from which it appears that the decision of your office was personally served upon said attorneys on August 14, 1896, and that, on September 12, following, they filed a motion for review and rehearing; that this motion was denied on December 3, following, and notice of decision personally served on the attorneys on December 26, following; that the appeal was not filed until February 5, 1897, sixty-nine days from the day of the service of the decision dismissing the contest, up to and including the day that said appeal was served upon Biehler, for which reason the motion to dismiss the appeal was made. As an excuse for the failure to file and serve the said appeal within the time allowed, it is stated in the affidavit referred to that said attorney was in the habit of making memoranda of cases upon a desk-calendar; that owing to the fact that the time for taking an appeal passed into the year 1897, and a new calendar not being available, he attempted to keep temporary memoranda in a blank book, until he could get a new calendar, and in this way a mistake as to dates occurred.

By your office decision of May 3, 1897, your office sustained the motion to dismiss the appeal, on the ground that the appeal was clearly not filed in time, and refused to forward the appeal to the Department.

In the case of *Dean v. Simmons*, 15 L. D., 527, there was no objection to the granting of the writ, and it was held that an application for certiorari may be allowed in behalf of a party whose failure to appeal in time is due to a mistake that is satisfactorily explained, when such action would not result in injury to innocent parties.

In the case of *Silverman v. Northern Pacific Railroad Company*, 17 L. D., 63, it was held that, appellee having waived his right to insist upon the failure to file the appeal within the time required by the rules of practice, an application for certiorari may be allowed when the failure to appeal within the time has been satisfactorily explained.

In the case of *Julien v. Hunter*, 18 L. D., 151, it is said:

The case of *Dean v. Simmons* (15 L. D., 527), presented a question somewhat similar to this. In that case, the attorney accepted notice of decision on the 24th of March, 1892, but minuted the date of such acceptance upon his contest docket as March 31,—just one week later. His appeal was rejected for not having been filed in time. Upon application for certiorari, the Department held that the writ might be allowed in such a case, where the mistake was satisfactorily explained, and where such action would not result in injury to innocent parties. In that case, there was no objection to the granting of the writ, while in the case at bar there is a formal motion for the dismissal of the appeal. The rule of that case, therefore, cannot be applied here, on account of the exception therein provided for.

But no reason is given why the rule should not be applied, and, in my opinion, where the failure to appeal in time is due to accident or mistake which is satisfactorily explained, as in this instance, certiorari should be allowed, when such action will not result in injury to innocent parties, which it is not pretended would be the case should the writ be granted.

But unless it is shown by the petitioner that the decision complained of was erroneous, certiorari will not be granted, although your office may have erred in declining to transmit an appeal. *Whiteford v. Johnson*, 14 L. D., 67; *Blackwell Townsite v. Miner*, 20 L. D., 544.

It is settled that the concurring findings of the local officers and your office are accepted by the Department, unless shown to be wrong. But it is alleged by the petitioner:

That the Honorable Commissioner, as affiant believes, failed to make a proper examination of the evidence in this case as shown by the record, and failed to make findings upon important facts which are sworn to in the record and are uncontradicted and undisputed, and which if findings had been made thereon would have clearly established the right of your petitioner to said land, in this, to wit, that the Honorable Commissioner failed to note and consider the testimony of the witness W. E. Spurlock as found on pages 71 and 72 of the record, a copy of which testimony is hereto attached, made a part hereof, and marked exhibit "F," and that your petitioner, had in his brief filed before the register and receiver and also in his brief filed before the Honorable Commissioner called attention to this testimony, and pointed out the page of the record on which the same could be found.

It appears from the decision of your office, on the motion of the petitioner for review of your office decision of July 25, 1896, as set out by the petitioner, that the petitioner charged in his motion for review,

among other things, that your office erred "in not finding that he had a camp and a portion of his family on the land from September 16, 1893, until his actual residence," and that you refused to consider the objection because the petitioner failed "to point out any evidence whatever from which the findings of facts as made" by your office "might be in any wise altered."

But the petitioner now adduces extracts, which he alleges are taken from the testimony of his son, W. E. Spurlock, who was examined in his behalf, at the hearing, as proof of the charge that your office failed "to make findings upon important facts which are sworn to in the record and are uncontradicted and undisputed, and which, if findings had been made thereon, would have clearly established" his "right to said land."

The petitioner, in his affidavit of contest, alleges that on September 16, 1893, he settled upon the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 30 and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 31.

No doctrine is better settled than that the notice given by settlement and improvements extends only to the technical quarter section upon which they are located. *Peasley v. Whiting*, 18 L. D., 356; *Miles v. Waller*, 16 L. D., 12; *Staples v. Richardson*, Id., 248; *Pooler v. Johnston*, 13 L. D., 134; *Shearer v. Rhone*, Id., 480; *Hemsworth v. Holland*, 7 L. D., 76; *L. R. Hall*, 5 L. D., 141; *Reynolds v. Cole*, Id., 555. In the case last cited it is said:

The tracts in question lie within that part of said abandoned military reservation. Cole alleged settlement on October 1, 1882, and continuous residence from that date. Reynolds alleged settlement on July 30, 1882, and cultivation of sixteen acres each year since settlement. The conflict between said entries is as to said lots 2 and 3. On appeal from the local office Reynolds asked that a hearing be ordered to determine the truth of his said allegations.

Your office, by letter of December 26, 1885, affirmed the action of the local office in rejecting the application, and refused to order a hearing, as Reynolds did not claim actual residence on the tract, or "state where his improvements lie."

It is clear Reynolds' application can not be allowed as made, for the reason that it conflicts in part with the prior entry of Cole.

On appeal to the Department, he does not claim that any of his improvements are on the land covered by the entry of Cole, nor even that they are in the quarter section containing that entry. I must therefore hold that he has not furnished proper grounds for a hearing to determine his rights as against those of Cole. His improvements may be altogether in section 1. It was held in the case of *L. R. Hall* (5 L. D., 141), that the notice given by settlement and improvement extends only to the quarter section as defined by the public surveys within which they are located.

It is not pretended that the evidence adduced shows that Biehler had actual notice that Spurlock claimed the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 30, and under the decisions cited the notice given by his settlement and improvement on the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 31, extended only to the quarter section upon which they were located, and did not extend to the quarter section in question. If it be assumed that the testimony of W. E. Spurlock, submitted with the petition, is true, does the witness swear that either he or his brother remained on the quarter section

in controversy, after the departure of his father from his claim? He is asked, "Where did you remain while your father was gone to Perry to file?" and replies, "I staid on the claim, most of the time." But he does not say he staid on the quarter section in controversy. "When you left the claim on Wednesday, did you leave any one in charge of it?" "Yes, sir." "Who?" "My brother." But he does not say that his brother staid on the quarter section in dispute. He swears that he returned to the claim on Thursday and brought the lumber with him, but he does not say he brought the lumber upon the quarter section in question. Asked "What improvements, if any, did your father make on this claim on Friday, 22nd day of September, 1893?" he answers: "He built a small house, started a well." Now it will be observed that both the local officers and your office found that he established his residence, not upon section 30, but upon section 31. With what plausibility can it be asserted that these extracts show that in the decision complained of your office failed to make findings upon important facts, which if findings had been made thereon would have clearly established the right of the petitioner to the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 30, the land in controversy, or that they show that the concurring findings of the local officers and your office are wrong.

I am, therefore, of opinion that the petitioner has not shown that the decision complained of was erroneous (14 L. D., 67), or that it did not "render substantial justice in the premises." (20 L. D., 544.)

On the fifth ground of error assigned very little need be said. It is a general rule of law that public officers are presumed to do their duty as the law requires (Lawson on Presumptive Evidence, page 53), and in the absence of evidence to the contrary it must be presumed that the register and receiver rightly performed their duty according to law and the rules of the Department.

For these reasons said petition is denied.

CHARACTER OF LAND—SECOND HEARING.

LEACH ET AL. v. POTTER.*

In a hearing ordered to determine the alleged known mineral character of land embraced in an agricultural entry, made at the conclusion of a prior contest involving the character of the land, the evidence must be confined to discoveries after the date of the first hearing, and prior to the allowance of the entry.

Acting Secretary Reynolds to the Commissioner of the General Land Office, August 28, 1896. (E. B., jr.)

This is an appeal from your office decision of October 10, 1895, in a proceeding to determine whether the land claimed by Merwin Leach, Mary Prosser, Elizabeth Jones, Theodore Etling and Thomas George, and known as the Mammoth and the St. George mining claims, is more

* Not heretofore reported.

valuable for its minerals than for purposes of agriculture. These claims are included within the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, section 26, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lot 1 of the SW. $\frac{1}{4}$ of section 35, T. 8 N., R. 10 E., M. D. M., Sacramento, California, land district, for which tract Frank M. Potter made commuted cash entry No. 4714, September 24, 1894.

As appears from the record the character of the land covered by the Mammoth and St. George (the latter then known as the Thomas George) lode locations has already been the subject of departmental decision (*Etling et al. v. Potter*, 17 L. D., 424). That decision, dated October 17, 1893, which held the land to be more valuable for agricultural purposes than for its minerals, was conclusive as to the character thereof up to the close of the inquiry in that case, which was in June, 1890, and precluded the consideration thereafter of any evidence on that point relating to any period prior to that time (*Stinchfield v. Pierce*, 19 L. D., 12, and *Dargin et al. v. Koch*, 20 L. D., 384). It is a well settled general rule that statutory reservation (section 2318 R. S.) of lands valuable for minerals from sale, except under the mining laws, is operative as between contending mineral and agricultural claimants only as to lands known to be more valuable for their minerals at date of sale, that is, at the date of the certificate of final entry. In view of the said decision and rule, no evidence of any discovery, development, or exploitation on said land, prior to June, 1890, or subsequent to September 24, 1894, was properly admissible or could properly be considered in reaching a judgment in this case.

On September 29, 1894, a few days after Potter's final entry had been made, the mineral claimants named above filed their sworn petition, alleging, among other things, ownership of the Mammoth and St. George lode locations, that the land embraced thereby was more valuable for its minerals than for purposes of agriculture, and was known to be so at date of said entry, that development work and explorations on the location since the last hearing had more clearly demonstrated the existence of gold therein in paying quantities, and that the known character of the land had materially changed by reason thereof since the close of the last inquiry, and asking that a hearing be held to determine the facts in the premises. A hearing was thereupon duly ordered and held, and upon consideration of all the evidence before them, and after their personal inspection of the land, the local officers, December 12, 1894, decided in favor of the mineral claimants and recommended that said lode claims be segregated from the tract entered by Potter and his entry canceled to that extent. Your said office decision reversed the decision of the local office, and hence the appeal by the mineral claimants.

The work done on or in connection with these mining claims during the period between the date of the previous hearing and the date of entry discloses practically nothing new as to their mineral value. The only work on the claims during that period consisted in extending and

deepening, somewhat, certain tunnels and shafts previously begun, to the extent necessary to comply with the law (section 2324 R. S.) requiring not less than one hundred dollars worth of labor or improvement on each mining claim each year. No new discovery of valuable mineral is shown during that period, nor was the exact or approximate value of any ore obtained from either location determined by any test. The "colors" obtained by the crushing and pounding process testified to by witnesses Wilcox and Ball, for the mineral claimants, were not obtained until February, 1895, nor was the milling test of nearly six dollars per ton from samples of ore taken from the St. George made until during that month.

The land is shown to be rough, lying mainly on steep hillsides and of comparatively small value for agricultural purposes, but the evidence in behalf of the mineral claimants does not meet the very reasonable and proper test announced in *Castle v. Womble* (19 L. D., 455), which is, that

where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a mine, the requirements of the statute have been met.

The decision of your office is therefore affirmed.

REPAYMENT—DESERT LAND ENTRY.

JOHN C. ANGELL.

A desert entry of land embraced within a prior pre-emption filing is not an entry "erroneously allowed" within the meaning of the repayment act, though an entry so made is subject to the subsequent assertion of the pre-emptor's right.

If a pre-emption claimant for offered land fails to assert his right of purchase within the statutory period, an intervening desert land entry will defeat said right; and if the entryman thereafter voluntarily relinquishes his entry, he is not entitled to repayment on the ground that his entry was canceled "for conflict."

The provisions of 2362, R. S., and of the act of June 16, 1880, with respect to repayment, contemplate relief only in cases where, for some reason not within the entryman's control, title to the land cannot be passed by the government.

Secretary Bliss to the Commissioner of the General Land Office, June 29,
(W. V. D.) 1897. (F. W. C.)

On January 26, 1897, John C. Angell filed in your office an application bearing date January 25, 1897, for repayment of \$120 paid by him on July 25, 1887, upon making desert land entry No. 771, of the N. $\frac{1}{2}$ and the SW. $\frac{1}{4}$ of Sec. 14, T. 18 S., R. 18 E., Mt. Diablo meridian, Visalia land district, California, containing four hundred and eighty acres.

On February 3, 1897, your office denied Angell's application for repayment.

A motion for review of said decision was denied by your office on March 3, 1897, and thereupon Angell appealed to this Department.

The facts affecting this matter briefly stated are: Prior to any of the filings or entries herein named, the lands involved became what is known as offered lands.

September 24, 1886, Manuel M. Nunes filed in the local office a pre-emption declaratory statement covering the NW. $\frac{1}{4}$ of said section, alleging settlement thereon that day.

November 10, 1886, Antonio S. Nunes filed his pre-emption declaratory statement covering the SW. $\frac{1}{4}$ thereof, alleging settlement October 10, 1886.

July 25, 1887, Angell made desert entry of the land included in the two pre-emption declaratory statements, and also of the NE. $\frac{1}{4}$ of said section.

January 25, 1890, cash certificate was issued to Manuel M. Nunes upon proof and payment under his declaratory statement.

May 26, 1890, Angell filed an affidavit and application for a cancellation of the cash entry of Manuel M. Nunes, stating—

That said township is offered land and had said Nunes any claim to said land he should have presented his proofs on or before September 24, 1887, one year after his alleged settlement on said land. That the proofs of said Manuel M. Nunes were not made nor his entry accepted until forty months after his alleged settlement on said land. I therefore ask that said cash entry . . . be canceled and that my desert entry No. 771 . . . be allowed to remain intact.

No action was taken upon this affidavit and application, for the reason that on June 25, 1890, Angell filed a written withdrawal in which his purpose in so doing is thus stated by him:

Having this day abandoned all my right, title and interest to said land and to the whole of said desert land entry No. 771, do cancel the same of record this day and have sold all my improvements and claim thereto to said Manuel M. Nunes.

The relinquishment referred to was filed the same day in the local office and is as follows:

I, John C. Angell, who on the 25th day of July, 1887, filed in the U. S. Land Office Visalia, Cal., desert land entry No. 771, upon the N. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of Sec. 14, Twp. 18 S., R. 18 E., M. D. M., do hereby abandon and relinquish said desert land entry No. 771, and the land embraced thereby and request that the same be canceled upon the records of the U. S. Land Office.

Witness my hand, this 5th day of May, A. D., 1890.

JOHN C. ANGELL.

This relinquishment bears a certificate showing that its execution was acknowledged by Angell before a notary in San Francisco, on the day it was signed, viz., May 5, 1890.

Upon the filing of the relinquishment, and solely because thereof, Angell's entry was canceled.

At the time of the filing of Angell's relinquishment, and apparently as a part of one transaction, Antonio S. Nunes made homestead entry of the SW. $\frac{1}{4}$, being the same tract theretofore embraced in his pre-

emption declaratory statement, and Manuel M. Nunes made homestead entry of the NE. $\frac{1}{4}$, the remaining tract included in Angell's desert entry.

Under the desert land act (19 Stat., 377), the time for reclaiming the land under the Angell entry would have expired July 25, 1890, so only one month thereof remained when the relinquishment was filed. The fact that the relinquishment was executed and acknowledged May 5, 1890, shows that the abandonment of the entry by Angell was in contemplation before his attempted contest against the cash entry of Manuel M. Nunes.

Instances in which repayment is authorized in cases like this are described in the statute (21 Stat., 287), as follows:

All cases where . . . desert and entries . . . have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed.

The filing of a pre-emption declaratory statement was not an entry of the land. Ever since the enactment of the pre-emption law it has been uniformly held by the land department that the filing of such declaratory statement does not segregate the land involved and does not withdraw it from entry. No decision to the contrary is attempted to be cited. A declaratory statement was an assertion by the pre-emptor of an intention to thereafter enter the land. That intention might be either carried into execution or abandoned. It has been the uniform practice in the land department to permit entries under the homestead, desert and timber-culture laws of land embraced within existing pre-emption declaratory statements. These entries have always been treated as subject to the claim of the pre-emptor, and if he seasonably made his cash entry thereunder, any intervening entry of the same land was thereby defeated. If the pre-emptor failed to make his cash entry, the intervening entryman took the land. As to all persons other than the pre-emptor the intervening entryman had the prior and better right.

The allowance, therefore, of Angell's entry by the local land office was proper. It was not the case of an entry "erroneously allowed" within the meaning of the repayment statute. It was an entry in the *allowance* of which no error was committed.

Angell's desert entry was not "canceled for conflict" but was canceled because of his voluntary relinquishment. Had either of the pre-emption claims rightfully proceeded to final proof, payment and entry before Angell's relinquishment, then, and not until then, there would have been a conflict between such pre-emption entry and the desert entry of Angell. The conflict so resulting would have required the cancellation of the desert entry to the extent that the same included land embraced within the pre-emption entry, and upon such cancellation a right to repayment would have accrued under the statute.

Section 2264 of the Revised Statutes regulating the entry of offered land under the pre-emption law, provides:

When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon and declaring his intention to claim the same under the pre-emption laws; and he shall, moreover, within twelve months after the date of such settlement, make the proof, affidavit, and payment hereinbefore required. If he fails to file such written statement, or to make such affidavit proof and payment within the several periods named above, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

This statute required Manuel M. Nunes and Antonio S. Nunes, respectively, to make proof and payment within twelve months after settlement, in default of which the land became "subject to the entry of any other purchaser." Neither Manuel M. Nunes nor Antonio S. Nunes made proof or payment within the time required. By reason of such failure, the land became subject to the entry of Angell, he being a conditional purchaser under the desert land act. The pre-emptors thereby lost their preference right under their declaratory statements and the better right to the land passed to Angell.

It appears that the local office, notwithstanding this, erroneously permitted Manuel M. Nunes to make proof, payment and cash entry under his declaratory statement on January 25, 1890. As before stated, Angell made application to have this cash entry canceled because of this error, but before it was acted upon he voluntarily withdrew his application, stating that he had sold his claim to the pre-emptor. At the same time he voluntarily relinquished his entire desert entry, the relinquishment being so connected with the immediate entry of the remaining portions of the land as to enforce the belief and conclusion that Angell fully acquiesced in the taking of the land by others. No part of his entry was canceled for conflict and no part thereof could have been so canceled, after the Nunes made default. Had Angell stood upon his rights, the resulting cancellation would not have applied to any part of his entry, but would have destroyed the cash entry of Manuel M. Nunes.

The act of June 16, 1880, as originally introduced in the House of Representatives, authorized repayment:

Where . . . desert land entries . . . have heretofore or shall hereafter be canceled for conflict, *or have been abandoned*, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed.

The Committee on Public Lands recommended that the words "or have been abandoned," be stricken out which was accordingly done by amendment. (Cong. Rec., 2 Sess. 46th Cong., Pt. 4, p. 3594.) This shows that the cancellation of an entry because of the abandonment thereof by the entryman was not intended to make a case for repayment. That a relinquishment is an abandonment needs no demonstra-

tion, but if it did, it would be sufficient in this case to refer to the language of Angell's relinquishment hereinbefore set forth. In the light of the change made in this act during its consideration by Congress, it is clear that a cancellation because of a relinquishment is not a cancellation for conflict.

Counsel for Angell calls attention to section 2362 of the Revised Statutes, and urge that the present application comes within the terms thereof. The section is as follows:

The Secretary of the Interior is authorized, upon proof being made, to his satisfaction, that any tract of land has been erroneously sold by the United States, so that from any cause the sale cannot be confirmed, to repay to the purchaser, or to his legal representatives or assignees, the sum of money which was paid therefor, out of any money in the Treasury not otherwise appropriated.

There was no desert land act until 1877, and the conditional sale made to Angell is not one of the sales in contemplation either when this section was originally enacted, or when it was included within the revision. Desert entries are specifically included in the repayment act of June 16, 1880 (21 Stat., 287), and under these circumstances a question may arise as to whether the later and specific act does not make exclusive provision with reference to repayment in cases of desert entry. However that may be, section 2362 only authorizes repayment where "any tract of land has been erroneously sold by the United States so that, from any cause, the sale cannot be confirmed." The fact that a sale is erroneous is not sufficient to bring it within the statute; it must, also, be one which cannot be confirmed. Obviously, there is no occasion to include the case of an erroneous sale, if, notwithstanding the error, the sale can be confirmed and thereby full title be securely vested in the purchaser. It was not the intention of Congress to authorize repayment in instances where the entryman can obtain full title but does not want it.

What has heretofore been said indicating that Angell's entry was not "erroneously allowed" equally shows that the land was not "erroneously sold." But if it be conceded that the land was "erroneously sold," within the meaning of section 2362, that error, when considered with the subsequent facts in this case, was not such as would prevent confirmation of the sale. Angell's entry could have been completed and the land sold to him under the desert land act, if he had not acquiesced in its going to others. After having obtained the better right to the land he should not be permitted to sell that better right, thereby making it a matter of pecuniary benefit to himself, and at the same time obtain repayment from the government on the theory that he paid for the land and obtained no right thereto.

The purpose of the repayment statutes is to reimburse one for money paid as the purchase price for land, only when, for some reason not within the control of the entryman, title to the land cannot be passed by the government.

It should be observed, that under the act of June 16, 1880, the erroneous allowance of an entry does not alone authorize repayment, the entry must also be one which cannot be confirmed. If, despite the error in its allowance, the entry can be confirmed, there is no reason for repayment, and the statute does not authorize it. The two statutes are in this respect identical. Angell's case does not come within either of them.

Your office decision is hereby affirmed.

SWAZE v. SUPRENANT.

Motion for review of departmental decision of April 21, 1897, 24 L. D., 337, denied by Secretary Bliss, June 29, 1897.

OKLAHOMA TOWNSITES—CHEROKEE OUTLET.
NORTHEAST PERRY.

Townsite entries in the Cherokee Outlet can only be made through townsite boards.

Secretary Bliss to the Commissioner of the General Land Office, June 29, (W. V. D.) 1897. (C. J. W.)

On December 10, 1896, townsite board of trustees No. 6, as successors to board No. 8, filed application in the local land office at Perry, Oklahoma, to purchase and make entry of the SW. $\frac{1}{4}$ of Sec. 14, T. 21 N., R. 1 W., for the benefit of and in trust for the use of occupants thereof, in accordance with the act of May 14, 1890 (26 Stat., 109). After proper notice said board offered final proof, on December 28, 1896, and made cash entry No. 125. On said 28th of December, counsel claiming to represent the occupants of said land appeared and protested against the final proof, cross-examined the witnesses introduced by the board, and introduced testimony which accompanies the final proof and is a part of the record. The local officers dismissed the protest and accepted the final proof, and an appeal was filed in the name of the townsite settlers of Northeast Perry. On February 10, 1897, your office declined to consider said appeal, and approved the final proof offered by the board. A similar appeal has been filed from your office decision.

The land in controversy was a part of the Cherokee Outlet and was originally included in the homestead entry of John J. Malone, and was the subject matter of controversy between certain persons claiming to be townsite settlers and Malone's representatives, which resulted in the cancellation of Malone's entry (23 L. D., 87). The land was at that time within the corporate limits of Perry.

It is said in that case:

For the reasons above given Malone's entry will be canceled, and the corporate authorities of the town of Perry will be advised that upon a proper showing and application, the land may be entered for the several use and benefit of the inhabitants thereof.

The land was treated as set apart and subject to acquisition by the townsite of Perry for the use and benefit of its inhabitants, such inhabitants as were upon the land, having been included within the corporate limits of that town.

One of the grounds of the protest filed is, that the application to make the entry by the board is at the instance of citizens of Perry. The protest is in the form of a petition, and asks for delay in anticipation of changes in the law as to the mode and manner in which townsite entries are to be made. It is said that said entry can be made much more cheaply to the lot occupants through the probate judge than through the townsite board. The protest and appeal contain only grounds which might properly be addressed to Congress in the form of a petition to change the law. This Department has no power to change the law; nor can it suspend public business merely to await desired or contemplated changes. It was announced in instructions issued February 14, 1894 (18 L. D., 122), that townsite entries in the territory known as the Cherokee Outlet could be made only through townsite boards, and that rule has been adhered to, and the local officers as well as your office properly followed it, and overruled the protest in this case. The final proof is satisfactory, and your office decision approving cash entry No. 125, for patenting, is affirmed.

HENLEY ET AL. v. SHARPBACK.

Motion for review of departmental decision of March 25, 1897, 24 L. D., 315, denied by Secretary Bliss, June 29, 1897.

SCHOOL LAND—SETTLEMENT BEFORE SURVEY.

FRANCIS P. CARLISLE.

A purchase, after survey, of the possessory right and improvements of one who settled on school land prior to survey, does not carry with it any right to the land as against the school grant.

Secretary Bliss to the Commissioner of the General Land Office, June 29, 1897.
(W. V. D.) (C. J. G.)

The land involved in this case is the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ Sec. 36, T. 1 S., R. 1 W., Salt Lake City land district, Utah.

Francis P. Carlisle has appealed to this Department from your office decision of December 9, 1895, holding for cancellation his homestead entry for said land.

It appears from a corroborated affidavit filed with said appeal that one Thomas Howard settled on said land in the year 1851 and had continuous residence thereon until the year 1883, when he sold his improvements to one Ephraim Bayliss. The latter resided upon and

cultivated said tract until the year 1887, when he in turn sold his improvements to the appellant herein, Francis P. Carlisle. Carlisle has resided upon and cultivated said land ever since, and has improvements thereon valued at \$2,500.

The land described herein is in a section reserved for school purposes under section 1946 of the Revised Statutes.

The act of February 26, 1859 (11 Stat., 385—now Sec. 2275 R. S.), provides:

That where settlements with a view to pre-emption have been made before the survey of the lands in the field, which shall be found to have been made on sections sixteen or thirty-six, said sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, shall have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by pre-emptors.

It is contended by the appellant that he is protected by the above act. This contention is not well founded. By reference to said act it will be seen that the protection extended therein is limited to those who have made settlement with a view to pre-emption before the survey of the lands in the field. The survey of the land in question was made in the year 1856. This being before Carlisle's settlement he is not protected by the provisions of said act. It is well settled by numerous departmental decisions that "a purchase after survey of the possessory right and improvements of one who settles on school land prior to survey, does not carry with it any right to the land as against the school grant." Hence, the appellant herein, being merely the purchaser of the possessory right and improvements of one who settled prior to survey, does not thereby secure any right to this land as against the school grant. The question is settled by *Gonzales v. French* (164 U. S., 338).

Your office decision is accordingly affirmed.

OKLAHOMA TOWNSITE—TRUSTEES—DISCHARGE.

TOWNSITE BOARD NUMBER SIX.

A townsite board of trustees should not be discharged from any portion of the trust imposed upon it, until the whole purpose of the trust is accomplished, or until such time as it may be relieved entirely from its duties.

Secretary Bliss to the Commissioner of the General Land Office, June 29,
(W. V. D.) 1897. (P. J. C.)

I am in receipt of your office letter ("G") of May 25, 1897, wherein is transmitted certain correspondence of Horace Speed, of Guthrie, Oklahoma, and townsite board No. 6.

It appears that Mr. Speed addressed said board as to the advisability of the board asking for its discharge as a board for further service as to the south half of East Guthrie. In so far as the government would

be interested in the discharge of the board from this service, it is stated that all their duties in relation to this particular portion of Guthrie are at an end, for the reason that all the lots have been transferred. In addition to this, it is suggested that if the board were discharged certain litigation now pending in the courts of the Territory, wherein is involved the title to the south half of East Guthrie, would lapse.

By letter of May 18, 1897, to Mr. Speed, the chairman of the board doubted the advisability of the board making such a recommendation to the Secretary of the Interior.

On May 19, Mr. Speed forwarded the former correspondence with the request that the board be discharged as to the portion of East Guthrie mentioned, and on its receipt the matter was, by the First Assistant Secretary, referred to your office for an early report. Your said office letter of May 25, is in answer to this request.

It appears that the predecessors to the present board made entry of the west half of Sec. 9, Tp. 16 N., R. 2 W., as the townsite of East Guthrie, under the act of May 14, 1890 (26 Stat., 109), and the land was patented to them as trustees, in trust for the several use and benefit of the occupants thereof according to their respective interests.

In your said office letter it is said:

It appears that Mr. Speed's statement, that the duties of the board as to the south half of East Guthrie are ended, is correct, all lot occupants in same having been ascertained and deeds issued to them. As to said land, then, if the trust, by the execution of the power by the trustees, has ended, the action of this office attempting to discharge them from such trust would be of no avail.

But, if the members of said board could be considered to yet be trustees for said south half of East Guthrie, and it be yet necessary to formally absolve them from their trust as to said land before such trust could cease, there would be an obstacle in the way of taking that action. The trustees of townsite board No. 6 were appointed trustees for the whole townsite of East Guthrie. They should not be discharged, then, from any portion of said trust until the whole purpose of the trust is accomplished, and said trustees yet have work in the north half of the townsite from which it would be impracticable to discharge them.

For the reasons stated above, and for the further reason that I hold it doubtful if the Department would be justified in granting a request of a nature calculated to interfere with the administration of justice by the courts, I have respectfully to report that I think Mr. Speed's request should be denied.

I concur in your recommendation. Aside from the impropriety of the Department taking any action that might interfere with the status of a case in the courts, it seems to me that the board should not be relieved of its duties until the trust is executed. By operation of law the board would not have any jurisdiction, perhaps, over any lots, title to which had passed from it, but the trust reposed in it is an enduring one as long as there remains anything to be done, or until such time as it may be relieved entirely from its duties. Because one lot or any other portion of the townsite has been conveyed and the board's jurisdiction thus ended as to the portion so conveyed, is no reason for making a formal order of discharge. If the transmission of title to any

portion of the townsite operates to divest the board's jurisdiction as to said portion, such an order is not needed, would be superfluous, and the making thereof would unnecessarily consume time which is required for other purposes.

HOMESTEAD CONTEST—SETTLEMENT RIGHTS.

HALL v. MITCHELL.

Acts of settlement performed by one claiming the right to make a second homestead entry, prior to his application for the exercise of such privilege, are not invalid, if it is found that the settler is in fact entitled to make such entry.

The case of Cawood v. Dumas, 22 L. D., 586, cited and distinguished.

A contest against a homestead entry, on the ground of priority of settlement, must fail, if the allegation is not made good by some preponderance of the evidence.

Secretary Bliss to the Commissioner of the General Land Office, June 30,
(W. V. D.) 1897. (C. J. W.)

W. N. Mitchell, on September 19, 1893, made homestead entry, No. 277, for NE. $\frac{1}{4}$, Sec. 11, T. 21 N., R. 2 E., at Perry, Oklahoma, which tract was a part of the Cherokee Outlet, opened to settlement September 16, 1893. On September 27, 1893, Aurelius C. Hall filed affidavit of contest against said entry, alleging prior settlement and petition to make second homestead entry. A hearing was had, at which both parties appeared, and the plaintiff submitted his testimony, at the close of which defendant moved to dismiss the contest on the ground that plaintiff was not a qualified settler at the time of his alleged settlement. This motion was sustained by the local officers, they holding that Hall was disqualified by reason of his having passed over a part of the Cherokee Outlet subsequent to March 3, 1893, and prior to August 19, 1893, and that he had made homestead entry on October 28, 1891, for the NW. $\frac{1}{4}$, Sec. 33, T. 16 N., R. 5 E., at Guthrie, Oklahoma, which he subsequently relinquished. This action was appealed from, and on February 2, 1895, your office reversed the local officers and directed that the defendant be allowed to submit his testimony, and that a decision be then rendered on the merits of the case. This hearing was duly had, and defendant submitted his testimony, and plaintiff submitted rebutting testimony, and on June 20, 1895, the local officers rendered a decision in favor of defendant.

From this decision plaintiff appealed, and on February 20, 1896, your office modified said decision, substituting therefor, an equitable division of the land between the parties. From this decision both parties have appealed. Each party insists that he was the first settler and therefore entitled to the whole tract, and this is the vital issue in the case. Each party raises a collateral issue against the other, Mitchell insisting that Hall was not qualified to make settlement because his alleged settlement antedated his application to make second homestead

entry, and Hall insisting that Mitchell performed no acts on the land which would constitute settlement until his return to it on the 21st of September, 1893. These propositions embody the substance of the contentions of the parties.

The collateral questions raised will be first disposed of.

Your office affirmed the local officers, in holding as a matter of law that Hall was not disqualified to make settlement, because of having once exercised his right of entry. If this was error then Mitchell's entry would antedate Hall's application to make second entry. The recent case of *Cawood v. Dumas* (22 L. D., 585) is cited in support of the contention that Hall's acts of settlement, antedating his formal application to make second entry, were illegal as against the intervening rights of Mitchell, whether he was held to be entitled to make second entry or not. Reference to the facts in the case cited will show, that Cawood was asking to amend an entry then of record, by substituting for the land entered, the tract on which Dumas had settled. It was not an application to make second entry. In the case of *Heiskell v. McDowell* (23 L. D., 63), the question at issue was passed upon and it was therein held:

If one in good faith, claiming the right to make a second homestead entry settles upon land subject to entry and applies for the restoration of his homestead right and permission to enter the land so settled upon and is adjudged to be entitled to make such entry, such judgment validates his acts of settlement and removes from them the presumption of invalidity.

The two cases cited are not in conflict. The rule in the *Cawood* case applies to uncanceled entries, and where third parties might be affected. The rule in the other case applies, where the previous entry has been canceled, and the question is between the applicant and the government as to whether he shall be permitted to make a second entry. The grant or refusal of the right in such cases will depend upon the good faith of the applicant and the cause of the loss of the first entry, and in its settlement only the applicant and the government are interested. The grounds on which Hall claimed this right were, it is believed, sufficient to entitle him to it, and your office properly so held. In reference to the contention that Mitchell failed to perform any act of settlement on the land on the day of the opening, your office found that both parties performed acts of settlement on the day of the opening, that both parties acted in good faith, and that the first acts of each were so nearly at the same time, as to prevent a conclusion as to which was the first. This includes an affirmative finding as to the sufficiency of the acts of both on the day of the opening, and leaves unsettled only the order of time in which they arrived on the land and claimed it.

Your office properly held that each performed sufficient acts on the day of the opening to be the basis of a valid claim, if followed up. The evidence is voluminous, but unfortunately much of it is immaterial to

the main matter to be determined. There is substantial concurrence between your office and the local office in the finding of specific facts, so far as they are mentioned and enumerated, but there is some variance in the deductions drawn from the facts. Both parties made the race on horseback, and both are shown to have been well mounted. They started from the south line of the Outlet,—Hall at a point some distance east of a line drawn north to the land in controversy, and Mitchell from a point about opposite the east line of the tract due north. Hall thinks he reached the claim 33 or 34 minutes after 12 o'clock, but did not examine his watch and could not be certain. He immediately staked the claim; soon after, he laid two foundations, one of which proved to be over the line on another claim. He remained on the claim until the middle of the afternoon of the next day, when he went to Perry, returning on the 18th; was delayed by legal proceedings from building, but commenced building house middle of January and completed it last of that month. Has a house and barn and eighty acres fenced with wire. Resides on the tract. Mitchell claims to have traveled directly north over the shortest route, and to have reached and staked the claim at 12.36 P. M., by watch set by soldier's time at the signal point before starting, laid a foundation, and left that evening at 3 P. M., for Perry, and got number to file on; returned on the 21st and cut logs for a house; on the 23d did some plowing, and fenced the claim with wire October 3, and 4, 1893. Has a dwelling house with seven rooms, a barn and hen-house, and forty to fifty acres broken; lives with his family on the claim.

The record has been carefully examined with a view to determining the order of the arrival of the parties on the tract, and the precise time at which each arrived. The exact time of Hall's arrival is not so definitely fixed as that of Mitchell. Mitchell is corroborated as to the time of his arrival, and some of Hall's witnesses corroborate him in opinion as to the time of his arrival, but the matter is left in doubt. The witnesses who testify for Hall say that they did not see Mitchell on the claim at that time, and those who testify for Mitchell did not see Hall. This merely negative testimony is weak and unsatisfactory. Your office expressed the opinion that the record left great doubt as to which party reached the land first. After a careful perusal of it, I am at least unable to find any preponderance in favor of Hall, and the entry must stand.

Your office decision, directing an equitable division of the land, was rendered before departmental decision in the case of *Sumner v. Roberts* (23 L. D., 201), which changes the rule in this class of cases, and it is therefore reversed, and defendant's entry held intact.

TIMBER CUTTING—EXPORTATION.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 29, 1897.

To Special Agents of the General Land Office.

GENTLEMEN: Your special attention is called to the fact that, in various acts of Congress relating to timber on the public domain, wherein authority is given to cut or remove such timber for any use or purpose whatever, it is expressly provided that such timber, and the products thereof, shall be consumed in the State or Territory in which the same is cut, and shall not be exported or transported out of such State or Territory. Yet numerous complaints have been received in this office that the provisions of law in this respect are being openly, wilfully and flagrantly violated by railroad companies, mining corporations and others, and that the special agents of this office make little, if any, attempt to prevent the same, or to secure evidence upon which this office can recommend the institution of proper legal proceedings against the parties guilty thereof.

You are, therefore, hereby expressly and imperatively directed to, hereafter, use your utmost endeavors to detect and prevent any such violations of law in the State or Territory in your charge, and to this end you will visit the several shipping points in the State or Territory in which you are located and make personal inspection of all shipments of timber and logs or any of the products thereof; ascertain the quantity in each shipment, the name of the shipper and to whom consigned, and all facts in regard to same that can be ascertained, keeping proper and full notes of all information acquired, with names and addresses of witnesses, etc.; you will then proceed to trace the timber, or its product, back, as far as possible, to its original condition and the source from which it was procured, and upon completion of the work, will report all of the facts to this office, on form 4-478, for its action. Where you have reliable evidence that any timber cut from public lands, or any product of such timber, is being, or about to be exported or transported out of the State or Territory where cut, you will notify all parties in interest, including the railroad or transportation company, in writing, that such shipment is in violation of law and forbid them from proceeding further therein, and will report your action to this office, submitting therewith evidence of service of notice on the several parties.

In all such cases, where you have knowledge that parties who have permits, or any special authority from this Department, to cut or remove timber on the public domain, are exporting or transporting any timber or any product thereof, out of the State or Territory, you will at once report them to this office in order that their permits or authority can be revoked and canceled.

It is the determination of this Department to put a stop to the exportation or transportation of the public timber or the products thereof, from the State or Territory in which the same is produced, and the special agents must direct their very best efforts to accomplish this purpose. Any special agent who is found derelict in his duty in this respect, will be subject to summary dismissal from the service.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved,
THOS. RYAN,
Acting Secretary.

SURVEY OF FOREST RESERVATIONS—ACT OF JUNE 4, 1897.

INSTRUCTIONS.

The phrase "public lands adjacent thereto," as used in the act of June 4, 1897, in making provision for the survey of forest reserves, should be construed to mean townships which actually adjoin said reserves, and such townships are to be surveyed under the supervision of the Director of the Geological Survey.

Secretary Bliss to the Commissioner of the General Land Office, June 30,
(W. V. D.) 1897. (W. A. E.)

The Department is in receipt of your office letter of June 22, 1897, asking to be advised as to the proper construction of the phrase, "and including public lands adjacent thereto," as used in the act of Congress approved June 4, 1897, entitled

An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes.

Said act appropriates:

For the survey of the public lands that have been or may hereafter be designated as forest reserves by executive proclamation, under section twenty-four of the act of Congress approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes," and including public lands adjacent thereto, which may be designated for survey by the Secretary of the Interior, one hundred and fifty thousand dollars, to be immediately available.

The act further provides that:

The surveys herein provided for shall be made, under the supervision of the Director of the Geological Survey, by such person or persons as may be employed by or under him for that purpose, and shall be executed under instructions issued by the Secretary of the Interior.

As the surveys of these timber reservations are to be made under the supervision of the Director of the Geological Survey, it is necessary that a definite limit be fixed in regard to the "public lands adjacent thereto" in order to prevent conflict between such surveys and those made under the immediate supervision of the surveyors-general.

It is suggested by your office that the surveyors-general be allowed to contract for surveys in all townships which do not actually adjoin the forest reservations. This would leave one tier or range of townships or fractional townships (as the case might be, according to the order setting apart the reservations) over which any necessary surveys may be extended under the supervision of the Director of the Geological Survey as "lands adjacent thereto," while all other lands would clearly be subject to survey under the regular appropriation, and the supervision of the surveyors-general.

The suggestion seems to be a good one. The phrase "public lands adjacent thereto," as used in said act, is accordingly construed to mean townships which actually adjoin the forest reservations, and such townships are to be surveyed under the supervision of the Director of the Geological Survey.

RULES AND REGULATIONS GOVERNING FOREST RESERVES ESTABLISHED
UNDER SECTION 24, ACT OF MARCH 3, 1891.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 30, 1897.

1. Under the authority vested in the Secretary of the Interior by the act of Congress, approved June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," to make such rules and regulations and establish such service as will insure the objects for which forest reservations are created under section 24 of the act of March 3, 1891 (26 Stat., 1095), the following rules and regulations are hereby prescribed and promulgated:

OBJECT OF FOREST RESERVATION.

2. Public forest reservations are established to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow.

3. It is the intention to exclude from these reservations, as far as possible, lands that are more valuable for the mineral therein, or for agriculture, than for forest purposes; and where such lands are embraced within the boundaries of a reservation, they may be restored to settlement, location, and entry.

PENALTIES FOR VIOLATION OF LAW AND REGULATIONS.

4. The law under which these regulations are made provides, that any violation of the provisions thereof, or of any rules and regulations thereunder, shall be punished as is provided for in the act of June 4,

1888 (25 Stat., 166), amending section 5388 of the Revised Statutes, which reads as follows:

That section fifty-three hundred and eighty-eight of the Revised Statutes of the United States be amended so as to read as follows: "Every person who unlawfully cuts, or aids or is employed in unlawfully cutting, or wantonly destroys or procures to be wantonly destroyed, any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than five hundred dollars or be imprisoned not more than twelve months, or both, in the discretion of the court."

This provision is additional to the penalties now existing in respect to punishment for depredations on the public timber. The Government has, also, all the common-law civil remedies, whether for the prevention or redress of injuries, which individuals possess.

5. The act of February 24, 1897 (29 Stat., 594), entitled "An act to prevent forest fires on the public domain," provides,

That any person who shall wilfully or maliciously set on fire, or cause to be set on fire, any timber, underbrush, or grass upon the public domain, or shall carelessly or negligently leave or suffer fire to burn unattended near any timber or other inflammable material, shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any district court of the United States having jurisdiction of the same, shall be fined in a sum not more than five thousand dollars or be imprisoned for a term of not more than two years, or both.

SEC. 2. That any person who shall build a camp fire, or other fire, in or near any forest, timber, or other inflammable material upon the public domain, shall, before breaking camp or leaving said fire, totally extinguish the same. Any person failing to do so shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any district court of the United States having jurisdiction of the same, shall be fined in a sum not more than one thousand dollars, or be imprisoned for a term of not more than one year, or both.

SEC. 3. That in all cases arising under this act the fines collected shall be paid into the public-school fund of the county in which the lands where the offense was committed are situate.

Large areas of the public forests are annually destroyed by fire, originating in many instances through the carelessness of prospectors, campers, hunters, sheep herders, and others, while in some cases the fires are started with malicious intent. So great is the importance of protecting forests from fire, that this Department will make special effort for the enforcement of the law against all persons guilty of starting or causing the spread of forest fires in the reservations in violation of the above provisions.

6. The law of June 4, 1897, for forest reserve regulations also provides, that

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations; except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

PUBLIC AND PRIVATE USES.

7. It is further provided, that

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church.

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

8. The public in entering, crossing and occupying the reserves, for the purposes enumerated in the law, are subject to a strict compliance with the rules and regulations governing the reserves.

9. Private wagon roads and county roads may be constructed over the public lands in the reserves wherever they may be found necessary or useful, but no rights shall be acquired in said roads running over the public lands as against the United States. Before public timber, stone, or other material, can be taken for the construction of such roads, permission must first be obtained from the Secretary of the Interior. The application for such privilege should describe the location and direction of the road, its length and width, the probable quantity of material required, the location of such material, and its estimated value.

10. The permission to occupy public lands in the reserves for schoolhouses and churches, as provided for in the law, is merely a privilege, and is subject to any future disposition that may be made of such tracts by the United States.

11. The right of way in and across forest reservations for irrigating canals, ditches, flumes and pipes, reservoirs, electric power purposes, and for pipe lines, will be subject to existing laws and regulations.

12. Under the term "to regulate their occupancy and use", the Secretary of the Interior is authorized to grant such licenses and privileges, from time to time, as may seem to him proper and not inconsistent with the objects of the reservations nor incompatible with the public interests.

13. The pasturing of live stock on the public lands in forest reservations will not be interfered with, so long as it appears that injury is not being done to the forest growth, and the rights of others are not thereby

jeopardized. The pasturing of sheep is, however, prohibited in all forest reservations, except those in the States of Oregon and Washington, for the reason that sheep-grazing has been found injurious to the forest cover, and therefore of serious consequence in regions where the rainfall is limited. The exception in favor of the States of Oregon and Washington is made because the continuous moisture and abundant rain-fall of the Cascade and Pacific Coast ranges make rapid renewal of herbage and undergrowth possible. Owners of sheep are required to make application to the Commissioner of the General Land Office for permission to pasture, stating the number of sheep and the location on the reserves where it is desired to graze. Permission will be refused or revoked whenever it shall appear that sheep are pastured on parts of the reserves specially liable to injury, or upon and in the vicinity of the Bull Run reserve, Crater Lake, Mount Hood, Mount Rainier, or other well-known places of public resort or reservoir supply. Permission will also cease upon proof of neglect as to the care of fires made by herders, or of the violation by them of any of the forest reserve regulations.

RELINQUISHMENT OF CLAIMS.

14. The law provides that where a tract within a forest reservation is covered by an unperfected bona fide claim, or by a patent, the settler or owner may, if he so desires, relinquish the tract to the United States and select in lieu thereof a tract of vacant public land outside of the reservation, open to settlement, not exceeding in area the tract relinquished. No charge is to be made for placing the new entry of record. This is in consideration of previous fees and commissions paid. Where the entry is in lieu of an unperfected one, the necessary fees in the making of final proof and issuance of certificate will be required. Where the entry is based on an unsurveyed claim, as provided for in paragraph 17 hereof, all fees and commissions attending entry must be paid, none having been paid previously.

15. Where an application is made for change of entry under the above provision, it must be filed in the land office for the district in which the lieu selection lies. The application must describe the tract selected and the tract covered by the unperfected entry, and must be accompanied by a formal relinquishment to the United States of all right, title and interest in and to the tract embraced in said entry. There must also be filed with the application an affidavit, corroborated by at least two witnesses cognizant of the facts, showing the periods and length of claimant's residence on his relinquished claim, as credit for the time spent thereon will be allowed under the new entry in computing the period of residence required by law. Residence and improvements are requisite on the new entry, the same as on the old, subject only, in respect to residence, to a deduction of the period covered by the relinquished entry.

16. Where final certificate or patent has issued, it will be necessary

for the entryman or owner thereunder to execute a quit-claim deed to the United States, have the same recorded on the county records, and furnish an abstract of title, duly authenticated, showing chain of title from the Government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for.

17. In case a settler on an unsurveyed tract within a forest reservation desires to make a change of settlement to land outside of the reservation and receive credit for previous residence, he should file his application as provided for in paragraph 15, including the affidavit as to residence therein required, and describing his unsurveyed claim with sufficient accuracy to enable the local land officers to approximately determine its location.

18. All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with report as to the status of the tract applied for.

LOCATION AND ENTRY OF MINERAL LANDS.

19. The law provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry", notwithstanding the reservation. This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner.

20. Owners of valid mining locations made and held in good faith under the mining laws of the United States and the regulations thereunder, are authorized and permitted to fell and remove from such mining claims any timber growing thereon, for actual mining purposes in connection with the particular claim from which the timber is felled or removed. (For further use of timber by miners, see below under heading "Free Use of Timber and Stone".)

FREE USE OF TIMBER AND STONE.

21. The law provides, that

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

This provision is limited to persons resident in forest reservations who have not a sufficient supply of timber or stone on their own claims or lands for the purposes enumerated, or for necessary use in develop-

ing the mineral or other natural resources of the lands owned or occupied by them. Such persons, therefore, are permitted to take timber and stone from public lands in the forest reservations under the terms of the law above quoted, strictly for their individual use on their own claims or lands owned or occupied by them, but not for sale or disposal, or use on other lands, or by other persons: *Provided*, that where the stumpage value exceeds one hundred dollars, application must be made to and permission given by the Department.

SALE OF TIMBER.

22. The following provision is made for the sale of timber within forest reservations in limited quantities:

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists; payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make a report in writing to the Commissioner of the General Land Office and to the receiver in the land office in which such reservation shall be located of his doings in the premises.

The sale of timber is optional, and the Secretary may exercise his discretion at all times as to the necessity or desirability of any sale.

23. While sales of timber may be directed by this Department without previous request from private individuals, petitions from responsible persons for the sale of timber in particular localities will be considered. Such petitions must describe the land upon which the timber stands by legal subdivisions, if surveyed; if unsurveyed, as definitely as possible by natural land marks; the character of the country, whether rough, steep or mountainous, agricultural or mineral, or valuable chiefly for its forest growth; and state whether or not the removal of the timber would result injuriously to the objects of forest reservation. If any of the timber is dead, estimate the quantity in feet, board measure, with

the value, and state whether killed by fire or other cause. Of the live timber, state the different kinds and estimate the quantity of each kind in trees per acre. Estimate the average diameter of each kind of timber, and estimate the number of trees of each kind per acre above the average diameter. State the number of trees of each kind above the average diameter it is desired to have offered for sale, with an estimate of the number of feet, board measure, therein, and an estimate of the value of the timber as it stands. These petitions must be filed in the proper local land office, for transmission to the Commissioner of the General Land Office.

24. Before any sale is authorized, the timber will be examined and appraised, and other questions involved duly investigated, by an official designated for the purpose; and upon his report action will be based.

25. When a sale is ordered, notice thereof will be given by publication by the Commissioner of the General Land Office, in accordance with the law above quoted; and if the timber to be sold stands in more than one county, published notice will be given in each of the counties, in addition to the required general publication.

26. The time and place of filing bids, and other information for a correct understanding of the terms of each sale, will be given in the published notices. Timber is not to be sold for less than the appraised value, and when a bid is accepted a certificate of acceptance will be issued by the Commissioner of the General Land Office to the successful bidder, who, at the time of making payment, must present the same to the receiver of public moneys for the land district in which the timber stands. The Commissioner of the General Land Office must approve all sales, and he may, in sales in excess of five hundred dollars in value, make allotments of quantity to several bidders at a fixed price, if he deems proper, so as to avoid monopoly. The right is also reserved to reject any or all bids. A reasonable cash deposit with the proper receiver of public moneys, to accompany each bid, will be required.

27. Within thirty days after notice to a bidder of an award of timber to him, payment must be made in full to the Receiver for the timber so awarded. The purchaser must have in hand the receipt of the Receiver for such payment before he will be allowed to cut, remove, or otherwise dispose of the timber in any manner. The timber must all be cut and removed within one year from the date of the notice by the Receiver of the award; failing to so do, the purchaser will forfeit his right to the timber left standing or unremoved and to his purchase money.

28. Sixty days notice must be given by the purchaser, through the local land office, to the Commissioner of the General Land Office of the proposed date of cutting and removal of the timber, so that an official may be designated to supervise such cutting and removal, as required by the law. Upon application of purchasers, permits to erect temporary sawmills for the purpose of cutting or manufacturing timber purchased

under this act may be granted by the Commissioner of the General Land Office, if not incompatible with the public interests. Instructions as to disposition of tops, brush and refuse, to be given through the supervisors in each case, must be strictly complied with, as a condition of said cutting and manufacture.

29. The act provides, that the timber sold shall be used in the State or Territory in which the reservation is situated, and is not to be exported therefrom. Where a reservation lies in more than one State or Territory, this requires that the timber shall be used in the State or Territory where cut.

30. Receivers of Public Moneys will issue receipts in duplicate for moneys received in payment for timber, one of which will be given the purchaser, and the other will be transmitted to the Commissioner of the General Land Office in a special letter, reference being made to the letter from the Commissioner authorizing the sale, by date and initial, and with title of case as therein named. Receivers will deposit to the credit of the United States all such moneys received, specifying that the same are on account of sales of public timber on forest reservations under the act of June 4, 1897. A separate monthly account-current (form 4-105) and quarterly condensed account (form 4-104) will be made to the Commissioner of the General Land Office, with a statement in relation to the receipts under the act as above specified.

31. Special instructions will be issued for the guidance of officials designated to examine and appraise timber, to supervise its cutting and removal, and for carrying out other requirements connected therewith.

BINGER HERMANN,
Commissioner.

Approved, June 30, 1897,
C. N. BLISS,
Secretary.

The text of the law under which the above rules and regulations are prescribed is as follows:

[PUBLIC—No. 2.]

AN ACT making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, for the objects hereinafter expressed, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, namely:

* * * * *

For the survey of the public lands that have been or may hereafter be designated as forest reserves by Executive proclamation, under section twenty-four of the Act of Congress approved March third, eighteen hundred and ninety-one, entitled "An Act to repeal timber-culture laws, and for other purposes," and including public lands adjacent thereto, which may be designated for survey by the Secretary of the Interior, one hundred and fifty thousand dollars, to be immediately available: *Provided*, That to remove any doubt which may exist pertaining to the authority of

the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests: *Provided*, That the Executive orders and proclamations dated February twenty-second, eighteen hundred and ninety-seven, setting apart and reserving certain lands in the States of Wyoming, Utah, Montana, Washington, Idaho, and South Dakota as forest reservations, be, and they are hereby, suspended, and the lands embraced therein restored to the public domain the same as though said orders and proclamations had not been issued: *Provided further*, That lands embraced in such reservations not otherwise disposed of before March first, eighteen hundred and ninety-eight, shall again become subject to the operations of said orders and proclamations as now existing or hereafter modified by the President.

The surveys herein provided for shall be made, under the supervision of the Director of the Geological Survey, by such person or persons as may be employed by or under him for that purpose, and shall be executed under instructions issued by the Secretary of the Interior; and if subdivision surveys shall be found to be necessary, they shall be executed under the rectangular system, as now provided by law. The plats and field notes prepared shall be approved and certified to by the Director of the Geological Survey, and two copies of the field notes shall be returned, one for the files in the United States surveyor-general's office of the State in which the reserve is situated, the other in the General Land Office; and twenty photolithographic copies of the plats shall be returned, one copy for the files in the United States surveyor-general's office of the State in which the reserve is situated; the original plat and the other copies shall be filed in the General Land Office, and shall have the facsimile signature of the Director of the Survey attached.

Such surveys, field notes, and plats thus returned shall have the same legal force and effect as heretofore given the surveys, field notes, and plats returned through the surveyors-general; and such surveys, which include subdivision surveys under the rectangular system, shall be approved by the Commissioner of the General Land Office as in other cases, and properly certified copies thereof shall be filed in the respective land offices of the district in which such lands are situated, as in other cases. All laws inconsistent with the provisions hereof are hereby declared inoperative as respects such survey: *Provided, however*, That a copy of every topographic map and other maps showing the distribution of the forests, together with such field notes as may be taken relating thereto, shall be certified thereto by the Director of the Survey and filed in the General Land Office.

All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said act, shall be as far as practicable controlled and administered in accordance with the following provisions:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may hereafter be set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions

of this Act or such rules and regulations shall be punished as is provided for in the Act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists; payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing to the Commissioner of the General Land Office and to the receiver in the land office in which such reservation shall be located of his doings in the premises.

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation,

and for that purpose may occupy any part of said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church.

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.

* * * * *

Approved, June 4, 1897.

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the protection of entrymen, under the rulings then in force as to the date when the rights of the company attached, should not be defeated by a changed ruling as to the attachment of rights under the grant, where the lands so selected have been sold by the company, and the grant is not enlarged by the approval of the selection.	381	The right of purchase under section 5 can not be recognized, if the bona fide character of the conveyance, under which the applicant claims, is not established ..	482
ACT OF APRIL 21, 1876.		The right to reimbursement under the act of March 3, 1887 (24 Stat., 550), can not be recognized if the title conveyed by the government is paramount to the claim of the railroad company.....	64
The provisions of section 2 are not restricted to persons who made entries under section 1 of said act, but apply, in the event of abandonment of such original entrymen, to cases where, "under the decisions and rulings of the Land Department," the lands covered by such original entries have been "reentered by pre-emption or homestead claimants who have complied with the laws governing pre-emption and homestead entries," and submitted satisfactory proof of such compliance.....	119	ACT OF SEPTEMBER 29, 1890.	
An entry allowed, under the rulings and decisions of the Land Department, of land to which a homestead claim had attached prior to notice of withdrawal on general route, that remained of record till after definite location, and was then abandoned, is within the confirmatory provisions of section 2, though made after the passage of said act	318	No right is acquired by a contest against an entry of lands reserved on account of a railroad grant, that will defeat the right of the entryman, who is in possession as a licensee, to purchase the land under the provisions of section 3, and the amendatory act of January 23, 1896.....	406
Railroad Land.		Records.	
ACT OF MARCH 3, 1887.		An attorney in good standing before the Land Department is entitled to inspect reports of a special agent on which final action has been taken by the General Land Office adverse to the interests of his client	379
The right of purchase under section 5 is not defeated by a prior adverse application to enter under which no settlement right is asserted	42	A request for information as to the cost of certified copies of specified papers or, in the General Land Office, is entitled to a response, with such information as may of necessity be required to form the basis for a request for an exemplification of the.	415
Land subject to indemnity selection, and sold to a purchaser in good faith, as a part of the grant, may be purchased under section 5, though no selection of the land was made by the company	42	Rehearing.	
Section 5 does not confer upon a purchaser from a railroad company, where the title of the company fails, the right to purchase from the government land known to be valuable for its mineral	172	See <i>Practice</i> .	
The status of an applicant to perfect title under section 5 as a "bona fide purchaser," is not affected by the fact that he holds under a quitclaim deed, or that said deed was executed in the consummation of an agreement for the exchange of property, nor by the further fact that prior to his purchase from the company he had been receiver of the land district within which the land is situated.....	409	Relinquishment.	
A "bona fide purchaser" from a railroad company of less than a legal subdivision is entitled to purchase such tract from the government under said section 5, and receive patent therefor; but if a survey of said tract is necessary, prior to the issuance of patent, the expense thereof should be borne by the applicant.....	410	Executed for the benefit of one holding a confidential and fiduciary relation to the entryman can not be recognized as of any validity in the presence of a just and equitable adverse claim.....	177
		Can not be held to be the result of a contest which had, prior to the, been finally decided in favor of the entryman.	428
		Executed by the guardian of an insane entryman, under the direction of a probate court, is unauthorized by law and invalid.....	494
		Repayment.	
		On application for, under an entry canceled for fraud, the applicant will not be permitted to go back of the judgment of cancellation and show that in fact there was no fraud.....	493
		A final decision under which a desert-land entry is canceled, on account of the non-desert character of the land, can not be impeached collaterally on application for	536
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		If a pre-emption claimant for offered land fails to assert his right of purchase	

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within the statutory period, an interven- ing desert-land entry will defeat said right; and if the entryman thereafter voluntarily relinquishes his entry, he is not entitled to, on the ground that his entry was canceled "for conflict".....	575	Of the fees and commissions paid on an entry will not be allowed where the entry is relinquished on account of the undesir- able character of the land and a second entry made.....	255
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Settlement.		Of a homesteader, who dies prior to the expiration of the time given for the assertion of his right, without having made application to enter, inures to the benefit of his widow; and her subsequent remarriage will not defeat her claim as the successor to the right of her deceased husband	181
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A hearing will not be ordered on an allegation that a tract of land, embraced within a certified list of State selections, was not, on account of its prior known mineral character, intended to be granted to the State, except upon a strong prima facie showing in support of such allegation	486	dence of the same character, as required to entitle the State to lands under its grant	231
Station Grounds.		By the act of March 2, 1849, all the swamp lands in the State of Louisiana were granted to said State, except lands bordering on streams, rivers, and bayous, which were treated by Congress as theretofore reclaimed from their swampy character, and falling within the provisions of the act of February 20, 1811, which gave to said State five per cent of the proceeds of their sale in order to provide a fund for their reclamation	231
See <i>Right of Way</i> .		At the date of the passage of the general swamp land act of September 28, 1850, there were no lands in the State of Louisiana subject to the operation of said act, as all of the swamp land had, prior thereto, been granted to said State by the special act of 1849; and it therefore follows that the State is not included within the indemnity provisions made by the act of March 2, 1855, for said provisions were specifically limited to States included in the general act	231
Statutes.		The grant of, does not include alternate reserved sections within the limits of a prior grant to the State for canal purposes	522
(See <i>Acts of Congress cited and construed</i> , page xx.)		Under section 2488, R. S., the return of land as swamp and overflowed is conclusive evidence as to the character of the land so returned and represented on the township plat, and this provision is not defeated by the act of June 17, 1892, granting homestead rights in the Klamath River Indian reservation	26
The phrase "public lands adjacent thereto" as used in the act of June 4, 1897, construed	588	Timber and Stone Act.	
Survey.		Prior to the issuance of final certificate under a timber-land application the local office has full jurisdiction to order a hearing on a protest, or adverse claim, filed against such application	88
The date of a township, is not fixed by the date of the work in the field, but by the approval of the plat	54	Does not allow the purchase of land that is inhabited by a bona fide settler	144
Where it is apparent from the record that in the, of a township, a large body of land adjacent to a navigable lake has been omitted through the establishment of a meander line between alleged swamp and dry lands, instead of at the true shore line of the lake, a survey of the lands so omitted should be made	68	The right to take lands chiefly valuable for the timber thereon under the settlement laws is limited to claims asserted in good faith for the purpose of securing a home	352
An order may properly issue for the, of a tract of land omitted from the original survey through the erroneous meander of a slough instead of a river proper	392	An applicant for the right-of timber land purchase must show that the land applied for is free from adverse occupancy and that he has made no other application to purchase under the timber-land act	360
The approved plat of an official, is conclusive as to the designation of tracts embraced therein, and must govern in the disposal of the lands covered thereby	480	Land covered by the bona fide settlement claim of a pre-emptor is not subject to timber-land purchase; and the applicant for the right of purchase can not take advantage of irregularities in the assertion of the pre-emption claim	376
An application of a State for, and reservation of a township under the act of August 18, 1894, must be denied, where, prior to such application, a survey of the township has been ordered for the benefit of settlers	122	Land subject to purchase under the, is not excluded from homestead entry	310
Swamp Land.			
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The claim of a State under the grant of, must fail if it does not appear that the lands were of the character granted at the date of the grant	68		
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Action on an indemnity list, in which the claim as to some of the tracts is allowed, amounts to a rejection of the claim as to the remainder	231		
The swampy character of land forming the basis of a claim for indemnity should be shown in the same way, and by evi-			

Timber Culture.

See *Application; Entry.*

Timber Cutting.

Circular of June 29, 1897, with respect to, for purposes of exportation

587

In construing the provisions contained in the two acts of June 3, 1878, and the act of August 4, 1892, with respect to timber cutting, it must be held that the first of said acts of 1878 (20 Stat., 88), relates to all mineral lands of the United States, but to none of any other character, and permits the cutting of timber on such lands for building, agricultural, mining, and other domestic purposes, but not for the purpose of sale or commerce, and that the second of said acts (20 Stat., 89), as amended by the act of 1892, relates to all non-mineral lands of the United States in all public land States and prohibits the cutting of timber on such lands, except as therein otherwise provided

167

Applications for permission to cut timber should not embrace above one quarter section; and no applicant will be accorded a second permit unless it satisfactorily appears that a most urgent necessity exists therefor

504

The action of a homesteader in cutting and selling timber growing on the land covered by his entry should not be held sufficient to justify cancellation of the entry, on the ground of fraudulent intent in making the same, if the entryman is actually residing on the land and apparently expending the proceeds of the timber in the permanent improvement of his claim

454

Town Lots.

In the disposition of, under the act of May 14, 1890, an additional assessment, for the legitimate purposes of the act, is authorized where such action operates uniformly upon all lots alike; but there is no authority for such an assessment where the burden falls upon the unclaimed lots alone

366

The occupancy of a, by the agents of a town-site company confers no right that will defeat an adverse occupant of the remainder of said lot who is claiming the whole of it

457

Occupancy of a, acquired through trespass and the wrongful dispossession of a prior occupant will not defeat the right of such occupant to a deed, though the trespasser may be the sole occupant at date of the town-site entry

558

A certificate of right issued by the provisional authorities of a town to a lot claimant is only to be regarded as prima facie evidence of title where there is an adverse claim at the time the case is considered by the town-site board

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Adverse occupants in good faith of a, at the date of a town-site entry may be treated, in cases where priority of settlement does not determine their rights, as joint applicants and receive a deed jointly, according to their respective holdings, though such occupants may have filed separate and adverse applications

565

In the interest of the government and intending purchasers a sale of, under sections 2380-2381, R. S., may properly take place at the town site, under the personal charge of the local officers

405

Town Site.

An application to make entry under section 2389, R. S., will not be allowed, where the number of bona fide occupants is not given, and it is not manifest that the occupants in fact desire in good faith to make such entry, and also where the application covers land apparently mineral in character and in close proximity to another town

258

The right to make an additional entry only exists where the applicant has, prior thereto, made a townsite entry of public land, and is limited then to land contiguous to that embraced within the original entry

526

On the application of trustees to make entry a charge of abandonment, as against the townsite settlers, may be properly entertained, and notice to said trustees of the hearing ordered thereon is notice to lot claimants

468

Entries in the Cherokee Outlet can only be made through townsite boards

580

A board of trustees should not be discharged from any portion of the trust imposed upon it, until the whole purpose of the trust is accomplished, or until such time as it may be relieved entirely from its duties

582

Transferee.

See *Alienation, Confirmation.*

Wagon Road Grant.

Mere occupation or use of a body of unsurveyed public land of indefinite area, without intent to acquire title to the particular portion thereof in controversy, is not such an appropriation of that portion as to except it, or the subdivision of which it is a part, from the operation of a

202

Action suspended on all entries allowed for lands within the conflicting limits of the grants for The Dalles Military Wagon Road Co., and the Northern Pacific R. R. Co., pending a judicial determination of the status of said lands

332